

# SEPARATION OF POWERS CRISIS: THE CASE OF ARGENTINA

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INTRODUCTION:  
THE PROBLEM OF SEPARATION OF POWERS IN ARGENTINA

The Argentine Constitution was drafted according to the United States Constitution (U.S. Constitution). Although initially Argentine scholars and the Argentine Supreme Court followed the U.S. example, continental European public law has exercised an increasingly important influence in the interpretation and development of constitutional law in Argentina. This influence has been particularly important in administrative law and has expanded to constitutional law. This situation has been aggravated by the 1994 constitutional amendment, which included many European institutions into the Argentine Constitution.

This study demonstrates the risks involved in using European precedents within a U.S. type of constitutional framework such as the one adopted by the Argentine Constitution. Argentina is a good example of how the principle of separation of powers can be destroyed through the misuse of alien legal constructions. Although still remaining presidential, by means of those interpretations and amendments, separation of powers in Argentina has given way to the fusion of powers of the parliamentary system.<sup>1</sup>

Today, the original conception of separation of powers (three branches of co-equal importance, with checks and balances in a horizontal relationship) has shifted to a vertical relationship with the executive branch at the top. Checks and balances have disappeared and, in fact, presidents exercise the lawmaking power through executive orders issued on grounds of necessity and urgency (*decretos de necesidad y urgencia*). In addition, none of the common controls of parliamentary systems exist, since presidents may not be removed by votes of non-confidence.

This Article argues that the failure of the presidential system in Argentina was not a direct consequence copying the U.S. presidential system. Instead the deformation of the presidential system adopted by the Argentine Constitution contributed to the failure of presidential democracy.

This Article shall prove that the presidential system is not responsible, as many scholars argue, for the failure of democracy in many countries in Latin America. Instead, it shall show that Argentina's solution is to strengthen its system of separation of powers by adding checks and balances in accordance with the U.S. model.

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<sup>1</sup> See WALTER BAGEHOT, THE ENGLISH CONSTITUTION 69 (7th ed. 1995).

Part I of this Article explains the influence of the U.S. Constitution in Argentina.

Part II discusses the separation of powers in a presidential system. In addition, this section deals with the development of the system in Argentina with particular emphasis on the problems created by the influence of continental European law in the development of the executive branch, and also explains the risks of applying incompatible foreign institutions.

Part III addresses the role of the judiciary in the expansion of presidential powers in the U.S. and in Argentina. This section compares the development of U.S. precedents regarding the scope of presidential powers with analogous precedents in Argentina to show how these systems, which were initially so similar, have evolved so differently.

Part IV analyzes both presidential systems and parliamentary systems and argues that Argentina's democracy did not fail during the twentieth century because of its constitutional structure but because of many other factors, including the deformation of the original system of separation of powers. Finally, this Article argues that presidential systems need be no more prone to instability than parliamentary systems and that instabilities or lack of democracy associated with presidential systems are actually attributable to other factors that will cause parliamentary systems to fail as well.

## I. INFLUENCE OF THE U.S. CONSTITUTION IN ARGENTINA

Argentina is a federal constitutional democracy.<sup>2</sup> The Argentine Constitution, established in 1853 and partially amended several times,<sup>3</sup> provides for a tripartite system of government consisting of an executive branch, headed by an elected president, a bicameral legislature and an independent judiciary.<sup>4</sup> The U.S. Constitution was the most important source of the 1853 Constitution of Argentina.

The influence of the U.S. model in Argentina is intimately related to the thought and work of Juan Bautista Alberdi.<sup>5</sup> He was one of the most important

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<sup>2</sup> CONSTITUCIÓN ARGENTINA art. 1 ("The Argentine Nation adopts for its government the federal, republican, representative form as established by the present Constitution.").

<sup>3</sup> The Argentine Constitution was amended five times: in 1860, 1866, 1898, 1957 and 1994.

<sup>4</sup> See ARG. CONST. pt. II: Authorities of the Nation, First Title: Federal Government, arts. 44-120.

<sup>5</sup> See 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).

and influential argentine scholars of the Nineteenth Century.<sup>6</sup> Alberdi reviewed and studied many different constitutions,<sup>7</sup> including the U.S. Constitution, and explained why Argentina should follow the U.S. governmental structure.<sup>8</sup>

Alberdi's constitutional work showed an undeniable admiration for the U.S. system, to which he attributed the progress of the United States.<sup>9</sup> He thought that the history and problems of the foundation of both countries were similar and that a U.S. type of constitution was going to be one of the solutions to the problems faced by Argentina between 1810 and 1853.<sup>10</sup>

After the 1810 revolution, a civil war plagued Argentina: there were continuous battles between federalists, rural caudillos who wanted to maintain their autonomy, and unitarians, members of the professional and commercial class in Buenos Aires who wanted to lead a centralized system of government. The 1820s were marked by continuous warfare until General Juan Manuel de

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<sup>6</sup> See PABLO LUCAS VERDU, ALBERDI, SU VIGENCIA Y MODERNIDAD CONSTITUCIONAL 81 (1998) (noting that Alberdi was called the "Founder of the Republic of Argentina").

<sup>7</sup> Among others, the 1833 Constitution of Chile, the 1823 Constitution of Peru, the 1821 Constitution of the states that formed the Republic of Colombia (Ecuador, Nueva Granada and Venezuela), the 1824 Constitution of Mexico, the 1829 Constitution of Uruguay, the 1844 Constitution of Paraguay, the 1849 Constitution of the state of California.

<sup>8</sup> See JUAN BAUTISTA ALBERDI, BASES Y PUNTOS DE PARTIDA PARA LA ORGANIZACIÓN POLÍTICA DE LA REPUBLICA ARGENTINA 44-115 (Ciudad Argentina ed., 1998) (1852). Miller explained the importance and influence of this book:

In 1852, Alberdi provided the single most important statement of the "Generation of 37's" political vision in "*Bases y Puntos de Partida para la Organización Política de la Republica Argentina*" (Bases and Points of Departure for the Political Organization of the Argentine Republic), probably the most politically influential book in Argentine history. His vision was fundamental at the Constitutional Convention of 1853, and was essentially realized in the following years.

See Miller, *supra* note 5, at 1501.

<sup>9</sup> See, e.g., ALBERDI, *supra* note 8, at 157-59.

<sup>10</sup> See ALBERDI, *supra* note 8, at 115 (arguing that

the mechanism of the general government of the United States offers us an idea of the way to make useful and practicable the association of principles in the organization of general authorities. In the U.S., like in Argentina, two tendencies, Unitarian and Federal, were in dispute for the power of government; the necessity to amalgamate them in a compound system suggested the Americans a mechanism that can be applied to a similar order of things, with modifications demanded by the special circumstances of each case. The discreet assimilation of an adaptable system in similar circumstances is not the servile copy that can never be discreet in constitutional politics.).

See also *id.* at 116-20.

Rosas, a federalist, established a twenty-five year dictatorship over Buenos Aires. Rosas was defeated in 1852 on Caseros' battle. Miller explained that: "Given its chaotic past, Argentina had little choice but to adopt an aspirational constitution in seeking to create entirely new governmental institutions."<sup>11</sup>

Following the U.S. model, Alberdi proposed a draft of a constitution that together with the U.S. Constitution were used by the 1853 Commission of Constitutional Affairs (Comisión de Negocios Constitucionales) as a direct source of the 1853 Constitution of Argentina. Gorostiaga, the most important member of such Commission, stated that the draft that was reviewed and approved with minor modifications by the 1853 Constitutional Convention was based on "the Constitution of the United States, the only model of true federation that exists in the world."<sup>12</sup> Other members of the Commission made similar statements.<sup>13</sup>

The 1853 Constitution of Argentina followed a U.S. style of separation of powers with a strong executive branch.<sup>14</sup> Alberdi sought to preserve the gains of the revolution of 1810 by establishing a vigorous and powerful executive branch to achieve an important goal: the country's unity and national peace.<sup>15</sup> The greatest achievement of Alberdi and the members of the 1853 Commission of Constitutional Affairs, particularly Gorostiaga, was to adapt the U.S. model to Argentine reality.<sup>16</sup> Obviously, the 1853 Constitution differed in some aspects from the U.S. Constitution,<sup>17</sup> but these differences

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<sup>11</sup> Miller, *supra* note 5, at 1490.

<sup>12</sup> EMILIO RAVIGNANI, *ASAMBLEAS CONSTITUYENTES ARGENTINAS IV* 468 (1937).

<sup>13</sup> *Id.* at 479.

<sup>14</sup> *Id.* at 134.

<sup>15</sup> *Id.* at 138.

<sup>16</sup> See Miller, *supra* note 5, at 1490 (explaining that the U.S. Constitution "was an important model from the beginning of the process that established the Constitution of 1853, and interestingly, the U.S. influence increased, not decreased, during the following three decades. Although Juan Bautista Alberdi, the most important intellectual figure behind the Constitution of 1853, sought to emulate the United States in general terms, he did not believe in blind imitation. In developing its Constitution in 1853 and 1860, Argentina generally adopted only the U.S. practices that it thought convenient.").

<sup>17</sup> ALBERDI, *supra* note 8, at 134. Regrettably, regarding presidential powers, Alberdi followed some institutions of the 1833 Constitution of Chile, specifically in the declaration of the president as the "supreme head of the Nation," in the power to appoint high-ranking officials without congressional approval and in the authority to declare a "state of siege" and suspend constitutional rights when internal unrest endangered the constitution or the government. These presidential powers were necessary when the 1853 Constitution was enacted because of the Civil War and continuous battles between Federalists and Unitarians. See *id.* at 27-28, 133-40. However, it proved to be a terrible mistake for the consolidation of democracy in Argentina due

were not essential and did not obscure the analogies between both constitutional systems.<sup>18</sup>

After Argentina enacted the 1853 Constitution, it entered a period of unity and national peace that ushered in a time of extreme wealth and progress.<sup>19</sup> This time, however, was not accompanied by a responsible exercise of the constitutional powers granted to the different branches of government, particularly the executive branch.<sup>20</sup>

As mentioned, albeit with some differences, Argentina adopted a presidential system patterned after the U.S. system. The undeniable influence of the U.S. Constitution in the preparation of the Argentine constitutional structure of government constituted what Mairal called the "determinant factors" that set out the general meaning of the legal system in Argentina, by contrast to the "fungible factors" that do not determine or have any influence over the core of the system.<sup>21</sup> For this reason, U.S. constitutional law exercised a strong influence for many years in the jurisprudence of the Argentine Supreme Court. In 1877, the Court said:

the system of government which governs us is not of our own creation. We found it in action, tested by long years of experience, and we have appropriated it. And it has been correctly

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to the abuse of these powers by future governments.

<sup>18</sup> It is undeniable that Alberdi was fully aware of the problems caused by the failure of many constitutions in South America. Moreover, that he rejected coping other constitutions as a solution for problems in Argentina. See ALBERDI, *supra* note 8, at 174.

<sup>19</sup> Miller, *supra* note 5, at 1485-86 (stating that:

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

<sup>20</sup> See Segundo V. Linares Quintana, *Comparison of the Constitutional Basis of the United States and Argentine Political Systems*, 97 U. PA. L. REV. 641, 665 (1948-49).

<sup>21</sup> HÉCTOR A. MAIRAL, *Algunas reflexiones sobre la utilización del derecho extranjero en el derecho público argentino*, in 2 ESTUDIOS DE DERECHO ADMINISTRATIVO 43, 43 (Instituto de Estudios de Derecho Administrativo ed.) (1999).

stated that one of the great advantages of this adoption has been to find a vast body of doctrine, practice and case law which illustrate and complete its fundamental principles, and which we can and should use in everything which we have not decided to change with specific constitutional provisions.<sup>22</sup>

However, as discussed in Part II, section *B* and Part III, section *B infra*, the development of the presidential system in Argentina eventually led to a deformation of the original structure of government, particularly regarding the separation of powers. This deformation shows how similar systems may evolve in completely different ways in two different countries.

This Article will explain the separation of powers in a presidential system, using the U.S. example as a model.

## II. SEPARATION OF POWERS IN A PRESIDENTIAL SYSTEM

### A. *The U.S. Example*

At the time of the writing of the U.S. Constitution, commentators created Montesquieu<sup>23</sup> with being the creator of the tripartite system of separate powers.<sup>24</sup> However, the Framers of the U.S. Constitution gave this system a unique shape and meaning.

The Framers created a system of checks and balances by assigning to each of the branches some of the functions that, under a rigid separation of powers approach, would belong more appropriately to another branch.<sup>25</sup> They considered the separation of powers among the legislative, judicial, and executive branches of government to be one of the most important and fundamental aspects of the new government.<sup>26</sup> The Framers thought that

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<sup>22</sup> *Lino de la Torre*, 19 Fallos 231 (1877).

<sup>23</sup> See generally *BARON DE MONTESQUIEU, THE SPIRIT OF LAWS* (Franz Neumann ed. & Thomas Nugent trans., 1949) (1748).

<sup>24</sup> See *CARL SCHMITT, TEORÍA DE LA CONSTITUCIÓN (VERFASSUNGSLEBRE)* 187 (Alianza Universidad Textos ed. 1996) (1928) (arguing that the real author of the doctrine of separation of powers was Bolingbroke).

<sup>25</sup> See generally *Leslie M. Kelleher, Separation of Powers and Delegations of Authority to Cancel Statutes in the Line Item Veto Act and the Rules Enabling Act*, 68 GEO. WASH. L. REV. 395 (2000).

<sup>26</sup> *FEDERALIST* No. 47, at 269 (James Madison) (Clinton Rossitor ed., 1999) [hereinafter *FEDERALIST* No. 47].



separation of powers would prevent the dangerous concentration of power in a single branch.<sup>27</sup> Moreover, their purpose was to promote efficiency in government by assigning different functions to different branches.

In its first three Articles, the U.S. Constitution establishes three distinct branches and granted each a main responsibility for exercising one of the three major types of governmental power. Article I vested the "Legislative Power" (the authority to make general rules reflecting the electorate's policy preferences) in Congress.<sup>28</sup> Article II vested the "Executive Power" to administer the laws in the president and imposed on him the duty to do so "faithfully."<sup>29</sup> Finally, Article III vested the "Judicial Power" (the authority to expound pre-existing legal rules in a particular fact situation) in federal courts for some types of "Cases" and "Controversies."<sup>30</sup>

The Founders believed in the primacy of the Legislative Power:<sup>31</sup> without congressional action, the president would have no law to execute, and the courts no law to expound. The exercise of legislative power, however, has its counter face. If Congress passes a statute, it can be executed only by the president and interpreted authoritatively only by the Courts. Indeed, a Federalist axiom, rooted in the rule of law, is that "the executive and judicial departments ought to have power commensurate to the extent of the laws."<sup>32</sup>

Effective separation of powers demands that each branch exercise its core function independently. This is guaranteed by the Constitution in its text. The members of each department are selected by different methods for fixed terms (two years for Representatives, six for Senators, four for the president, and permanent tenure for federal judges).

There are some overlapping functions between these three branches of government. For example, the president has a legislative role: he may introduce bills<sup>33</sup> and veto legislation.<sup>34</sup> The House of Representatives is

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<sup>27</sup> *Id.*

<sup>28</sup> U.S. CONST. art. I.

<sup>29</sup> U.S. CONST. art. II.

<sup>30</sup> U.S. CONST. art. III.

<sup>31</sup> FEDERALIST No. 51 (James Madison).

<sup>32</sup> Robert Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 418 (1996).

<sup>33</sup> U.S. CONST. art. II, § 3.

<sup>34</sup> U.S. CONST. art. I, § 7, cl. 2.

assigned what normally would be considered the executive role of prosecuting impeachments,<sup>35</sup> and the judicial role of trying impeachments is given exclusively to the Senate.<sup>36</sup>

The Constitution also grants Congress the power to create lower federal courts,<sup>37</sup> as well as virtually plenary power to control the jurisdiction of the lower courts and the appellate jurisdiction of the Supreme Court.<sup>38</sup> Granting these powers to Congress may seem contrary to the pure doctrine of separation of powers, but it is explicitly contemplated in the 1787 Constitution.<sup>39</sup> Furthermore, this overlap of power is not unique. Congress and the president share power over foreign affairs; for example, the president may negotiate valid treaties only with the concurrence of two-thirds of the Senate.<sup>40</sup> As Peter E. Quint explains: "The Anti-Federalists argued . . . that the Constitution disregarded Montesquieu's doctrine and raised the spectre of tyrannical consolidation by 'mixing' the powers of the three branches—for example, by allowing the president to veto legislation and empowering the legislature to impeach and remove executive officers."<sup>41</sup> The mere constitutional declaration of the boundaries of these departments erected only parchment barriers against the abuse of power—especially abuse emanating from the Legislature, which experience demonstrated was "everywhere extending the sphere of its activity

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<sup>35</sup> U.S. CONST. art. I, § 2, cl. 5.

<sup>36</sup> U.S. CONST. art. I, § 3, cl. 6.

<sup>37</sup> U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

<sup>38</sup> It was established in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 148 (1803), that Congress cannot limit the original jurisdiction of the Supreme Court, which is conferred by Article III, but the appellate jurisdiction of the Court is subject to congressional control under the "exceptions" clause. See U.S. CONST. art. III, § 2, cl. 2 ("In all the other Cases . . . the supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make."); see also *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 512-14 (1868).

<sup>39</sup> M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 175-89 (2d ed. 1998).

<sup>40</sup> U.S. CONST. art. II, § 2, cl. 2 (establishing that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur").

<sup>41</sup> Peter E. Quint, *The Federalist Papers and the Constitution of the United States*, 77 KY. L.J. 369, 379 (1989).

and drawing all power into its impetuous vortex.”<sup>42</sup> This is why Madison further sought to defend the U.S. Constitution against the charge that it had improperly distributed legislative, executive, and judicial powers.<sup>43</sup>

Madison dismissed the idea that periodic reviews of the Constitution or appeals to the people could provide adequate correctives. Instead, in the brilliantly drawn defense of the 1787 Constitution’s checks and balances in Federalist 51, he argued that the auxiliary precautions of a divided legislature elected by different constituencies for different terms, reinforced by an Executive wielding a veto and also enjoying a special relation with the Senate, would best preserve the constitutional allocation of power by encouraging “[a]mbition . . . to counteract ambition.”<sup>44</sup>

Arthur M. Schlesinger, Jr. states that the greatest importance of the separation of powers lies in

the old theory of the founding fathers—to preclude the exercise of arbitrary power. The separation of powers is the vital means of self-correction in our system. It is the means of protection against the resurgence of the ‘imperial Presidency.’ It is the ultimate guarantee of the system of accountability.<sup>45</sup>

The constitutional text and structure implicitly permit even more blending of functions and powers. For example, Congress and the Court share authority to regulate procedure in federal courts.<sup>46</sup> The Framers considered a certain amount of blending of functions and powers necessary to provide some practical security for each branch against “the invasion of the others.”<sup>47</sup>

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<sup>42</sup> FEDERALIST No. 48, at 277 (James Madison) (Clinton Rossiter ed. 1999).

<sup>43</sup> FEDERALIST No. 47, *supra* note 26. In a well-known passage, James Madison argued that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.” *Id.* Madison, however, rejected the notion of a pure or complete separation of powers, arguing that only “where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.” *Id.* at 270-71.

<sup>44</sup> FEDERALIST No. 51, at 290 (James Madison) (Clinton Rossiter ed., 1999).

<sup>45</sup> Arthur Schlesinger, Jr., *The Constitutional and Presidential Leadership*, 47 MD. L. REV. 54, 65 (1987).

<sup>46</sup> WESTEL WOODBURY WILLIUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* § 807 (2d ed. 1929).

<sup>47</sup> FEDERALIST No. 48, at 250 (James Madison) (Clinton Rossiter ed., 1999). Madison wrote that the political maxim of separation of powers

Moreover, the Framers understood that blending of powers was a practical necessity for the day-to-day administration of government. It was their understanding that the "Executive Power necessarily included some measure of executive discretion 'to fill in the details' in implementing legislation."<sup>48</sup>

In accordance with this understanding, Congress from the outset has sought assistance from both the executive and judicial branches by delegating lawmaking authority to them.<sup>49</sup>

Finally, it is important to point out that the separation of powers was completed with the decision rendered in *Marbury v. Madison*,<sup>50</sup> when the Court firmly established itself as the arbiter of separation of powers cases and controversies. Judicial review obtained an importance unforeseen by the Framers. Now it is necessary to explain the development of separation of powers in Argentina, with particular emphasis on the problems created by the influence of continental European law in the development of the powers of the executive branch.

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does not require that the legislative, executive and judiciary departments should be wholly unconnected with each other . . . unless these departments be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.

<sup>48</sup> Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 39 (1993).

Hamilton strongly insisted that public administration was largely an executive function, and he assumed that this necessarily entailed some discretion as to means. Jefferson espoused a perhaps even more expansive version of executive power. While consistently denying that the Executive could be invested with 'legislative' or 'judiciary' powers, he wrote to Governor Cabell that 'if means specified by an act are impracticable, the constitutional [executive] power remains, and supplies them . . . . This aptitude of means to the end of a law is essentially necessary for those who are executive; otherwise the objection that our government is an impracticable one would really be verified.'

*Id.* (footnotes omitted).

<sup>49</sup> See, e.g., *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406, 409 (1928) (holding that the Constitution permits Congress to seek "assistance from another branch, [provided] the extent and character of that assistance [is] fixed according to common sense and the inherent necessities of the governmental co-ordination" and setting out the "intelligible principle" standard); *Field v. Clark*, 143 U.S. 649 (1892); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825); *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813).

<sup>50</sup> 5 U.S. (1 Cranch) 137 (1803).

### *B. The Case of Argentina*

Argentina is an interesting case for the analysis and explanation of the failure of democracy in a pure presidential system. One of the most important problems in Argentina was the existence of an incomplete separation of powers due to the deformation suffered by the presidential system during the twentieth century.

In a presidential system, it is important for lawmaking power to be firmly anchored in the legislative branch. Moreover, it is vital for courts to enforce, at some level, requirements that legislation come from Congress. Surprisingly, however, today the most important legislator in Argentina is the executive branch.

The main factors that contributed to the deformation of the original structure of separation of powers of the 1853 Constitution of Argentina were the following: (i) the weak action of Congress in controlling abuses of the executive branch; (ii) the Supreme Court's admission of the *de facto* doctrine after the first coup d'état in 1930; (iii) the influence of Continental European Law among Administrative Law scholars; (iv) the tolerance of abusive exercise of emergency powers by the executive branch during most of the period between 1930-1989; (v) the judicial recognition of the power of the president to issue executive orders on grounds of necessity and urgency in 1990; and (vi) the 1994 Constitutional Amendment.

In Argentina, the executive branch<sup>51</sup> is the dominant branch at the federal level.<sup>52</sup> The president<sup>53</sup> is elected by direct vote and may serve a maximum of two consecutive four-year terms.<sup>54</sup> Congress<sup>55</sup> has exclusive power to enact laws concerning federal legislation, including international and inter-provincial trade, immigration and citizenship, patents, and trademarks.<sup>56</sup> Moreover, the Constitution entitles Congress to enact the Codes concerning civil, commer-

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<sup>51</sup> ARG. CONST. arts. 87-107.

<sup>52</sup> CARLOS S. NINO, *El Hiper-Presidencialismo Argentino y las Concepciones de la Democracia*, in EL PRESIDENCIALISMO PUESTO A PRUEBA 56 (1992).

<sup>53</sup> ARG. CONST. arts. 87-99.

<sup>54</sup> ARG. CONST. art. 90, 94.

<sup>55</sup> ARG. CONST. arts. 44-84.

<sup>56</sup> The Argentine Congress consists of a 72-seat Senate and a 257-seat Chamber of Deputies. Senators are elected for six-year terms on a staggered basis, with one-third of the Senate elected every two years. Deputies are elected for four-year terms on a staggered basis; one-half of the Chamber is subject to election every two years.

cial, criminal, mineral, labor and social security matters.<sup>57</sup> These codes are enforceable throughout the country, though, since they are not federal laws, the provincial courts have jurisdiction in cases involving interpretation of these codes.<sup>58</sup>

Even though it is clear that law-making power is vested in Congress,<sup>59</sup> since the 1994 Constitutional Amendment, Argentine presidents have the faculty to issue executive orders on grounds of necessity and urgency (DNUs) whenever they consider there is such emergency, urgency or necessity.<sup>60</sup> The road to the inclusion of DNUs in the Argentine Constitution was complex and intimately related to the misuse of European public law by scholars and courts, and the influence of the *de facto* governments.

Moreover, it is necessary to clarify the clear and sharp difference between an American Executive Order (EO) and a DNU.

With respect to EOs, Louis Fisher states that they are a source of law only when they draw upon the constitutional powers of the president or powers expressly delegated by Congress and that "actions that exceed those bounds have been struck down by the courts. When the executive orders lack statutory support, they have been held by the courts to be without the force and effect of law. Executive orders may not supercede a statute or override contradictory congressional expressions."<sup>61</sup>

In Argentina, a DNU issued by the president, without delegation by Congress and with the sole requisite of the invocation of necessity or urgency, can override laws and can infringe individual rights.

This particular institution was borrowed by administrative law scholars from the French doctrine. For example, Juan Cassagne, arguing erroneously that the constitutional model for the Argentine executive branch was inspired in French constitutional law, claims that: "a strong and supreme Executive power is perfectly compatible with the recognition of an exceptional

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<sup>57</sup> ARG. CONST. art. 75(12).

<sup>58</sup> ARG. CONST. art. 116.

<sup>59</sup> ARG. CONST. art. 44.

<sup>60</sup> ARG. CONST. art. 99(3).

<sup>61</sup> LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 113 (1997).

prerogative on behalf of the executive organ to enact decrees on grounds of necessity and urgency [DNU] . . .”<sup>62</sup> compatibility that he extends to “the equilibrium of powers.”<sup>63</sup>

It was incorrect to use French constitutional law precedents to analyze the extension of the powers of the executive branch in a country that adopted a presidential system following a U.S. style of separation of powers. Bernard Schwartz explains that:

the common-law lawyer who examines the rule-making power in France is immediately struck by the fact that, in the French system, the administration is vested with the inherent authority to promulgate rules that have the force of law. This is something that is foreign to Anglo-American conceptions of executive power, for, in our theory, the administration possesses only rule-making authority that has been delegated to it by the legislature . . . [To the contrary,] under French theory, the inherent rule-making authority of the executive is a very broad one.<sup>64</sup>

The use of continental European public law, created for a parliamentary system, to interpret the law of a presidential system creates confusion and problems.<sup>65</sup>

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<sup>62</sup> Juan C. Cassagne, *Sobre la Fundamentación y los Límites de la Potestad Reglamentaria de Necesidad y urgencia*, [1991-E] *Revista Argentina Jurídica - La Ley* [hereinafter L.L.] 1179, 1184.

<sup>63</sup> *Id.* at 1184.

<sup>64</sup> Bernard Schwartz, *Inherent Executive Power and the Steel Seizure Case: a Landmark in American Constitutional Law*, 30 CAN. B. REV. 466, at 468 (1952).

<sup>65</sup> *See id.* at 476

It may well be that the worst abuses inherent in such a system are avoided by the existence in France of a parliamentary system of government. The executive in France, as in Britain, is wholly responsible for the parliament and can be dismissed by the legislature if its exercise of inherent authority is disapproved of. In the United States, on the other hand, as is well known, there is nothing like the direct accountability of the executive to the legislature which prevails in countries that, like France, are governed by a Parliamentary system . . . . In a system like the American one, where the executive is almost entirely independent of legislative control, the recognition of inherent executive power like that acknowledged to exist in the executive in France, in virtue of its constitutional charge to ensure the execution of the laws, could be much more dangerous than in a parliamentary system.

Alberdi warned of this danger:

In this matter it is extremely dangerous to forget the principle that all public law precepts and the articles of the Constitution are the basis of Administrative Law . . . It is possible to copy a Commerce Code or even a Civil Code because they have universally accepted principles; but it is rare to be able to copy with success the rules of administration of a country that is governed by a constitution different than ours because those rules are inseparable of the peculiar way by which a government exercises its function.<sup>66</sup>

The 1853 Constitution of Argentina did not provide textual support for DNUs. However, from 1853 to 1983, the measure was used fifteen times,<sup>67</sup> mostly by military governments.<sup>68</sup> After the recovery of democracy, from 1983 to 1989, President Alfonsín issued twelve DNUs. These DNUs were issued in times of social and economic unrest and with the excuse that they were indispensable to preserve democracy and stability in Argentina. As the U.S. Supreme Court said in *Ex parte Milligan*: "A violation of law on the pretense of saving such a government as ours is not self-preservation but suicide."<sup>69</sup> The Argentine case proves that the U.S. Supreme Court was right.

Unfortunately, in 1990 the Supreme Court recognized the use of DNUs in the "*Peralta*" case.<sup>70</sup>

This judicial recognition opened Pandora's box: during the Menem era,<sup>71</sup> DNUs were abusively used several times.<sup>72</sup> One of the most negative aspects

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<sup>66</sup> JUAN BAUTISTA ALBERDI, *SISTEMA ECONÓMICO Y RENTÍSTICO DE LA CONFEDERACIÓN ARGENTINA* 355 (Ciudad Argentina ed. 1998) (1853).

<sup>67</sup> See ALEJANDRO PEREZ HUALDE, *DECRETOS DE NECESIDAD Y URGENCIA. LIMITES Y CONTROL* 10-11 (1995).

<sup>68</sup> Congress was shut down by the military governments on many occasions during the twentieth century.

<sup>69</sup> See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866).

<sup>70</sup> See *Peralta*, 313 Fallos 1513 (1991). This case will be explained in detail in Part III, section B *infra*.

<sup>71</sup> The 1853 Constitution of Argentina established a six-year fixed term without the possibility of reelection. After the 1994 Amendment, this term was reduced to four years, with one reelection. After his first six-year period (1989-1995), President Menem was reelected for a period of four years (1995-1999).

<sup>72</sup> See *De la Rúa Firmó Menos Decretos que Menem*, *LA NACIÓN* (Buenos Aires), Dec. 11, 2000 (stating that Menem issued 545 DNUs in his two presidencies and that President De la Rúa,



of the Argentine presidentialism between 1989 and 1994 was the extent to which President Menem was able to effectively bypass Congress on several occasions through the issuance of DNUs.<sup>73</sup>

In 1994, DNUs were included in the Argentine Constitution. The 1994 amendment<sup>74</sup> was a demonstration of the increasing influence of the European law in the Argentine constitutional system.<sup>75</sup> Though one of the main goals of the 1994 Constituent Convention was the attenuation of presidentialism,<sup>76</sup> the acceptance of the Executive faculty to issue DNUs was a mistake because reality shows that presidents nowadays have more power because of the constitutional recognition of a de facto unconstitutional practice.

Article 99 of the Argentine Constitution, as amended in 1994, provides:

The President of the Nation has the following attributes: . . . He participates in the formation of laws in accordance with the Constitution, promulgates them and causes them to be published. The Executive Power may in no case, under the sanction of absolute and irreparable nullity, issue dispositions of a legislative nature.<sup>77</sup>

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elected in December 1999, issued 28 in his first five months in office, one more than Menem in the same period of time). The article, written in one of the most prestigious newspapers in Argentina, also states that one of the DNUs was issued in June to deregulate the social services in January (eight months later). As can be seen, there was neither urgency nor necessity to avoid congressional discussion of such a measure. This is one of many examples that illustrates how this extraordinary measure is frequently abused by the executive branch in Argentina.

<sup>73</sup> See SCOTT MAINWARING & MATTHEW SOBERG SHUGART, *PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA* 285 (1997).

<sup>74</sup> See Nestor Pedro Sagües & Keith S. Rossen, *An Introduction and Commentary to the Reform of the Argentine National Constitution*, 28 U. MIAMI INTER-AM. L. REV. 41 (1996) (providing a thorough explanation of the antecedents and extent of the 1994 amendment).

<sup>75</sup> See MAIRAL, *supra* note 21, at 50-51 (explaining the influence of the French Public Law doctrine in the acceptance of DNUs and the influence of the Spanish Public Law doctrine in the acceptance of the *Consejo de la Magistratura* (Council of Magistrates)). See also Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J. 1 (2000) (explaining the European influence over the Argentine Ombudsmen (ARG. CONST. art. 86) that "is clearly reminiscent of the Spanish Defensor del Pueblo").

<sup>76</sup> See Law No.24.309, Dec. 29, 1993 [LIV-A] A.D.L.A. 89 (Declaración de la Necesidad de Reforma de la Constitución), art. 2 (Arg.) ("The purpose, meaning and extent of the amendment is expressed in the Agreement of Basic Coincidence [Núcleo de Coincidencias Básicas]: A. Attenuation of the presidential system. . .").

<sup>77</sup> ARG. CONST. art. 99(3).

This severe rule is that the president cannot exercise legislative power, is the proper rule. This is a good rule.

However, this article of the Argentine Constitution also provides an exception:

Only when due to exceptional circumstances it is impossible to follow the ordinary formalities for the approval of laws foreseen by this Constitution, and when it is not the case of rules governing criminal, tax, electoral matters or the political parties regime, the President may issue decrees on grounds of necessity and urgency, which shall be decided in a general agreement of ministers that must countersign them, together with the Chief of Cabinet.<sup>78</sup>

This is not a good exception.

The drafting of this provision was incongruous. It stipulates a hard prohibition and then establishes a substantial exception. Moreover, the text raises serious hermeneutic problems. For example, what is the meaning of the word "impossible" under this exception? Bidart Campos claims that

neither presidential hardship in taking a certain measure, nor the convenience or necessity of such measure, nor the urgency valued by the executive, nor the slowness of Congress, nor even the hostility of Congress towards a certain bill, create the impossibility that in exceptional circumstances grants the power to dictate DNUs.<sup>79</sup>

Bidart Campos is correct that this solution is not the only one accepted among the scholars.

The problems with this provision extend further: DNUs must be submitted within ten days for consideration by a Permanent Bicameral Commission of the Congress, which in turn must send to each chamber a report about how these DNUs should be treated. Then a law specially sanctioned by an absolute majority of all members of each chamber of Congress will dictate what occurs.<sup>80</sup>

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<sup>78</sup> ARG. CONST. art. 99(3).

<sup>79</sup> German Bidart Campos, *Los Decretos de Necesidad y Urgencia*, [2001-A] L.L. 1114, 115.

<sup>80</sup> The final paragraph of art. 99(3) provides:

The Permanent Bicameral Commission was never formed. Therefore, there is a loophole in the system that can be used by the president to avoid the control of Congress.<sup>81</sup> An important check is missing.

Bidart Campos stated that: "since the 1994 Amendment, the unconstitutional distortion of this exceptional faculty granted to the executive branch grew in an alarming proportion. While the inexistence of the Permanent Bicameral Commission impedes Congress' intervention, the issuance of DNUs is unconstitutional."<sup>82</sup> However, this is only the opinion of a scholar. What is the real consequence of not having formed this Commission? There is not one.

Even after the 1994 Amendment, Argentine scholars are still using European sources to justify the doctrinal acceptance of DNUs and to define the extent and limits of its use by presidents. For example, using French administrative law doctrine, Barra claims that the president has a broad lawmaking power under the Argentine Constitution.<sup>83</sup> This is not only inconsistent with the text, spirit, and meaning of the Constitution; it is also a dangerous idea because DNUs are used as a tool to avoid congressional debate for laws. Barra also claims that the judiciary branch does not have the right to review this type of legislation (DNU).

Barra's reasoning about the existence of a broad legislative prerogative on behalf of the executive branch is wrong. Further, the judicial branch must control the president's issuance of DNUs. Otherwise, DNUs could be used to elude Congress opposition. This is tantamount to doing away with the Congress. If as a result of Congress' refusal to pass a certain bill, the president

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The Chief of Cabinet shall personally, and within ten days, submit the decree to the consideration of the Permanent Bicameral Commission, whose composition must respect the proportion of the political representatives of each Chamber. This commission shall submit its report within a period of ten days to the plenary meeting of each Chamber for its express treatment, which the Chambers are to immediately consider. A special law approved by the absolute majority of all the members of each Chamber shall regulate the formalities and scope of the intervention of Congress.

<sup>81</sup> See Humberto Quiroga Lavie, *El Control de la Actividad Legislativa del Presidente de la República, a Propósito del Proyecto del Diputado Nacional Ramón Torres Molina* 178 *Revista Jurídica Argentina - El Derecho* [hereinafter E.D.] 621, 627 (1998) (arguing that without proper control over legislative activity of the president, the attenuation of the Argentine presidentialism intended by the 1994 Constituent Convention is almost impossible).

<sup>82</sup> See Bidart Campos, *supra* note 79, at 1-2.

<sup>83</sup> See Rodolfo Barra, *Reglamentos Administrativos*, [1999-F] L.L. 1034. Barra is a well-known Administrative Law scholar in Argentina and he used to be a member of Menem's government.

can issue a DNU, then the urgency, necessity, or emergency is only the mere opposition held by Congress and this is not an objective emergency. Monaghan stated that: "to transform political deadlock into an emergency would drain the concept of emergency of all content."<sup>84</sup> This could be the result of admitting the prerogative of presidents to issue DNUs without judicial review, as some scholars claim.<sup>85</sup>

Nowadays, as a consequence of the 1994 Amendment, even the Argentine Supreme Court Justices cite the French and the Spanish constitutional systems without reviewing the important differences that the Argentine constitutional structure has with these systems.<sup>86</sup>

This data cannot be taken too lightly. American public law, as applicable to the Argentine system, and the French system, as used by the scholars to justify the inclusion of DNUs in the Argentine legal system, depart from absolutely dissimilar bases. This is the reason why they reach to entirely different conclusions.

In a parliamentary system, Prime Ministers have and ought to have different attributes than presidents. This is why DNUs are easily accepted in those systems.<sup>87</sup> Since the government is exercised by a commission of the Parliament (the cabinet),<sup>88</sup> the faculties of the government to issue DNUs imply the exercise of the law-making power vested in the Parliament. This is a consequence of the fusion of powers and functions between the executive and legislative branches, typically found in parliamentary governments.<sup>89</sup> Thus, the recognition of this faculty does not generate any tension at all in these constitutional systems.

To the contrary, in a presidential system<sup>90</sup> where separation of powers with mutual checks and balances is essential, the incorporation of DNUs to the constitutional order subverts the very basis of the institutional system. This happens because DNUs dilute separation of powers and allow the executive

<sup>84</sup> Monaghan, *supra* note 48, at 38.

<sup>85</sup> See MIGUEL S. MARIENHOFF, *TRATADO DE DERECHO ADMINISTRATIVO* 266 (1982).

<sup>86</sup> See PAOLO BISCARETTI DI RUFFIA, *INTRODUCCIÓN AL DERECHO CONSTITUCIONAL COMPARADO* 84 (1996).

<sup>87</sup> Ironically, even in some Parliamentary systems, DNUs are accepted with greater restrictions than in Argentina. See, e.g., Const. Italy art. 77; Const. Ice. art. 28; see also Nestor Pedro Sagües, *Los Decretos de Necesidad y Urgencia: derecho comparado y derecho argentino*, [1985-E] L.L. 748, 804.

<sup>88</sup> See BAGEHOT, *supra* note 1, at 68.

<sup>89</sup> See *id.* at 69; see also DOUGLAS VERNEY, *The Analysis of Political Systems*, in AREND LIJPHART, *PARLIAMENTARY VS. PRESIDENTIAL GOVERNMENT* 33 (Arend Lijphart ed., 1995).

<sup>90</sup> Like the U.S. system and the one adopted by the Argentine Constitution.

branch to exercise the core function of the legislative branch: the law-making power. In arguing that the separation of powers is destroyed in Argentina, this Article does not reject overlapping functions nor does it embrace a vision of complete separation of the branches of government. Rather, the point is that it is contradictory to accept that presidents can exercise the lawmaking power vested in Congress by the issuance of DNUs. There is no real separation of powers in such constitutional structure.

Although many scholars claim that DNUs are necessary in cases of urgency or necessity in order to avoid delays and to achieve efficiency, this line of reasoning should be rejected. In his dissenting opinion in *Myers v. United States*, Justice Brandeis said that the doctrine of the separation of powers was adopted by the 1787 Constitutional Convention "not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save people from autocracy."<sup>91</sup> This statement accurately reflects the spirit of the separation of powers that has been abandoned by Argentina.

Arguing about the efficiency of government in times of alleged emergencies, the partisans destroyed important checks and balances opening the door for autocracy. Moreover, as some of these emergencies were, in fact, self-inflicted, worse governments created more emergencies and, thus, had more faculties than the good ones.<sup>92</sup> This is one of the reasons why, Part IV, argues that Argentina's solution is not to move toward a Parliamentary system (to the fusion of powers) but to reinforce the separation of powers following the U.S. constitutional system. As Williams states the "disregard of the system of checks and balances set up by [the] Constitution are, no matter how well intentioned they may be, substantial strides down the high-way leading to a totalitarian form of government."<sup>93</sup>

Some scholars argue that the Justice Brandeis dictum is a half-truth:

Instead of indiscriminately championing the virtues of the separation doctrine, we should remember that it can satisfy a number of objectives, not all of them worth seeking. The framers

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<sup>91</sup> 272 U.S. 52, 293 (1926).

<sup>92</sup> Héctor A. Mairal, *Argentina: El Derecho En Tiempos Del Cólera*, ACTUALIDAD JURÍDICA URÍA & MENÉNDEZ 9, 13 (2002).

<sup>93</sup> Arthur M. Williams, Jr., *The Impact of The Steel Seizures Upon The Theory of Inherent Sovereign Powers of The Federal Government*, 5 S.C. L.Q. 1, 27 (1952).

of the American Constitution did not want political system so fragmented in structure, so divided in authority, that government could not function.<sup>94</sup>

Fisher claims that Justice Story pointed out in his *Commentaries* that the Framers adopted a separation of powers doctrine but “endeavored to prove that a rigid adherence to it in all cases would be subversive of the efficiency of the government, and result in the destruction of the public liberties.”<sup>95</sup> However, the Argentine experience proves that public liberties are sacrificed on the altar of alleged governmental efficiency. As Carl Friedrich prophetically stated “many who today belittle the separation of powers seem unaware of the fact that their clamor for efficiency and expediency easily leads to dictatorship.”<sup>96</sup>

In spite of the effort made by some scholars to disguise essential differences and to emphasize presumed similarities of detail between European systems and the Argentine system,<sup>97</sup> at the same time in which they insist on supposed fundamental differences with the American system, it is clear that European constitutions offer incompatible solutions for Argentina.

### *C. The Risks of Applying Incompatible Foreign Institutions*

Drafters who borrow an idea from other constitutions usually look for legal systems worthy of emulation. However, many times these drafters are not fully aware of important principles and implications of those systems from which they borrow institutions. They may be taking a principle or idea from one tradition and applying it to another. Hence, “planting a proposition in a different cultural, historical, or traditional context may lead to results quite

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<sup>94</sup> FISHER, *supra* note 61, at 8.

<sup>95</sup> Quoted in 3 Elliot 280.

<sup>96</sup> CARL J. FRIEDRICH, *TEORÍA Y REALIDAD DE LA ORGANIZACIÓN CONSTITUCIONAL DEMOCRÁTICA (EN EUROPA Y EN AMÉRICA)* 176 (1946).

<sup>97</sup> There are important scholars in Argentina that argue that the U.S. influence in the 1853 Constitution was relatively small, emphasizing, on the contrary, colonial antecedents that may have followed the Argentine constituents as an alternative source for the 1853 Constitution (particularly with respect to the extent of the faculties of the executive branch). See Ricardo Ramírez Calvo, *Alberdi y la Intervención Estatal de los Servicios Públicos*, [2002-B] L.L. 1154, 1160. This doctrine tries to reject the application of American constitutional interpretation in Argentina because its direct result would be the plain unconstitutionality of an enormous amount of regulations advocated by this doctrine. Thus, it is noticeable that this rejection owes more to a desire to confirm a policy of restriction of individual rights for reasons of general welfare, rather than to a concrete and reasoned study of the real sources of the Argentine Constitution.

different from those one finds in the country from which the proposition was borrowed."<sup>98</sup> Borrowing has become one of the grand old topics of comparative law.<sup>99</sup>

All foreign norms and precedents must be analyzed within the context in which they were adopted and where they are applied. Norms and constitutional principles of any country integrate a system. Thus, they must be studied along with that system. The study of a foreign system is legally irrelevant

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<sup>98</sup> A.E. Dick Howard, *The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383, 402-04 (1996) (arguing that borrowing constitutional ideas from other countries has its hazards:

The whole constitutional enterprise may founder on just such cultural differences. Liberal reformers in early nineteenth century Latin America—those who wrote the post-colonial constitutions after independence from Spain—often tried to copy the experience of the United States. Those transplants failed because the soil in which they were planted was simply not congenial; the conditions for constitutional democracy were not yet in existence. Efforts to transplant federalism of the kind recognized under the United States Constitution, for example, foundered when Latin American leaders did not take into account the vast differences between the conditions that brought the 1787 document into being and Latin America's tradition of centralization.

The limits of imitation are suggested by an observation penned by Juan Bautista Alberdi, the father of Argentine constitutionalism: All constitutions change or succumb when they are but children of imitation; the only one which does not change, the only one which moves and lives with the country, is the constitution which that country has received from the events of its history, that is to say, from those deeds which form the chain of its existence, from the day of its birth. The historical constitution . . . survives experiments and floats away from all shipwrecks.

Alberdi, in this passage at least, seems to have underestimated the value of borrowing from other countries' constitutional experience. There are many examples of successful constitutional adaptations from one country's experience to another. Swiss federalism, as shaped by that country's 1848 Constitution, owes much to the Philadelphia Constitution of 1787. When India achieved its independence and drafted a constitution, there seemed widespread agreement on the Euro-American constitutional tradition as a source both of principles and often of specific provisions. But Alberdi's statement is still useful as a cautionary note: a constitution is unlikely to succeed if it is drafted without regard for a country's history, traditions, and political culture.).

<sup>99</sup> See Mark V. Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 325 (1998).

unless it can be connected to arguments already available within the domestic legal system<sup>100</sup> or if it can be used as a contrast to explain main differences between both systems.<sup>101</sup>

To transplant a foreign institution without proper analysis of the compatibility with the constitutional structure of the country where the borrowed institution wants to be applied, might cause contradictions in the normative system of this country and can lead to the inefficiency or rejection of the institution or transplanted principle. Therefore, an analogy between the transplant of constitutional structures and the transplant of organs of the human body can be drawn up. The transplanted organ must be compatible with the body that receives the transplant; otherwise, the transplanted organ would be rejected. Before the transplantation of a foreign constitutional structure, an analysis of its compatibility with the constitutional body of the country where this structure is going to be applied must be made. Otherwise, this institution will be rejected.

Biscaretti di Ruffia claims that in the investigation of Comparative Public Law even though it is not required that both legal systems under examination have exactly the same norms and institutions. This, can lead to the absurdity of eliminating the very possibility of comparison. Thus, to make a comparison it is necessary that they both have substantial analogy of informative principles and constitutional structures.<sup>102</sup>

Argentine public law doctrine demonstrates a noticeable inclination to use foreign sources for the interpretation of the Argentine Constitution without reviewing the compatibility of those legal systems. This characteristic, that reflects an unusual knowledge of comparative law, can nevertheless lead to serious ambiguities and confusion.<sup>103</sup> As Frankenberg stated "comparatists rarely find it worth mentioning by which criteria they select their material . . . France and West Germany represent the civil law world, while the United States and England stand for the common law world . . ."<sup>104</sup>

Scholars must be very careful in looking into foreign law to support constitutional solutions for Argentina. They must take into consideration the essential characteristics of our public law and its similarities and differences

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<sup>100</sup> See Mark V. Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1307 (1999).

<sup>101</sup> See MANUEL GARCIA-PELAYO, *DERECHO CONSTITUCIONAL COMPARADO* 21 (1999).

<sup>102</sup> See BISCARETTI DI RUFFIA, *supra* note 86, at 83.

<sup>103</sup> See MAIRAL, *supra* note 21, at 42.

<sup>104</sup> Gunter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411 (1985).



with many foreign sources. Unfortunately, today scholars do not properly analyze whether foreign norms and interpretations are compatible with the Argentine constitutional system. Thus, foreign law is mentioned indiscriminately.<sup>105</sup> There is a marked tendency to use more and more European Constitutional Law as a source for the interpretation of the Argentine Constitution, specially French and Spanish, without any consideration about the existing mutual incompatibility between the Argentine constitutional system and the system adopted by most European countries. This inclination, has been transformed into an uncontrollable fashion, true constitutional snobism, a cause of numerous ambiguities and erroneous interpretations.

An example of an incompatible foreign institution borrowed from Europe is the "Chief of Cabinet"<sup>106</sup> (CoC) which was introduced in the constitutional life of Argentina by the 1994 Amendment.<sup>107</sup> According to the Argentine Constitution,<sup>108</sup> the CoC is appointed by the president and can be censured by the legislative branch. The CoC, in fact, does not reduce the faculties of the president, but only relieves him of a series of administrative tasks. Moreover, the president can assume those faculties at any time because he continues to be the supreme head of the nation, the political person in charge of the general administration of the country, etc.<sup>109</sup> This situation may not be too problematic; however, if the CoC is censured by Congress, there can be great tension in the system.

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<sup>105</sup> See MAIRAL, *supra* note 21, at 57 (giving the example of the book of EDUARDO MENEM & ROBERTO DROMI, *LA CONSTITUCIÓN REFORMADA* which references the constitutions of Paraguay of 1992 (on fifty-one occasions), of Bolivia of 1967 (on twenty-nine occasions) and of Peru of 1993 (on forty occasions), leading up to 336 references to Latin American constitutions. They also included seventy-seven references to European constitutions (mainly the French, Spanish and Italian constitutions). In contrast, these scholars did not include a single reference to the Constitution of the United States).

<sup>106</sup> See ARG. CONST. arts. 100-101.

<sup>107</sup> See Sagüés & Rossen, *supra* note 74, at 54-55 (arguing that:

one of the showpieces of the reform was the creation of the position of the 'Chief of the Cabinet of Ministers.' The responsibilities of this position require overseeing the general administration of the country, issuing regulations, naming employees of the Administration, executing the budgetary law, among other things. The Chief of the Cabinet is politically responsible to the National Congress, which can remove him by an absolute majority of the votes of the members of each chamber. This brings Argentina closer to a parliamentary system. But the president, acting alone, has discretion to nominate and remove the Chief of the Cabinet.).

<sup>108</sup> ARG. CONST. art. 101.

<sup>109</sup> ARG. CONST. art. 99(1).

In parliamentary systems in general (except for the cases of Norway and Israel), the way to solve disagreements is by means of dissolution of the Parliament. Thus, the referee of the dispute between the Executive Power (Cabinet) and the Parliament is the electorate, since after the dissolution new elections are called. However, in the Argentine system that solution does not exist and the possible dispute between the CoC and Congress does not have a solution. Therefore, there is a possibility of blockage in the system. Jiménez de Aréchaga, one of the most important Uruguayan constitutionalists of all times, said that censure without dissolution is bad constitutional technique.<sup>110</sup>

Another example of the main differences between the Argentine system and many of the European systems (except for countries like Norway) is the approach to the value of the constitutions as legal norms that can be invoked by individuals before the courts of justice. Only since 1978, Spanish constitutionalists have recognized the constitution as a legal norm, and not without dispute.<sup>111</sup> García de Enterría tried to demonstrate in 1981 that, since the 1978 Spanish Constitution, the Hispanic tradition that denied specific normative value to the Constitution had been broken.<sup>112</sup> At a first glance, the Spanish Constitutional Court declared that the Constitution was an orientation norm for the Legislative Power, and that the latter had to transform constitutional legal mandates into authentic legal principles.<sup>113</sup> This Court modified that doctrine in 1982 admitting the character of legal norm of the constitution.<sup>114</sup>

The refusal to recognize the Constitution as a directly indispensable legal norm to be invoked by individuals is not exclusive of Spanish constitutionalism. Sánchez Viamonte stated that: "all proclamations done by

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<sup>110</sup> 1 JUSTINO JIMÉNEZ DE ARÉCHAGA, *LA CONSTITUCIÓN DE 1952* 69 (1995).

<sup>111</sup> See GASPAR ARIÑO ORTIZ, *PRINCIPIOS DE DERECHO PÚBLICO ECONÓMICO* 140-50 (1999); see also PABLO LUCAS VERDU, *EL DERECHO CONSTITUCIONAL COMO DERECHO ADMINISTRATIVO*, in 13 *REVISTA DE DERECHO POLÍTICO DE LA UNIVERSIDAD NACIONAL DE ESTUDIOS A DISTANCIA*, 7 (1982) (rejecting the notion of the Constitution as a legal instrument. He contemptuously denominates this position as the "administrativization" of constitutional law. To this author, the Constitution would be: first, a series of values and principles; second, it would contain some legal norms. The legal character of the constitution is rejected by this school of thought.).

<sup>112</sup> See EDUARDO GARCÍA DE ENTERRÍA, *LA CONSTITUCIÓN COMO NORMA JURÍDICA Y EL TRIBUNAL CONSTITUCIONAL* 39 (3d ed. 1983).

<sup>113</sup> JAVIER PÉREZ ROYO, *CURSO DE DERECHO CONSTITUCIONAL* 214 (1994).

<sup>114</sup> *Id.* at 214.

the French declarations, about the guarantee of the rights of the man and the citizen, are nothing but unfulfilled promises, since there was no legal instrument that constitutes a proper guarantee for them."<sup>115</sup>

With respect to European constitutions in general, Löwenstein affirmed that individual liberties are guaranteed by constitutions more formally than materially.<sup>116</sup> Moreover, this author noticed that the protection of fundamental liberties depended solely on the good will and auto limitation of the officers in power, which in fact meant a weak protection.<sup>117</sup> The thesis that claimed the relative normative value of constitutions is still defended by many European public scholars. Biscaretti di Ruffia, for example, affirms that declarations of rights only have legal value if an explicit requirement of laws exists or when principles formulated in those declarations are considered transformed into general principles of legal ordering.<sup>118</sup>

In France, although the *Conseil Constitutionnel* has recognized total constitutional value in the Declaration of Rights of the Man and of the Citizen of 1789,<sup>119</sup> access to the jurisdiction of the *Conseil* is forbidden to individuals.<sup>120</sup> Thus, there is no constitutional guarantee in favor of citizens for the protection of the exercise of their fundamental rights. As Schwartz stated "a constitution is a mere paper instrument unless the guaranties contained in it are adequately safeguarded by the courts."<sup>121</sup>

In 1993, President Mitterrand submitted under Parliament's consideration a proposal of amendment to the French Constitution. The purpose of the amendment was to grant individuals the right to require the intervention of the *Conseil Constitutionnel* to seek protection of their rights. The Senates,

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<sup>115</sup> See CARLOS SÁNCHEZ VIAMONTE, *EL CONSTITUCIONALISMO. SUS PROBLEMAS* 166 (1957).

<sup>116</sup> KARL LÖWENSTEIN, *TEORÍA DE LA CONSTITUCIÓN* 397 (1986).

<sup>117</sup> *Id.* at 398.

<sup>118</sup> See PAOLO BISCARETTI DI RUFFIA, *DERECHO CONSTITUCIONAL* 261 (1987).

<sup>119</sup> JAVIER PARDO FALCÓN, *EL CONSEJO CONSTITUCIONAL FRANCÉS* 123 (1990) (quoting Decision No. 132 of Jan. 16, 1982).

<sup>120</sup> The following officers are the only ones authorized to raise questions of constitutionality before the *Conseil Constitutionnel*: the president of the Republic, the Prime Minister, the president of the National Assembly, the president of the Senate, sixty deputies or sixty senators, the Minister of Justice, the Fiscal Ministry, the Government, voters and candidates and the Prefects, *chefs de territoires* and the representatives of the government in a given circumscription. Nevertheless, the authorization of these public officers is not ample but limited in each case. For example, the possibility to raise questions before the *Conseil Constitutionnel* by voters and candidates (the one who appear as ampest at first sight) is reduced exclusively to questions related to the procedure of the national elections and referendums.

<sup>121</sup> Schwartz, *supra* note 64, at 467.

however, rejected the proposal. It is traditional jurisprudence of the *Conseil Constitutionnel* that the constitutionality of laws adopted by way of referendum cannot be reviewed, since they constitute the direct expression of the national sovereignty.<sup>122</sup> Thus, the French Constitution is not an indispensable legal norm that can be invoked by individuals.<sup>123</sup>

In Germany, with the exception of the failed 1848 Constitution that was never enacted, fundamental rights did not have constitutional recognition until the 1919 Constitution of Weimar. This Constitution included a second part, articles 109 to 165, that established the rights and fundamental obligations of Germans (*Grundrechte und Grundpflichten der Deutschen*).<sup>124</sup> However, these fundamental rights were neither developed nor effectively used during the Weimar Republic.<sup>125</sup> Only in 1949, when the Basic Law of the Federal Republic of Germany was enacted did these fundamental rights acquire the value of directly indispensable legal norm that could be invoked by individuals.<sup>126</sup> This is why, in 1950, Kruger stated that, before 1949, "fundamental rights were only worth in the scope of the law, today the laws are only worth in the scope of the fundamental rights."<sup>127</sup>

The evolution of United States constitutionalism was very different. The U.S. Constitution was considered from the beginning a legal norm of immediate application. American doctrine and constitutional jurisprudence considered the 1787 Constitution not as a program or orientation norm for the public powers, but as an indispensable law that could be invoked by individuals without the need of legislative implementation. The concept of constitu-

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<sup>122</sup> See HÉCTOR GROS ESPIELL, *La Última Reforma Constitucional Francesa*, in ESTUDIOS CONSTITUCIONALES 409 (1998).

<sup>123</sup> Although it is true that the *Conseil Constitutionnel* has stated that once a legal claim is put under its jurisdiction they are not limited by the objections of constitutionality made by those who submit that project for its revision, and that the *Conseil* can control the constitutionality of other aspects of the claim, this fact does not modify the expressed conclusion. See THIERRY DI MANNO, *Jurisprudence du Conseil Constitutionnel*, in 26 REVUE FRANCAISE DE DROIT CONSTITUTIONNEL, 349 (1996). Neither individuals nor the courts of justice are qualified to require the intervention of the *Conseil*, nor can the *Conseil* take part if the review has not been asked by those who are authorized by law to do so. See Ricardo Ramírez Calvo, *Los Bienes Colectivos y la Constitución Nacional*, [2001-D] L.L. 1208, 1211.

<sup>124</sup> *Deutsche Verfassungen*, Wilhelm Goldmann Verlag, Munich, at 96-105 (1965).

<sup>125</sup> See KONRAD HESSE ET AL., *HANDBUCH DES VERFASSUNGSRECHTS* I 130 (2d ed. 1994).

<sup>126</sup> *Id.* at 131.

<sup>127</sup> FRANCISCO FERNÁNDEZ SEGADO, *SISTEMAS DE PROTECCIÓN JUDICIAL DE LOS DERECHOS FUNDAMENTALES*, in 22 REVISTA URUGUAYA DE DERECHO CONSTITUCIONAL Y POLÍTICO, No. 67-71 (1995) (citing HERBERT KRÜGER, *DIE EINSCHRÄNKUNG VON GRUNDRECHTEN NACH GRUNDGESETZ*).

tional supremacy, and the immediate and indispensable normative value of the Constitution are both creation of United States constitutionalism.

The Argentine Constitution adopted a similar criterion. Since the enactment of the 1853 Constitution, constitutional norms were applicable law by the courts<sup>128</sup> and were invoked by individuals. Therefore, Argentina developed a long tradition of judicial review and an important constitutional jurisprudence.<sup>129</sup>

In 1887, the Argentine Supreme Court stated that:

the palladium of freedom is not a law that can be suspended in its effects, revocable according to public conveniences of the moment; the palladium of freedom is the Constitution, the sacred coffer of all liberties, of all individual guarantees whose observation is inviolable, whose severely scrupulous guard must be the fundamental object of the laws, the essential condition of the decisions of the federal justice.<sup>130</sup>

The fundamental difference between Argentine and European constitutionalism is obvious. Argentina adopted a presidential system following the American model, whose differences with European parliamentary governments are evident. Those basic differences generate constitutional solutions equally dissimilar, whose adoption in Argentina cannot take place without generating serious tensions in the system.

Take again, as an example, the differences between European countries and both the U.S. and Argentina with respect to judicial review. In many European countries, the judicial branch does not constitute a real power, whose hierarchy is equal to the one of the other powers. European theory understands that acts of Parliament represent the general will of the people. This is why it is so difficult for them to admit that the will of the people may be limited or controlled by a branch whose origin is far from being popular.

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<sup>128</sup> See, e.g., *Rios, Gomez y Rios*, 1 Fallos 32 (1863); see also *Tomkinson*, 1 Fallos 62 (1864).

<sup>129</sup> See 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, 79 (1997) (stating: "Argentina presents one of the longest traditions of judicial review in the world, dating back to the 1860s").

<sup>130</sup> *Sojo*, 32 Fallos 120 (1887).

With the exception of the interesting case of Norway,<sup>131</sup> it was not until 1920, when Hans Kelsen prepared the Austrian constitution, that there was judicial review of norms enacted by the Parliament. This task had to be performed by a special constitutional court that did not integrate the judicial branch. In order to avoid the intellectual difficulty faced by European doctrine in admitting that a court could control the constitutionality of the laws enacted by Parliament, Kelsen affirmed that when carrying out this control the court acted like a "negative legislator."<sup>132</sup>

To the contrary, the Argentine 1853 Constitution, following the U.S. model, established a judicial branch with equal hierarchy as both the president and Congress. Moreover, the Argentine Constitution vested in the judicial branch the faculty to control acts of the remaining branches of government and to declare them unconstitutional when there is a conflict between their acts and the Constitution. Thus, it is pretty clear that both European and Argentine systems depart from different concepts regarding separation of powers and also arrive at different solutions with respect to the hierarchy and attributions of each branch of government.

Similar differences can be drawn with respect to DNUs as seen in Section B. This is the reason why taking European constitutional law as a model, far from constituting a modernization of the Argentine constitutional system as some scholars claim, constitutes a regression to constitutional primitivism, to times that Argentina's constitutional evolution surpassed almost 150 years ago.

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<sup>131</sup> See Carsten Smith, *Judicial Review of Parliamentary Legislation: Norway as a European Pioneer*, in [2000] PUBLIC LAW [P.L.] 595, 597 (explaining that "Norway's Supreme Court was apparently the first court in Europe to establish . . . judicial review powers . . . [and that] our constitutional adjudication remained a relatively well-kept secret in an international perspective, effectively protected by linguistic barriers. In an international literature on judicial review, Norwegian practice is very much an unknown quantity."). Carsten Smith is the Chief Justice of Norway's Supreme Court.

<sup>132</sup> Hans Kelsen, *Judicial Review of Legislation*, 4 J. OF POLITICS 2, 187 (1942) (claiming that the judicial review of the constitutionality of laws is a legislative and not a judicial function. This is also the reason why the Austrian Constitution of 1920 arranged that the members of the Constitutional Court had to be elected by the Parliament.); see also CARL SCHMITT, *LA DEFENSA DE LA CONSTITUCIÓN* 21 (Tecnos 2d ed. 1998) (1931) (claiming that the defense of a constitution is not and cannot be in any case task of a court). This is why he concluded that the president of the Reich is the only one who can be the defender and guarantor of the constitution. *Id.* at 213-20.

## III. THE ROLE OF THE JUDICIARY

In a system of separation of powers, the role of the judiciary is vital in preserving barriers against concentration of power and maintaining checks and balances. Moreover, the role of courts could be helpful to the avoidance of stalemates between branches.<sup>133</sup>

A comparison between the U.S. example and the case of Argentina regarding cases involving the exercise of lawmaking power by the executive branch will illustrate the deformations that the presidential system suffered in Argentina.

A. *The U.S. Example*

Even if one acknowledges that there is a large accepted practice of EOs in the United States,<sup>134</sup> there is a substantive difference between this practice and the one that is usual in Argentina. As Schwartz explains:

even though the administrative rule-making power is an enormous one today in the common-law world, it is still one that has its source in delegations by the legislature. In Anglo-American theory, it is only the elected representatives of the people who have been vested with the inherent power to legislate. Other governmental organs may exercise legislature authority only by virtue of an express grant of such authority from the legislature.<sup>135</sup>

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<sup>133</sup> See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1565-66 (1991) (stating

The Court's role in cases involving separated powers, no less than in those involving the Bill of Rights, ought to be as vigilant arbiter of process for the purpose of protecting individuals from the dangers of arbitrary government. When exercises of power by one branch of government, or by coalitions of two or more acting together, threaten the integrity of government process, then the Court should consider interfering to restore a balance of power, a balance of process.).

<sup>134</sup> Some scholars argue that this practice of the executive is unconstitutional. See, e.g., JAMES L. HIRSE, *GOVERNMENT BY DECREE: FROM PRESIDENT AUTHORITY TO DICTATOR THROUGH EXECUTIVE ORDERS* (1999).

<sup>135</sup> See Schwartz, *supra* note 64, at 469.

In order to determine whether a particular delegation of lawmaking power is permissible under the U.S. Constitution, not only must the text of Article I be considered, but also the logic of the entire Constitution and the structure of the government it creates. Under Article I, all legislative power, which is vested exclusively in Congress, must be exercised in accordance with the Presentment Clause.<sup>136</sup> A formalist reading of the text, without reference to the basic structure of government, could quickly lead to the conclusion that Congress cannot delegate any lawmaking authority at all. However, the U.S. Supreme Court in a series of cases recognized that, under certain circumstances, this delegation did not violate the Constitution.

In 1892, in *Field v. Clark*,<sup>137</sup> the Court held that "[C]ongress cannot delegate legislative power . . . [and that this] is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the [C]onstitution."<sup>138</sup> However, the Court upheld the delegation to the president of authority to suspend tariff exemptions under the Tariff Act, finding that it was not a delegation of legislative power. Although the Court's approach was quite formalist, in that it sought to distinguish between legislative and non-legislative powers, the Court applied a functional analysis to define the core, non-delegable part of the "legislative" power. The Court found that the power delegated to the president under the Act was not "legislative" because Congress, and not the president, had established the basic policy in the Act, leaving only the "enforcement" of that policy to the executive branch.<sup>139</sup> Kelleher explains that in subsequent cases, when delegations to administrative agencies were challenged, "the Court used a functionalist definition of the legislative power as comprising the core function of making policy decisions, and thus did not define the "legislative" power as synonymous with lawmaking power."<sup>140</sup>

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<sup>136</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>137</sup> 143 U.S. 649 (1892).

<sup>138</sup> *Id.* at 692.

<sup>139</sup> *Id.* at 693.

<sup>140</sup> Kelleher, *supra* note 25, at 423. In *United States v. Grimaud*, the Court upheld a statute authorizing the Secretary of Agriculture to regulate the use of public forests for the protection against destruction by fire and depredations. The Secretary's promulgation of regulations was "lawmaking," and necessarily involved some policy decisions in the sense that it called for value judgments concerning the use and distribution of resources, rather than simply the application of technical expertise. Nevertheless, the Court held that the statute's broad delegation did not mean a transfer of the legislative power. Rather, the Court held that it was a grant of administrative authority to 'fill up the details' of the basic legislative policy determined by Congress. See 220 U.S. 506, 509, 517, 522-23 (1911) (quoting *Wyman v. Southard*, 23 U.S. (10



With the New Deal, Congress began to make broader delegations of discretion to administrative agencies. When these broad delegations were challenged, the Court initially found them invalid.<sup>141</sup> However, the Court started to routinely uphold broad delegations to administrative agencies that became common in the decades following the New Deal.<sup>142</sup> The New Deal precipitated an evolution of the Court's delegation jurisprudence. In a pragmatic accommodation of the new reality of the modern administrative state, the Court's delegation doctrine evolved from the formalistic approach of *Field*, in which the issue was whether the power being delegated was legislative, to an increasingly flexible and more functionalist approach, concerned more with sufficient controls and accountability for the exercise of delegated lawmaking and policymaking authority.<sup>143</sup>

In *Panama Refining*, the Court held that it would uphold such delegations only if Congress made the basic policy decisions and established the "primary standards" to guide the exercise of administrative discretion.<sup>144</sup> The focus shifted from defining the lines between legislative and non-legislative powers

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Wheat.) 1, 43 (1825)).

<sup>141</sup> See Kelleher, *supra* note 25, at 424 n.199. Within two years, the Court upheld three constitutional challenges to delegations made during the initial years of the New Deal. See *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935) (invalidating delegation under the National Industrial Recovery Act ("NIRA") that authorized the president to prohibit transportation in interstate commerce of certain petroleum products, stating that "Congress has declared no policy, has established no standard, has laid down no rule . . ."); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541 (1935) (invalidating core delegation in NIRA on the grounds that it "supplies no standards"); *Carter v. Carter Coal Co.*, 298 U.S. 238, 310-11 (1936) (invalidating statutory delegation to fix wages and hours on the grounds that it was arbitrary and violated due process).

<sup>142</sup> See, e.g., *Yakus v. United States*, 321 U.S. 414, 423 (1944) (upholding delegation in Emergency Price Control Act, which authorized the Office of Price Administration to fix maximum prices).

<sup>143</sup> See Kelleher, *supra* note 25, at 425.

<sup>144</sup> 293 U.S. at 421-26 (explaining

The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply . . . . The Congress . . . may establish primary standards, devolving upon others the duty to carry out the declared legislative policy; that is, as Chief Justice Marshall expressed it, to fill up the details under the general provisions made by the Legislature.).

*Id.* (citing *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)).

to determining whether the exercise of lawmaking powers is an encroachment on, or abdication of, Congress's power and duty to make the basic political choices.<sup>145</sup> This modern delegation doctrine is often referred to as the "intelligible principle" standard,<sup>146</sup> which requires that delegation contain an "intelligible principle" linking the ends, or policy, chosen by Congress and providing the means to carry out those ends to the branch that receives that delegation.<sup>147</sup>

There is an important debate among scholars about the constitutionality of the delegation doctrine.<sup>148</sup> Epstein and O'Halloran explain that advocates of an enhanced non-delegation doctrine fear that the concentration of power in one branch of the government "inevitably leads to tyranny and a loss of individual liberty," citing Federalist No. 47 as affirmation: "The accumulation of all powers, legislative, executive and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."<sup>149</sup>

One way that power can come to reside within a single branch is through Congress' delegation of the details of policymaking to executive agencies. As Justice Kennedy stated in his concurring opinion in *Clinton v. New York*, "[L]iberty demands limits on the ability of any one branch to influence basic political decisions . . . abdication of responsibility is not part of the constitutional design."<sup>150</sup> Therefore, the argument is that, to ensure liberty it is necessary to limit such delegations of authority.<sup>151</sup>

Kelleher states that:

There is more to the delegation doctrine if one does not lose sight of the doctrine's evolution and the larger context of separation of powers principles. That is, lawmaking power may be transferred only if it is adequately controlled. The Court tolerated the broad

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<sup>145</sup> See Kelleher, *supra* note 25, at 425.

<sup>146</sup> In *Touby v. United States*, 500 U.S. 160, 165 (1991), the Court articulated the doctrine by declaring that "so long as Congress lays down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power" (quoting *Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928)).

<sup>147</sup> See *Touby*, 500 U.S. at 165.

<sup>148</sup> Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 223 (1997).

<sup>149</sup> David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 949-50 (1999).

<sup>150</sup> *Clinton v. City of New York*, 524 U.S. 417, 450-52 (1998) (Kennedy, J., concurring).

<sup>151</sup> *Id.* at 950.

delegations of discretion to administrative agencies so common in the decades following the New Deal, only because they were accompanied by extensive procedural safeguards and controls, including controls on external to the delegating statute.<sup>152</sup>

In the U.S., Congress and the courts are able to exercise control over the Executive's exercise of delegated authority, to guard against overreaching and to ensure that Congress has made the basic policy decisions that are at the non-delegable core of the legislative function.<sup>153</sup> However, there were occasions in which the executive branch tried to exercise lawmaking power without statutory support. The major example of the judiciary striking down an EO is *Youngstown*.<sup>154</sup>

### 1. *The Youngstown Case*

In 1952, during the Korean War, a dispute arose between the steel companies and their employees over certain terms and conditions to be included in a new collective bargaining agreement. After several months of unsuccessful negotiations, the unions called a nationwide strike. The steel industry was considered extremely important for the military industry at large.

On April 8, 1952, President Harry S. Truman issued an EO<sup>155</sup> directing the Secretary of Commerce to take possession of more than eighty plants and keep them running in the interest of national defense. As Letizia explains, the president "based his authority for such seizure, not on any specific enactment by Congress, nor on any enumerated or implied grant of power contained in the U.S. Constitution, but on the inherent power assertedly contained in the Constitution, and redounding to the President in such situation."<sup>156</sup> Acting pursuant to this EO, Secretary of Commerce Charles Sawyer issued an order stating the need to take possession of certain plants.<sup>157</sup> On April 9, 1952, the

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<sup>152</sup> Kelleher, *supra* note 25, at 426.

<sup>153</sup> In Argentina, to the contrary, these controls are non-existent due to the acceptance of European doctrine regarding the Executive's broad rule-making power. Thus, presidents exercise in fact the lawmaking power through the promulgation of DNU's. See MAIRAL, *supra* note 21, at 48-49.

<sup>154</sup> FISHER, *supra* note 61, at 114.

<sup>155</sup> Executive Order No. 10,340, 17 Fed. Reg. 3139 (1952).

<sup>156</sup> Donald J. Letizia, *Inherent Power of the President to Seize Property*, 3 CATH. U. L. REV. 1, 27 (1953).

<sup>157</sup> See Williams, Jr., *supra* note 93, at 5 (explaining that this action precipitated a vigorous

owners of the steel companies filed a request to the United States District Court for the District of Columbia for a temporary restraining order. The request was denied by Judge Holtzoff.<sup>158</sup> On April 29, 1952, the owners of the mills were granted preliminary injunctions restraining the Secretary of Commerce from seizing their plants.<sup>159</sup>

On May 2, 1952, the injunction orders were stayed, pending review of the case, and the United States Supreme Court granted certiorari.<sup>160</sup> The mill owners argued that the president's order was an exercise of lawmaking power, a legislative function which the Constitution has expressly confided to Congress and not to the president. Congress had never statutorily authorized the seizure. It had enacted three statutes providing for governmental seizure of the mills in certain specifically prescribed situations, but the executive branch never claimed any of those conditions had existed prior to its action. Congress had in fact considered and rejected authorization for the sort of seizure that President Truman actually ordered.<sup>161</sup>

*Youngstown* presented the first clear test in the courts of a case where the president made a seizure of property without statutory authorization to do so.<sup>162</sup> The Supreme Court, in a decision concurred by six of its nine members, affirmed the judgment of the District Court and invalidated the EO.<sup>163</sup> Justice Hugo Black delivered the opinion of the Court. The Court held that the power of the president to issue an EO:

must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied. Indeed,

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controversy:

as to whether or not the President had acted within the scope of his powers, and whether or not, if he had acted *ultra vires*, the courts were empowered to intervene his action. The broad question . . . was whether or not our Federal Government being a government of enumerated powers possessed any inherent powers—or any other powers—which gave it authority to take action similar to that asserted by the President in his Executive Order).

<sup>158</sup> WILLIAM H. REHNQUIST, *THE SUPREME COURT* 157 (2d ed. 2001).

<sup>159</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569 (D.D.C. 1952).

<sup>160</sup> 343 U.S. 937 (1952).

<sup>161</sup> See Williams, Jr., *supra* note 93, at 18.

<sup>162</sup> *Id.* at 17.

<sup>163</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

we do not understand the Government to rely on statutory authorization for this seizure.<sup>164</sup>

The Court further reasoned:

It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution.<sup>165</sup>

During the argument of this case, the government claimed that presidents had made similar seizures in the past and that such continued action, albeit not supported by the Constitution, became valid for its continuous use. The Court rejected this argument and expressly held that:

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States."<sup>166</sup>

The Constitution grants the Congress the power to legislate in matters related to the defense of the nation, the prosecution of war, and the support of the army.<sup>167</sup> As Williams states: "The President's power as Commander in Chief of the Armed Forces is purely military in nature and is directly related to the direction of such forces . . . The war powers of the President do not include legislation."<sup>168</sup> Thus, the Court held that: "The order cannot properly

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<sup>164</sup> *Youngstown*, 343 U.S. at 585.

<sup>165</sup> *Id.* at 587.

<sup>166</sup> *Id.* at 587-88.

<sup>167</sup> U.S. CONST. art. I, § 8.

<sup>168</sup> Williams, Jr., *supra* note 93, at 14.

be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces."<sup>169</sup>

Finally, the Court expressly stated that:

The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand.<sup>170</sup>

The importance of *Youngstown* lies fundamentally in the attempt made by the courts to check a power seen to be dangerous in its future potentialities. As Chemerinsky states: "Controlling Presidential power is necessary to safeguard individual liberties, and it is the role of the courts to protect this rights. Thus, there is no justification for judicial restraint in review of the Executive."<sup>171</sup>

In the same sense, this case "represents the bedrock principle of constitutional order: except perhaps when acting pursuant to some "specific" constitutional power, the president has no inherent power to invade private rights; the President not only cannot act *contra legem*; he or she must point to affirmative legislative authorization when so acting."<sup>172</sup> However, it is necessary to distinguish between delegation of legislative power in domestic and foreign affairs.<sup>173</sup> As Fisher explains "the Supreme Court looks more sympathetically upon delegation that involves external affairs."<sup>174</sup> The major example of a delegation case involving foreign affairs is *Dames & Moore v. Regan*.

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<sup>169</sup> 343 U.S. at 587.

<sup>170</sup> *Id.* at 589.

<sup>171</sup> Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 894 (1983).

<sup>172</sup> Monaghan, *supra* note 48, at 10; *see also* Schwartz, *supra* note 64, at 471 (arguing that "if the decision of the American courts in *Youngstown Sheet & Tube Co. v. Sawyer*, the steel seizure case, means anything, it means that they have rejected this theory of inherent power in the executive").

<sup>173</sup> *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936) (Justice Sutherland wrote that legislation over international affairs "must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible where domestic affairs alone are involved . . .").

<sup>174</sup> FISHER, *supra* note 61, at 96.

## 2. *Dames & Moore v. Regan*

On January 19, 1981, President Carter entered into three agreements with Iran to secure the release of 52 American hostages seized in Teheran on November 4, 1979.<sup>175</sup> As part of the settlement of the hostage situation, President Carter took a number of actions affecting the claims that American creditors initiated against Iran. These agreements were entered into without the advice and consent of the Senate. The action which posed the most difficult constitutional issue was the suspension of all contractual claims against Iran that were pending in American courts, the nullification of all attachments and liens secured against Iranian property, and the transfer to Iran by July 19, 1981, of Iranian property held in the United States; such claims were to be later arbitrated by an International tribunal. Fisher states that the Court: "strained to uphold an agreement it could not possibly overturn, given the foreign policy implications."<sup>176</sup>

In *Dames & Moore v. Regan*,<sup>177</sup> the Supreme Court upheld the president's authority to enter into and carry out the agreements with Iran. The case was argued on June 24, 1981, and decided eight days later: July 2, 1981. As Marks and Grabow explain: "Recognizing its expeditious treatment of questions that touch fundamentally upon the manner in which our Republic is to be governed, the Court repeatedly emphasized the narrowness of its holding."<sup>178</sup> The decision, written by Justice Rehnquist, was unanimous.

The Court held that the claims suspension was within the president's constitutional authority. It upheld the president's extinction of attachments and liens on the ground that the "plain language" of the International Emergency Economic Powers Act (IEEPA) permitted such executive action.<sup>179</sup>

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<sup>175</sup> Lee R. Marks & John C. Grabow, *The President's Foreign Economic Powers after Dames & Moore v. Regan: Legislation by Acquiescence*, 68 CORNELL L. REV. 68 (1982).

<sup>176</sup> FISHER, *supra* note 61, at 252.

<sup>177</sup> 453 U.S. 654 (1981).

<sup>178</sup> Marks & Grabow, *supra* note 175, at 69.

<sup>179</sup> *Id.* (arguing that the

Court's holding, however, ignored both the legislative history of the IEEPA and its precursor statute, the Trading with the Enemy Act (TWEA), and its own earlier admonitions against a literal reading of the language of the two statutes. The Court also failed to provide a conceptually solid foundation in upholding the President's authority to suspend private claims pending in United States courts against foreign nations, relying upon a theory of implied congressional delegation through acquiescence that is without precedential support.).

While Congress had never explicitly delegated to the president the power to suspend such claims, it had implicitly authorized that practice by a long history of acquiescing in similar presidential conduct. However, the Court carefully stressed the limited scope of its holding. It was not holding that the president had constitutional authority to settle or suspend all claims; the Court was simply deciding that where such settlement or suspension is a "necessary incident to the resolution of a major foreign policy dispute,"<sup>180</sup> and Congress has acquiesced in that type of presidential action, the action will be deemed within the president's constitutional authority. In any event, the fact that Congress has consented to presidential action will not bring the action itself within the scope of the president's constitutional authority; it will merely be a factor in the analysis of close cases.

In *Dames & Moore*, the president's general executive authority in foreign policy matters (and perhaps his Commander-in-Chief powers) was probably also part of the analysis. The Court upheld the power of the president to remove the commercial claims of American citizens against foreign nations from the jurisdiction of U.S. courts. The Court held that Congress had acquiesced in the president's settlement of the claims of United States citizens against foreign nations, and that the acquiescence was tantamount to an express congressional delegation. Thus, according to *Dames & Moore*, Congress may sometimes be found to have impliedly acquiesced in the president's exercise of power in a certain area.<sup>181</sup> Where such acquiescence exists, this fact may be enough to tip the balance in favor of a finding that the president acted within the scope of his constitutional authority. The Court relied on such a theory of implied congressional acquiescence in upholding President Carter's power to take certain actions for the purpose of obtaining the release of American hostages from Iran.<sup>182</sup>

Quint argues that: "The most interesting aspect of *Dames & Moore* is its almost exclusive reliance upon congressional authorization through acquiescence or tacit approval. Instead of finding inherent executive power, the Court appeared to establish a special technique of statutory interpretation that is applicable in determining presidential authority in foreign affairs cases."<sup>183</sup> After *Dames & Moore*, in spite of congressional action, a president may, by executive agreement, suspend and effectively terminate the enforceable claims

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<sup>180</sup> *Dames & Moore*, 453 U.S. at 688.

<sup>181</sup> *Id.* at 679.

<sup>182</sup> *Id.* at 686.

<sup>183</sup> Peter Quint, *The Separation of Powers Under Carter*, 62 TEX. L. REV. 785, 817 (1984).



of American citizens in United States courts.<sup>184</sup> As Fisher states, "whether Carter's action becomes a precedent for further expansions of presidential powers depends on congressional reactions to future executive initiatives."<sup>185</sup>

### *B. The Case of Argentina*

The Argentine Constitution provides for an independent judiciary;<sup>186</sup> however, while the judiciary is nominally independent and impartial, its processes are inefficient, and at times subject to political influence.<sup>187</sup>

Since the 1853 Constitution was inspired by the U.S. Constitution the Argentine Supreme Court followed the evolution of the jurisprudence of the U.S. Supreme Court very closely.<sup>188</sup> In a very famous case, the Argentine Supreme Court said that:

the decisions of the Supreme Court of the United States, that had inspired our decisions almost every time when we interpreted the same precepts adopted by our Constitution, moved us to maintain

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<sup>184</sup> See Marks & Grabow, *supra* note 175, at 102-03.

<sup>185</sup> FISHER, *supra* note 61, at 252.

<sup>186</sup> The Argentine judicial system is divided into federal and provincial Courts, and each system has lower courts, courts of appeal and Supreme Courts. The supreme judicial power of Argentina is vested in the Supreme Court of Justice, which has nine members who are appointed by the president with the consent of the Senate. Each province has its own constitution, elects its own governor and legislators, and appoints its own judges to the provincial courts. The judicial system is divided into federal and provincial courts, each headed by a Supreme Court with chambers of appeal and section courts below it.

<sup>187</sup> U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR THE YEAR 2000 (released Feb. 26, 2001).

<sup>188</sup> See, e.g., *Ercolano*, 136 Fallos 161, 178 (1922) (upholding a 1921 law that temporarily froze apartment and commercial rents nationwide whose constitutionality was challenged. The Argentine Supreme Court relied on *Block v. Hirsh*, 256 U.S. 135 (1921), a U.S. Supreme Court decision handed down only a year before, which upheld a similar rent freeze in the District of Columbia); see also *Mango*, 144 Fallos 219 (1925) (the Argentine Supreme Court reconsidered the rent freeze and this time held it unconstitutional on grounds that too much time had passed to continue to consider it a temporary, emergency measure, and that the emergency had ceased to exist. The Court's decision once again relied on a U.S. Supreme Court ruling, *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924), decided three years after the *Block* case and holding the same District of Columbia rent freeze unconstitutional because it had gone on too long); see also *Viñedos y Bodegas Arizu*, 157 Fallos 359 (1930) (citing U.S. law and finding unconstitutional provincial tax that targets specific high income groups and businesses to pay for pension system).

the jurisprudence of the "Ercolano" case and others cases coincident with the jurisprudence of the Supreme Court of the United States.<sup>189</sup>

This was a period of time when the authority of the Argentine Supreme Court was highly respected. However, the admission of the *de facto* doctrine in 1930, the tolerance of the abusive emergency powers during most of the period between 1930-1989,<sup>190</sup> and the recognition of the power of the president to issue DNUs in 1990<sup>191</sup> started to undermine the legitimacy and respectability of the Court.

### 1. Argentine Jurisprudence on the *De Facto* Doctrine and DNUs

As soon as the Court started to gradually depart from U.S. Supreme Court precedents,<sup>192</sup> Continental European public law, especially the French doctrine, began to exercise an increasingly important influence in the interpretation and development of Argentine Constitutional Law. As Part II, Section *B infra* will show, the influence in administrative law has been particularly important in the study of the prerogatives of the president to issue DNUs.

With respect to DNUs, it is necessary to review two periods of the doctrine of the Argentine Supreme Court: before the acceptance of the *de facto* doctrine in 1930 and after the 1994 Amendment of the Constitution. The road to the acceptance of DNUs cannot be understood without reviewing the *de facto* doctrine.<sup>193</sup> Some scholars claim that this doctrine "has eroded legal thought

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<sup>189</sup> *Avico*, 172 Fallos 21 (1934) (citing U.S. law extensively and upholding legislation suspending mortgage payments and evictions).

<sup>190</sup> All but one of the members of the Court were impeached and removed from office in 1947. In the following years, it was changed five times *en masse*. See *infra*.

<sup>191</sup> See *Peralta*, 313 Fallos 1513 (1990) (upholding a DNU that seized savings in bank accounts and turned them into long-term government bonds).

<sup>192</sup> See Miller, *supra* note 5, at 1568 n.603 (explaining that

[T]he Argentine Supreme Court continues to cite U.S. law today, but since the late 1940s, unlike in the 1920s and 1930s, little intellectual integrity has accompanied its use. The Court cited U.S. case law in the 1920s and 1930s in order to change Argentinian practice, but its use of U.S. law was accurate, and in cases with similar factual scenarios. In the late 1940s, however, the court began to interpret U.S. law out of context in order to reach a desired result.).

<sup>193</sup> Many authors claimed that the Argentine Supreme Court adopted the *de facto* doctrine in an early case in 1865. See *Baldomero Martinez*, 2 Fallos 127 (1865); see, e.g., William C. Banks & Alejandro D. Carrio, *Presidential Systems in Stress: Emergency Powers in Argentina and the*

in Argentina and this is why scholars now accept the unconstitutional practice of DNU's without any shame."<sup>194</sup>

Banks and Carrio argue that:

The courts and the Congress have done little to enforce the rule of law and respect for the Constitution in Argentina. Symbolically, the most important element in the decline of the Argentine legal system has been the excessive exercise of emergency powers and their purported constitutional sanction. This institutionalization of constitutional emergency powers began in 1930, four days after the coup, when the Supreme Court was asked to decide whether to recognize formally the legitimacy of the military government.<sup>195</sup>

The coup took place on September 6, 1930 and was led by General José Félix Uriburu. The coup interrupted the existing constitutional rule (1853-1930) and overthrew the government of President Yrigoyen. After the coup, General Uriburu sent a note to the Supreme Court informing in that he had established a provisional government as a result of the triumphant revolution.

The military allowed the Argentine Supreme Court to continue operating with its pre-coup Justices. Then, the Court approved the Uriburu government and declared it constitutional.<sup>196</sup> In the *Acordada* of September 10, 1930,<sup>197</sup> the

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*United States*, 15 MICH. J. INT'L L. 1, 27 n.138 (1993) (arguing that the doctrine was adopted in the Baldomero's case when "the Supreme Court declared that a *de facto* government 'exercised provisionally all national power . . . with the right of the triumphant revolution, assented to by the people' "). However, this precedent was decided in a very particular historical context and not as a general principle to be applicable for the future but as a practical solution for a unique problem. Due to its little relevance, this precedent went unperceived for many years. (See NARCISO LUGONES ET AL., *LEYES DE EMERGENCIA, DECRETOS DE NECESIDAD Y URGENCIA XI* (1992) (arguing that the 1865 precedent was in fact ignored by the Supreme Court due to its lack of relevance). This explains why the Baldomero's case was not cited on September 10, 1930 when the Supreme Court issued the *Acordada* regarding the legitimacy of the military government that arose after the coup d'état.

<sup>194</sup> See LUGONES ET AL., *supra* note 193, at XI-XII.

<sup>195</sup> Banks & Carrio, *supra* note 193, at 27.

<sup>196</sup> The Court made its position known by means of an Accord (*Acordada*).

<sup>197</sup> See *Acordada* del Sept. 10, 1930 158 Fallos 290 (1930). Basically, the *Acordada* said:

The provisional government which has just been established in the country, is then, a *de facto* government the title of which cannot be judicially disputed with success by persons in so far as it carries out the administrative and political function derived from the possession of force as an instrument of

Supreme Court declared the new military government constitutional because it vowed to uphold the Constitution and it had the will and power to secure national peace.<sup>198</sup> The Supreme Court simply abdicated its responsibility to measure official conduct against legal norms. In this 1930 *Acordada* one must find the explanations of the origins of the decline of legal thought in Argentina<sup>199</sup> and the initial path to continuous destruction of separation of powers by both action of the executive and omission by the Legislative and judicial branches.<sup>200</sup> Irizarry and Puente explain that: "the obvious purpose [of the Court] has been to give the new government a semblance of regularity and legality in accordance with the *de facto* doctrine . . . to invest, in other words, the government with a colorable title to office, a plausible investiture and an appearance of general acceptance by and support of the people."<sup>201</sup>

Although later decisions by the Court purported to limit the powers of a *de facto* government, the lawless character of emergency powers has rendered judicial controls ineffective even concerning Executive usurpations of the basic right to rule Argentina. In 1935, in the *Administración de Impuestos Internos v. Malmonge Nebreda* case,<sup>202</sup> the Court held that the *de facto* government had executive but not judicial or legislative power. However, the Court recognized that a case might arise where the provisional government, in

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order and social security. Notwithstanding that, if, once the situation becomes normal, in the development of the action of the *de facto* government, the officers who make it up should ignore the individual guarantees or those of property or others secured by the Constitution, the Administration of Justice charged with making the form that be complied with, would restore them in the same conditions and to the same extent that it would have done with the legal executive power. And this last conclusion, imposed by the very organization of the judicial power, is confirmed by the declarations of the provisional government, which, in assuming charge has hastened to give oath to comply with and to cause to be complied with the Constitution and the fundamental laws of the nation, a decision which implies the consequence that it is ready to . . . render the aid of the force which it possesses to obtain compliance with judicial judgments.

<sup>198</sup> See Tim Dockery, *The Rule of Law over the Law of Rulers: The Treatment of De Facto Laws in Argentina*, 19 FORDHAM INT'L L.J. 1578, 1596-97 (1996).

<sup>199</sup> See LUGONES ET AL., *supra* note 193, at XII.

<sup>200</sup> See Banks & Carrio, *supra* note 193, at 28-29 (arguing that the 1930 decision effectively relegated the judiciary to a position of utter subservience to the executive branch, destroying whatever independence Argentine judges might have brought to bear in upholding constitutional norms).

<sup>201</sup> J. Irizarry & Puente, *The Nature and Powers of a De Facto Government in Latin America*, 30 TUL. L. REV. 15, 33 (1955).

<sup>202</sup> See 172 Fallos 365 (1935).

the absence of Congress, faced with an extraordinary situation of necessity might exercise legislative powers by means of decrees.<sup>203</sup> This was the first step to disaster.

After the coup of June 4, 1943, the Court issued another *Acordada* recognizing the de facto administration of Generals Ramírez and Perón.<sup>204</sup> Dockery explains that: "Although the military immediately suspended the Constitution it left the judiciary intact. As it did in the *Acordada* of 1930, the Supreme Court once again recognized the validity of the *de facto* Government."<sup>205</sup>

From 1930 to 1947, the Court took the position of arbiter of the scope of the de facto government's power, which was to be determined in light of the Constitution. The Court held in many cases that the de facto government was limited to acts necessary to keep the government functioning to carry the political purposes of the Constitution.<sup>206</sup> Thus, it declared many of the decree-laws of the de facto governments unconstitutional.<sup>207</sup> As Irizarry and Puente explains "[i]t soon become evident, especially under the social revolution under Perón got under way, that the limitations laid down by the Court would seriously obstruct the program of the revolution, since many of its objectives ran counter to the Constitution of 1853."<sup>208</sup>

In 1947, President Perón initiated the impeachment and removal from office of all but one of the Supreme Court Justices.<sup>209</sup> Eventually, the impeachment had a great impact in the jurisprudence of the Court with respect to the lawmaking power of the de facto governments.

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<sup>203</sup> See Irizarry & Puente, *supra* note 201, at 43-44.

<sup>204</sup> See 196 Fallos, 5 (1943).

<sup>205</sup> Dockery, *supra* note 198, at 1598.

<sup>206</sup> See, e.g., *Alfredo Castro*, 204 Fallos 359 (1946).

<sup>207</sup> A decree-law is defined as a legislative rule of general and obligatory character issued by a de facto government on a topic that, in a legal or de jure government, would be normally the subject of legislation by Congress. Irizarry and Puente explains that: "Decrees-laws should be issued only in exceptional and urgent cases and in the absence of the constitutional law-making body. They have the value and efficacy of real laws and may be given retroactive application. . . ." Irizarry & Puente, *supra* note 201, at 56. The similarities between the decree-laws and the DNUs are obvious.

<sup>208</sup> *Id.* at 67.

<sup>209</sup> See Miller, *supra* note 129, at 80 (explaining that "[T]he most serious event in the Supreme Court's decline, the impeachment and removal from office of all but one member during proceedings in 1946 and 1947, occurred during a newly elected civilian government under Juan Perón").

After the removal of the majority of the Court by impeachment, in October, 1947, in the *Ziella v. Smiriglio* case,<sup>210</sup> the Court held that:

the decree-laws issued by the *de facto* government are valued by reason of their origin and since they have the force of law they continue in force even though they have not been ratified by Congress as long as they are not repealed in the only manner in which they may be so, that it is to say, by other laws.

These new principles were ratified in many subsequent cases.<sup>211</sup> The Court adopted "the 'plenary authority' theory, which holds that a *de facto* government has legislative powers to the extent necessary to govern."<sup>212</sup>

After 1947, the entire Supreme Court and most of the remainder of the Argentine judiciary had been replaced *en masse* five times (1955, 1962, 1966, 1976 and 1983). The *de facto* doctrine was never overruled.<sup>213</sup>

The plain acceptance of DNUs in a democratically elected government arose in 1990, in the *Peralta* case. Before analyzing this case it is important to take note of a historical fact: in 1990, President Carlos Menem successfully packed the Supreme Court by passing a law that ordered to increase the number of members of the Court from five to nine. With the resignation of two Justices, Menem was able to appoint six Justices. Thus, he was able to avoid the control of the Supreme Court and to obtain many favorable decisions in delicate matters. As Miller eloquently stated "[s]ince the packing of the Court, its obedience to the Executive has sometimes bordered on the burlesque."<sup>214</sup>

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<sup>210</sup> 48 L.L. 361 (1947).

<sup>211</sup> See Linares Quintana, *supra* note 20, at 664.

<sup>212</sup> Irizarry & Puente, *supra* note 201, at 43.

<sup>213</sup> See Dockery, *supra* note 198, at 1635 (arguing that

[B]y failing to reject the validity of laws born from authoritarian rule, the current treatment of *de facto* laws weakens Argentina's constitutional institutions by allowing for methods of legislation not enumerated in the Constitution and eroding public confidence in the legal system. The Supreme Court's retreat from a standard requiring express or tacit congressional ratification of all *de facto* laws before the Court would recognize them as valid, sets a dangerous precedent by recognizing the ability to legislate by force.).

<sup>214</sup> Miller, *supra* note 129, at 152.

## 2. The "Peralta" Case

During President Menem's term, hyperinflation was still harming Argentina's weak economy. The value of the American dollar was skyrocketing, as Argentines queued before money changers to trade their Argentine currency for dollars in hope of protecting their savings. Banks were forced to offer high interest rates on short-term savings in Argentine currency, in order to lure customers. With seven day or shorter interest periods, customers would cash in their investments, buy more dollars with their profit, and force the value of the dollar higher, requiring the banks to offer even higher interest rates to attract depositors. Prices were rising as the value of the local currency deteriorated.

For Menem's government, the spiral of inflation was of immediate concern because of a *de facto* decree-law that made the government's Central Bank responsible for bank deposits in the event of bank default.<sup>215</sup> Instead of proposing a legislative solution or even seeking congressional support for executive enforcement of existing laws, President Menem issued a DNU.<sup>216</sup> The DNU provided that banks were relieved from paying all but a small portion of deposits to investors. The balance would be covered by government bonds with a value fixed in dollars.

Deposit holders were outraged. First, the promised bonds had not been issued when the DNU went into effect.<sup>217</sup> When they were issued five months later, their market value was far less than their declared value. Second, accrued bond interest could not be collected for the first year. Third, only Argentines who maintained their savings in local currency were harshly affected by the DNU; the wealthy kept their savings in dollars. Finally, the banks themselves suffered; instead of depositors' cash, they received only the bonds while the government took the money.

Scholars were quick to conclude that the government acted simply because it faced "a shortage of cash"<sup>218</sup> and that the action was a sheer "confiscation."<sup>219</sup> The Argentine Constitution states that property is inviolable and that

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<sup>215</sup> Decree-law No. 21.256, Feb. 14, 1977 [XXXVII-A] A.D.L.A. 121 (Arg.). The guarantee of the Central Bank for deposits in cases of default was eliminated by means of Law No. 24.144, Oct. 13 and 15, 1992 [LII-D] A.D.L.A. 3892 (Arg.).

<sup>216</sup> Presidential Decree No. 36/90, Jan. 30, 1990 2 E.D.L.A. 11 (1990) (Arg.).

<sup>217</sup> Alberto Bianchi, *La Corte Suprema ha establecido su tesis oficial sobre la emergencia económica*, [1991-C] L.L. 141.

<sup>218</sup> See *id.* at 165.

<sup>219</sup> German J. Bidart Campos, *El Fallo de la Corte Sobre el Plan Bonex*, 77 E.D. 26 (1991).

the taking of property for public use will be preceded by legislation and previously compensated.<sup>220</sup> Confiscation or any other form of forcible acquisition of private property by the government is specifically prohibited.<sup>221</sup> Moreover, the government's economic powers are entrusted to the Congress.<sup>222</sup>

Economic emergencies are familiar in Argentina, as are restrictions on the economic rights of citizens during crisis. Congress has enacted emergency legislation to help some economically disadvantaged group, such as tenants,<sup>223</sup> homeowners<sup>224</sup> and consumers several times.<sup>225</sup> Typically, the judiciary has upheld these measures as being important to public interest in a time of emergency.<sup>226</sup>

When presented with President Menem's DNU in the "Peralta" case, however, the Supreme Court acknowledged that it could not simply rely on precedents. Instead, after announcing that the doctrine of separation of powers should not be construed to cause "a total disruption of the State,"<sup>227</sup> the Court determined that it would not permit the "technicality" of considering the form and author of the DNU to work "to the detriment of unity"<sup>228</sup> of the government.<sup>229</sup> The Court held that, during an economic crisis, the president is empowered to assume duties entrusted to Congress, so long as the Congress does not affirmatively object.<sup>230</sup>

The Court's decision reflects the dangers of a relativist view of separation of powers and emergency powers. Purporting to rely on an earlier challenge of a presidential DNU responding to an economic emergency,<sup>231</sup> where Congress ratified the president's actions by statute prior to decision (thus rendering the case moot), the Peralta court held that the DNU was valid so long

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<sup>220</sup> See ARG. CONST. art. 17.

<sup>221</sup> *Id.*

<sup>222</sup> See *id.* arts. 67(2), (4), (10) (before the Amendment of 1994).

<sup>223</sup> Law No. 11,157, Sept. 19, 1921, [1920-1940] A.D.L.A. 79 (Arg.).

<sup>224</sup> Law No. 11,741, Oct. 10, 1933, [1920-1940] A.D.L.A. 486 (Arg.).

<sup>225</sup> Law No. 20,680, June 24, 1974, [XXXIV-C] A.D.L.A. 2006 (Arg.).

<sup>226</sup> See *Avico*, 172 Fallos 21 (1934).

<sup>227</sup> See *Peralta*, 313 Fallos 1513 (1991).

<sup>228</sup> *Id.*

<sup>229</sup> Justice Oyhanarte concurred and said that the presidential decree had the same status as a congressional statute, being signed by the Executive for reasons of "necessity and urgency . . . In matters like these substance must prevail over forms." [1991-C] L.L. at 140, 187. See Bianchi, *supra* note 217, at 40.

<sup>230</sup> *Peralta*, 313 Fallos at 1545.

<sup>231</sup> *Porcelli*, 312 Fallos 555 (1989).



as Congress, having notice of the DNU, "has not adopted a contrary decision [or] has not rejected its terms."<sup>232</sup>

The Court reasoned that Congress still had the final decision on such matters, that it had not rejected the DNU, and that it had in fact given the decree tacit approval by mentioning it in subsequent legislation.<sup>233</sup> Thus, congressional silence was equated with the affirmative enactment of a statute.<sup>234</sup>

Once this question of separation of powers was resolved, the Court held that emergency conditions permitted a reasonable interference with property rights, relying erroneously on the U.S. Supreme Court's *Blaisdell* decision.<sup>235</sup>

<sup>232</sup> *Peralta*, 313 Fallos at 1545.

<sup>233</sup> See Law No. 23.871, art. 16, [L] A.D.L.A 3718.

<sup>234</sup> The reasoning in *Peralta* about congressional tacit approval bears some similarities with *Dames & Moore v. Regan*, 463 U.S. 654 (1981). However, unlike *Dames & Moore*, the *Peralta* case was a decision about a domestic affair and that there was no statute like the IEEPA that delegated the authority to the president to issue the DNU. In *Dames & Moore* the U.S. Supreme Court relied on Justice Frankfurter's statement in *Youngstown* ("a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive power' vested in the President") to justify congressional acquiescence. *Dames & Moore*, 453 U.S. at 686. This was certainly not the case in Argentina where there was no "longstanding practice" of issuance of DNUs. Perhaps, the *Peralta* case bears some resemblance with the *Youngstown* case where the EO issued by President Truman was not supported by any delegation of legislative powers.

<sup>235</sup> *Peralta*, 313 Fallos at 1547-49; *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934). In *Blaisdell*, the Court held that:

The Minnesota Statute of April 18, 1933, by its own terms to remain in effect only during the continuance of the emergency and in no event beyond May 1, 1935, applying only to pre-existing mortgages, reciting the existence of a severe financial and economic depression for several years, resulting in many mortgage foreclosure sales for very inadequate prices, and stating that these conditions have created a public economic emergency calling for the exercise of the state's police power, authorizing the district court, upon application made after notice, to extend the period for redemption from foreclosure sales for such additional time as the court may deem just and equitable, but in no event beyond May 1, 1935, and suspending during such period the right to maintain an action for a deficiency judgment, and, while leaving the mortgagor in possession during the period of extension, requiring him to pay all or a reasonable part of the income or rental value of the property, as fixed by the court, toward the payment of the mortgage debt, interest, taxes, or insurance, at such time and in such manner as shall be determined by the court, is a reasonable and valid exercise of the state's reserved power to protect the vital interests of the public during the emergency, and does not violate the contract clause of the Federal Constitution.

Unlike *Blaisdell*, the *Peralta* case was not a challenge of a law enacted by Congress (in *Blaisdell*,

Ironically, in the *Blaisdell* case the U.S. Supreme Court held that:

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.<sup>236</sup>

In Argentina, regretfully, emergency conditions gave presidents the power to issue DNUs. In this instance, Argentine Congress failed to "prevent power from slipping through its fingers."<sup>237</sup> Congressional acquiescence had in fact empowered the executive branch. The outcome of the *Peralta* case "is striking not just for its outcome in favor of the government, but for its acceptance of the authority of the Executive to issue emergency decrees with the legal force of a law passed by Congress, with virtually no standards limiting the exercise of this power."<sup>238</sup> Moreover, Garro explained that this decision leaves a "wide margin of discretion to the president's determination of urgency and necessity."<sup>239</sup>

At this point, a comparison with the U.S. example is important. Sunstein claims that:

a domestic crisis -widespread unemployment, social unrest- does not give the President any new power. There is no judicial understanding that the President has greater authority if he can point to an emergency situation, or claim that unusual presidential action is crucial. . . . An emergency does not give the President any unilateral powers.<sup>240</sup>

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it was a state legislature) but by a DNU issued by the president.

<sup>236</sup> *Blaisdell*, 290 U.S. at 425-26.

<sup>237</sup> *Youngstown*, 343 U.S. at 654.

<sup>238</sup> Miller, *supra* note 129, at 176.

<sup>239</sup> Alejandro M. Garro, *Nine Years of Transition to Democracy in Argentina: Partial Failure or Qualified Success?*, 31 COLUM. J. TRANSNAT'L L. 1, at 82-83 (1993).

<sup>240</sup> Cass R. Sunstein, *An Eighteenth Century Presidency in a Twenty-First Century World*,

In the United States, in the event of an emergency, Congress may decide to confer statutory authority on the president in order to enable him to respond to a crisis. As Sunstein explains: "Congress has made this decision in emergencies. In the New Deal, for example, Congress gave the President a range of new authorities because of the perceived need for special responses to the Great Depression. But the President has not been allowed to act on his own."<sup>241</sup>

The case was very different in Argentina: a domestic crisis led to recognition of an unconstitutional action of the president and to the shift of lawmaking power from Congress to president in case of urgency and necessity. This decision is one of the weakest points in the history of the Argentine Supreme Court. Fortunately, the doctrine of the *Peralta* case changed in the "*Verrochi*" case.

### 3. The "*Verrochi*" Case

In accordance with article 99(3) of the Argentine Constitution,<sup>242</sup> that provides the authority of presidents to issue DNUs, the Argentine Supreme Court established a new doctrine with respect to judicial review when the constitutionality of a DNU is challenged in the judiciary branch. The Court held that: "the exercise of legislative functions on behalf of the President is accepted only under a rigorous exceptional situation and with material and formal exigencies, which constitutes a limitation and not an expansion on the practice held in the country since 1989."<sup>243</sup>

Moreover, the Court held that:

In order to legitimately exert legislative faculties that, at least in principle, are alien to the Executive Power, it is necessary to have the existence of one of these two circumstances: a) that it is impossible to dictate the law by means of the ordinary proceeding provided for in the Constitution; or b) that the situation that

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48 ARK. L. REV. 1, 13-14 (1994).

<sup>241</sup> *Id.* at 14.

<sup>242</sup> See ARG. CONST. art. 99(3) (1994).

<sup>243</sup> Verrochi, 184 E.D. 1097 (1999).

requires legislative solution is of such urgency that it must be solved immediately, in an incompatible term with the normal proceeding of the laws.<sup>244</sup>

The Court clearly established its duty to review the constitutionality of the DNUs:

The constitutionality control of the conditions under which the exceptional exercise of legislative faculties by the Executive Power is admitted, corresponds to the Judicial Power . . . It is attribution of the Supreme Court to evaluate the factual pattern that would justify a DNU; having, in this sense, to disregard criteria of mere convenience other than extreme circumstances of necessity, since the Constitution does not allow to choose between the sanction of a law or the fastest imposition of certain material contents by means of a decree.<sup>245</sup>

However, the Court introduced a new dangerous doctrine and held that "if the urgent solution has to be solved immediately in a period of time incompatible to the one established in the Constitution for the enactment of the laws, the President is authorized to issue DNUs."<sup>246</sup>

This new doctrine is not clear and the door for discretion on behalf of the Executive to decide the opportunities to issue DNUs was opened again. As Midon claimed: "our judges had a strange will to move on the edge of illegality; this is why we think that this case was wrongly decided. It looks now as an exquisite dish for the jaws of power."<sup>247</sup> Though this new doctrine proposed by the Argentine Supreme Court, still gives too much power to presidents, this change in the jurisprudence is plausible. However, the Argentine Court needs to develop a more stringent standard of review of the issuance of DNUs to avoid future abuses of power.

The way to ameliorate the presidential system in Argentina is by strengthening separation of powers and adding checks and balances in accordance with the U.S. example instead of moving towards a parliamentary system.

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<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> Mario A. Midón, *Verrochi: Empate Técnico entre la Libertad y el Poder*, [1999-E] L.L. 595.

## IV. PRESIDENTIALISM OR PARLIAMENTARISM?

What is presidentialism? What are the main features of a presidential system?

These questions are key issues for the development of the analysis of the different types of systems that were adopted in Latin America. Many authors focused their analysis on two features of presidentialism: 1) that both the president and the legislative branch enjoy democratic legitimacy and are elected by the people (the "dual democratic legitimacy"); and 2) that both the president and the legislative branch are elected for fixed terms (the "rigidity" of presidential systems).<sup>248</sup> Though this constitutes an interesting approach to review presidential democracies from a critical perspective, this premise was erroneous and prevented these scholars from analyzing particular important problems that affected various countries in Latin America.

One of the main features of a presidential system is the separation of powers. It is undeniable that this feature was vital in the constitutional structure designed by the U.S. Framers.<sup>249</sup> There is no other way of understanding the strengths and weaknesses of the U.S. system than to analyze this key issue. Thus, Shugart and Carey in correctly define of a presidential system: "a regime type based on the ideal of maximum separation of powers and full and exclusive responsibility of the cabinet to the president."<sup>250</sup>

*A. The Problem with the Arguments about the Failure of Presidential Democracy*

Those who defend parliamentary systems base their critique on a supposed superiority of this system to bear crises and give the example of Latin America and its coup d'états to affirm that presidential system is the cause of all evils. Many of these scholars based their critique on false premises.

One of the false premises that invalidates many scholars' critique of presidential democracies is that the systems that were in force in Latin America were very different from the one that was adopted in the U.S.<sup>251</sup>

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<sup>248</sup> See JUAN LINZ & ARTURO VALENZUELA, *THE FAILURE OF PRESIDENTIAL DEMOCRACY. THE CASE OF LATIN AMERICA* 6 (1994).

<sup>249</sup> See *FEDERALIST NOS. 47-51* (James Madison).

<sup>250</sup> MATTHEW SOBERG SHUGART & JOHN M. CAREY, *PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS* 15 (1992).

<sup>251</sup> See, e.g., Bruce Ackerman, *The New Separation of Powers*, 113 *HARV. L. REV.* 633, 646 (2000) (informing that: "There are about thirty countries, mostly in Latin America, that have

According to Mainwaring and Shugart, "This theme is particularly important because of the tendency in the debate to focus on the contrasts between parliamentarism and presidentialism and the concomitant tendency to pay less careful attention to differences among presidential systems."<sup>252</sup>

The empirical argument against presidentialism is based mostly on the Latin American experience.<sup>253</sup> However, many of the systems of government in force in Latin America had important parliamentary components that created a lot of tension in the development of the system.<sup>254</sup> This is a very important issue to consider when analyzing the bad experience with democracy in Latin America because countries that introduced parliamentary elements to ameliorate their constitutional structure had a miserable experience and failed massively in their purpose.<sup>255</sup> As an example, Shugart and Carey argue that certain types of presidential systems may be more likely than others to produce problems of democratic governability, depending on the balance of the constitutional powers between the different branches of government and a number of other variables.<sup>256</sup>

There were also important differences not taken into account, such as the electoral systems that were completely different in many countries in Latin

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adopted U.S.-style systems. All of them, without exception, have succumbed to the Linzian nightmare at one time or another, often repeatedly." However, there is not a single reference to the differences that countries such as Chile, Uruguay, Brazil, and even Argentina had in their constitutional structure in comparison with the U.S. system.)

<sup>252</sup> MAINWARING & SHUGART, *supra* note 73, at 3.

<sup>253</sup> *Id.* at 12.

<sup>254</sup> For example: Ecuador in its 1929 Constitution, Honduras in its 1924 Constitution, Cuba in its 1940 constitution, Peru in its 1933 Constitution, Guatemala in its 1945 and 1956 Constitutions, Uruguay in its 1934 and 1942 Constitutions, etc. See ALBERTO RAMON REAL, NEOPARLAMENTARISMO EN AMÉRICA LATINA 31-45 (1962).

<sup>255</sup> See REAL, *supra* note 254; see also PETER SIAVELIS, THE PRESIDENT AND CONGRESS IN POST-AUTHORITARIAN CHILE 196 (2000) (arguing that parliamentarism had a bad name in Chile "because of their erroneous association with the turbulent period in Chilean history known as the Parliamentary Republic from 1891 to 1925." He continues explaining that the "parliamentary republic" is in fact "a misnomer, because the regime that existed in this period was not a pure parliamentary system. Rather, the regime was characterized by shared cabinet responsibility to the Congress and the president, a configuration that created extreme problems of cabinet instability and democratic governability." Even with Siavelis's argument about the characterization of the parliamentary regime that existed in Chile from 1891-1925 (explained *infra*), it is surprising how authors like Nino are still proposing semi-presidential systems as solutions for countries like Argentina. See Carlos Santiago Nino, *Transition to Democracy, Corporatism and Constitutional Reform in Latin America*, 44 U. MIAMI L. REV. 129, 163 (1989).

<sup>256</sup> SHUGART & CAREY, *supra* note 250, at 22.

America in comparison to the one in force in the U.S.<sup>257</sup> The ways in which presidents and congress are elected play a critical role in determining the political party system and the relationship between the Executive and the legislative branch in presidential democracies because “even where powers are formally separate, the processes of election to the two branches interact in ways that affect the functioning of democracy.”<sup>258</sup> As Siavelis states, “a discussion of the attributes of presidential systems per se is not valid without reference to the type of legislative electoral system, the formula for electing the president, the timing of elections, and other institutional variables.”<sup>259</sup>

Many scholars focused their critique on the presidential systems in Latin America in mere structural designs, particularly the structure of the relations between the Executive and the legislative branch. Few scholars focused their critique on the separation of powers that was not strong enough in many countries in Latin America to ensure that lawmaking powers were firmly anchored in the legislative branch. This eventually led to the hypertrophy of presidential power, including the shift of law-making power from Congress to presidents that was the cause of many abuses of power. This is also a key issue.

In connection with separation of powers, very little attention is given to the judiciary branch that needs a huge reform throughout Latin America.<sup>260</sup> The role of the judiciary, at least in Argentina’s case, was important in the decay of the presidential system with the acceptance of the *de facto* doctrine and the expansion of presidential powers through the emergency doctrine and the acceptance of DNUs, usually used and abused in Argentina. Moreover, it is argued *infra* that the judiciary may play a critical role in the definitive consolidation of democracy.

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<sup>257</sup> It is not the purpose of this paper to present this argument at length. It will be a topic to develop in a complementary work. However, for an in depth analysis of this issue, see generally MAINWARING & SHUGART, *supra* note 73; see also SIAVELIS, *supra* note 255.

<sup>258</sup> SHUGART & CAREY, *supra* note 250, at 3.

<sup>259</sup> SIAVELIS, *supra* note 255, at xix.

<sup>260</sup> See Luz Estella Nagle, *Latin America in the Twenty-First Century: The Cinderella of Government: Judicial Reform in Latin America*, 30 CAL. W. INT’LL.J. 345, 377 (2000) (arguing that

There is a need for reforming the judiciaries of many Latin American nations. But, real reform must take place within the other two branches of government, which today continue to use the judiciary as a tool for advancing the interests of the ruling elite. The other branches must relinquish the historical chains placed on the judiciary as a subservient branch of government.).

Another false premise is found in the statistics that defenders of parliamentarism use as a proof of the alleged superiority of this system over presidentialism. There is no consensus among the scholars about a valid methodological approach to inferred definitive conclusions from the data. As Mainwaring and Shugart explained, some arguments against presidentialism "fall prey to a selection bias and hence spurious correlation."<sup>261</sup>

First of all, data is manipulated to support conclusions that are far from definitive. For example: Shugart and Carey showed that during the 20th century twelve presidential regimes failed in comparison with twenty one parliamentary systems that broke down in the same period. Moreover, they argued that: "[o]ur greater number of parliamentary failures than presidential failures is hardly what one would expect from reading most of the comparative literature. Perhaps parliamentary regimes have received more credit than they are due as means to resolve political conflicts."<sup>262</sup> Even more surprising are the statistics about the so called "Third World": 52.2 percent of presidential systems have failed in comparison with a 59.1 percent of parliamentary systems.<sup>263</sup>

Second, the parliamentary system has failed in many countries around the world. In Europe, it failed in Portugal in 1926, in Germany in 1933 (when Hitler, after losing three consecutive presidential elections, acceded to power in a parliamentary system), in Spain in 1936, which led to Franco's dictatorship and the civil war; and in Italy in 1922, when Mussolini acceded to power. In Greece, under a parliamentary system there also was a coup d'état in 1967.<sup>264</sup> In Eastern Europe, the parliamentary system failed in countries such as Estonia in 1934 and Lithuania in 1926.

The parliamentary system also failed massively in Africa (e.g., Kenya in 1969, Nigeria in 1966, Sierra Leone in 1967, and Somalia in 1969).<sup>265</sup> The

<sup>261</sup> MAINWARING & SHUGART, *supra* note 73, at 19.

<sup>262</sup> SHUGART & CAREY, *supra* note 250, at 40.

<sup>263</sup> *Id.* at 41. Particularly relevant is the fact pointed out by these authors that the only non-Third World country with a presidential regime is the United States. Moreover, that most of the presidential failures that occurred in Third World nations with presidential regimes reappeared later as democracies. To the contrary, on the parliamentary failures in the Third World only Turkey reappeared as a democracy. But see LINZ & VALENZUELA, *supra* note 248, at 72 (stating that "[t]hese figures would support the thesis that the type of regime makes little difference, or even that parliamentary regimes are more vulnerable than pure presidential ones. . . . However, more information is needed either to prove or disprove such a conclusion.").

<sup>264</sup> See Irwin P. Stotzky, *The Fragile Bloom of Democracy*, 44 U. MIAMI L. REV. 105, 119 n.34 (1989).

<sup>265</sup> SHUGART & CAREY, *supra* note 250, at 40.



same happened in Asia: in Pakistan, for example, there were many coup d'états with a parliamentary system,<sup>266</sup> in 1954, 1977 and lastly one during 1999. The same happened in Thailand in 1976 and Turkey in 1980.<sup>267</sup>

In the Americas, Grenada underwent a communist coup d'état with a parliamentary regime in 1979.<sup>268</sup> Surinam in 1982 and Guyana in 1978 have also had coup d'états under the same systems.

Cuba had a semi-parliamentary system that failed before the Batista dictatorship. Peru had a prime minister for many years,<sup>269</sup> and Fujimori's

<sup>266</sup> Stotzky, *supra* note 264, at 119 n.33.

<sup>267</sup> SHUGART & CAREY, *supra* note 250, at 10-11.

Two principal criticisms of parliamentarism on the British model thus emerge. First, an assembly formally constructed to represent local interests is compromised in that function and instead becomes principally an "electoral college" for determining which party holds executive power. It thus emerges as neither a legislature, as legislative authority is concentrated in the cabinet, nor very representative, at least on the level at which its members are chosen, since the national policy concerns that are expressed by parties capable of winning national power become paramount. Second, and stemming from the first, where elections are contested almost entirely on the basis of which of two major parties shall receive unchallenged executive power for a prescribed period, electoral contests may become excessively polarized, perhaps raising the stakes of elections so much as to destabilize the system. The collapse of British-style parliamentary regimes in countries as diverse otherwise as Grenada, Nigeria and Pakistan is an example of potential pitfalls of parliamentary systems.

<sup>268</sup> See John Norton Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145 (1984) ("In March 1979, the constitutional Government of Grenada was overthrown in a coup led by Maurice Bishop . . . . The Bishop regime . . . indefinitely suspended elections, ended freedom of the press and other political freedoms.").

<sup>269</sup> See Nino, *supra* note 255, at 161.

The system established in Peru by the 1979 Constitution goes even further in the parliamentary direction. The President is the chief of state and personifies the nation. He has the power to formulate the general political direction of government, but he must appoint a chief of cabinet who serves as the President of the Council of Ministers. This species of prime minister proposes to the President the names of the other ministers and presides over meetings of the Council of Ministers. He has few other relevant powers, however, because most executive functions, including control of the administration, are concentrated in the President. The Council of Ministers has the functions, among others granted by law, of approving the projects that the President sends to Congress, approving legislative decrees, and deliberating over public issues. The House of Deputies may affect the political responsibility of the Council of Ministers or of individual ministers through a vote of censure or no confidence by more than half of the members. The

government proved that this did not mean that the system was more stable.

In 1997, Haiti under a semi-parliamentary regime went through a serious constitutional crisis that arose, among other things, due to the parliamentary features included in its 1987 Constitution.<sup>270</sup> Aucoin claims that: "Serious thought should be given to reforms which would reorder the balance of power between the executive and legislative branches, for the emphasis on parliamentary supremacy in the Constitution as it currently stands has clearly contributed to the stalemate which threatens it."<sup>271</sup>

Parliamentary systems have also failed around the world and did not ensure per se a more stable democracy. In this sense, if scholars want to support their critique with statistics, they need to improve or develop an objective and impartial standard method for the analysis of data.<sup>272</sup>

Another false premise is the little or total lack of analysis of the bad experiences suffered by many countries in Latin America with parliamentary regimes. Ironically, these countries are usually used as examples of the failure of presidential systems. The study of the experience of these countries is essential to the proper analysis of which system is better for Latin America. There are three cases: Chile, Brazil and Uruguay.

### *B. The Case of Chile*

The 1833 Constitution of Chile established a presidential system and created the figure of a strong president.<sup>273</sup> However, in order to control

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President of the Republic may dissolve the House of Deputies if it has censured three councils of ministers. In such cases, the President must hold elections within thirty days.

<sup>270</sup> See Louis Aucoin, *Haiti's Constitutional Crisis*, 17 B.U. INT'L L.J. 115 (1999)

On January 11 of this year, President Rene Preval, Haiti's second President under its 1987 Constitution, addressed the nation, declared an end to Parliament's term of office, and implied he would govern by decree while organizing new elections. Within a week, he took measures calling for the cessation of all budgetary and administrative support of Parliament. His actions are the most dramatic yet in the escalating constitutional crisis, a result of the political deadlock between the President and Parliament which occurred in the aftermath of the Prime Minister's resignation in June of 1997.

<sup>271</sup> *Id.* at 140.

<sup>272</sup> See, e.g., Ackerman, *supra* note 251, at 646. Ackerman explains that: "Of course, each breakdown comes associated with a million other variables, but as Giovanni Sartori puts it, this dismal record 'prompts us to wonder whether their political problem might not be presidentialism itself.' " This is a dogmatic assumption.

<sup>273</sup> In his book, Alberdi thought that the 1833 Constitution was responsible for the

presidential authority, several features of the parliamentary system were included.<sup>274</sup> As Galdames claimed: "even though the 1833 Constitution established a presidential absolutism, the periodic or constitutional laws ended subordinating the Executive Power to the permanent and direct control of the Congress."<sup>275</sup> The truth is that the arrival of the parliamentary system in Chile was the consequence of a slow evolution of the practice of government.

One of the powers of the Chilean Congress was to approve periodic laws without which the president could not govern. Campos Harriet claims that the drafters "had given the Parliament . . . the power to approve the periodic laws; without them no president could govern; this was the essence of the parliamentary regime."<sup>276</sup> Among these laws were the Budget Law, the Fiscal Law and the laws that established the forces in sea and land and authorized their emplacement in Congress.

This power was used as a tool to impose changes of ministers. Campos Harriet said: "In the extraordinary session of November 3rd, 1841 . . . the Senate approved by unanimity to suspend the discussion of the bill that authorized the collection of taxes and contributions and the budget for 1842."<sup>277</sup> Likewise, Heise González explained that: "In 1841, the Senate suspended the treatment of the periodic law . . . until the Executive included in the call to extraordinary sessions the bills required by the Senate. The President . . . accepted the Senate's request and implicitly accepted a limitation to his faculties."<sup>278</sup> Similarly, Campos Harriet stated that: "In 1857, the Parliament decided not to approve the law that authorized the collection of the contributions until President Manuel Montt changed the cabinet. The President had to accept this."<sup>279</sup>

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achievement of peace in Chile. Thus, he took it as a model to design a strong Executive as a tool to solve the same problems in Argentina. In his view, the peace of Chile: "comes from its Constitution. The Constitution has given order and peace . . . through a strong Executive Power . . . This characteristic constitutes the originality of the Chilean Constitution, which, in my point of view, is as original as the Constitution of the United States." ALBERDI, *supra* note 8, at 138.

<sup>274</sup> See arts. 36 and 37, CONSTITUCIÓN DE CHILE DE 1833, in ANALES DE LA REPÚBLICA (LUIS VALENCIA ANACIA ed., 2d ed. 1986); see also JULIO HEISE GONZÁLEZ, HISTORIA DE CHILE: EL PERÍODO PARLAMENTARIO 1891-1925 22 (1974).

<sup>275</sup> LUIS GALDAMES, HISTORIA DE CHILE. LA EVOLUCIÓN CONSTITUCIONAL (1925), quoted by HEISE GONZÁLEZ, *supra* note 274, at 29.

<sup>276</sup> FERNANDO CAMPOS HARRIET, HISTORIA CONSTITUCIONAL DE CHILE 271 (7th ed. 1992).

<sup>277</sup> *Id.* at 271.

<sup>278</sup> HEISE GONZÁLEZ, *supra* note 274, at 29.

<sup>279</sup> CAMPOS HARRIET, *supra* note 276, at 272.

No president could possibly govern without these laws. As long as presidents were able to influence Congress through electoral fraud, the system continued to function as presidential. Campos Harriet said: "All these attempts to parliamentary independence were countervailed by the electoral intervention that assured the Presidents a favorable majority in Congress."<sup>280</sup>

In 1874 an amendment to the Constitution was approved. This amendment granted the following power to the "*Comisión Conservadora*" (a sort of bicameral commission that exercised legislative faculties during the recess of the Congress): "The *Comisión Conservadora*, on behalf of Congress, shall exercise Congress' faculty of surveillance over the other branches of the public administration."<sup>281</sup> Those in favor of the parliamentary system interpreted this article as the declaration that Congress exercised control over the executive branch (a basic principle in the parliamentary regime). Silva Bascuñan claimed that:

the 1874 amendment has been very strong to crown the parliamentary government, when it granted to the *Comisión Conservadora* the faculty (that belonged to Congress) of surveillance over all other branches of public administration which meant that this faculty could only be exercised with the support of the majority existing in Congress.<sup>282</sup>

By 1890, electoral freedom became more widespread and presidents started to lose their control over Congress. After this, a battle started between Congress and the president for the power to control the direction of government. Congress refused to approve periodic laws if the ministers in the Executive did not follow the policies that Congress dictated. Tensions increased and ended in the revolution against President José Manuel Balmaceda in 1891. In fact, historians affirm that it was President Balmaceda who tried to break constitutional order by closing Congress with an executive decree and trying to impose himself by means of war. In this small civil war,<sup>283</sup> Congress' forces defeated the presidential army and Balmaceda committed suicide in the Argentine Embassy.

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<sup>280</sup> *Id.* at 272.

<sup>281</sup> *Constitución de Chile de 1833*, art. 58, in *ANALES DE LA REPÚBLICA*, *supra* note 274.

<sup>282</sup> ALEJANDRO SILVA BASCUÑAN, *TRATADO DE DERECHO CONSTITUCIONAL* 43 (Editora Jurídica de Chile) (1963).

<sup>283</sup> Actually, it lasted eight months.

This meant the end of the presidential system in Chile and the inauguration of the period known by Chileans as the "Parliamentary Republic." Rivas Acuña stated: "There was no intention to make an important constitutional amendment, but simply to enforce the Constitution. It is true that she embraced a presidential regime. However, without changing her wording, the Constitution will incarnate the spirit of a parliamentary regime."<sup>284</sup>

During this period, both the Chambers of Deputies and Senators, indistinctively, exercised the political faculties of interrogating and censuring the ministers. Moreover, they also enforced the creation of new cabinets representing parliamentary majority.<sup>285</sup> After the government of José Joaquín Pérez, the Minister of Interior started to be treated like a Prime Minister.<sup>286</sup>

In the Chilean parliamentary regime, the ministers' responsibility was collective. Thus, censure of one minister almost led inevitably to the whole cabinet's resignation.<sup>287</sup> Cabinet instability became the defining feature of this period.<sup>288</sup> Rivas Acuña explained that the continuous changes in the ministries that had been widely criticized in the administration of President Balmaceda, started to function again. It was not the president who made the crisis but the political powers through their agreements in Congress.<sup>289</sup>

The parliamentary system did not grant stability or order due to serious malfunctions and numerous problems. The various political parties<sup>290</sup> used obstruction in Congress as a way of persuading the Executive to adopt certain measures and to change members of the cabinet.<sup>291</sup> As Rivas Acuña explains:

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<sup>284</sup> 1 MANUEL RIVAS ACUÑA, *HISTORIA POLÍTICA Y PARLAMENTARIA DE CHILE* 10 (1964).

<sup>285</sup> CARLOS REVE MILLAR, *EL PARLAMENTARISMO CHILENO Y SU CRISIS: 1891-1924*, in *CAMBIO DE RÉGIMEN POLÍTICO* 261 (OSCAR GODOY, ed., 1992).

<sup>286</sup> See *id.* at 268.

<sup>287</sup> *Id.* at 261.

<sup>288</sup> During the period of Jorge Montt there were eight total changes of Cabinet and four partial ones; during that of Federico Errazuriz Echaurren there were eleven total and eleven partial changes; during the period of German Risco there were sixteen total and three partial changes; during Ramon Barros Luco's period there were thirteen total and six partial changes; during the one of Juan Luis Sanfuentes there were fifteen total and five partial changes; and during the period of Arturo Alessandri until the 1924 coup there were sixteen total changes of cabinet and two partial. CAMPOS HARRIET, *supra* note 276, at 285.

<sup>289</sup> See RIVAS ACUÑA, *supra* note 284, at 23 (referring to the period of Jorge Montt, president during 1891-1896).

<sup>290</sup> There were six political parties: liberals, democratic liberals (balmacedistas), nationals, radicals, conservatives, and democrats. None of them had a majority in Congress. Therefore, "many artificial and transitory coalitions had to be made." See CAMPOS HARRIET, *supra* note 276, at 284.

<sup>291</sup> See RIVAS ACUÑA, *supra* note 284, at 30 (explaining how Jorge Montt, due to his deep

"The Parliament is responsible for the continuous changes in ministries. These changes will be responsible for parliamentary sterility. Causes and effects may be confused; but there is a fact that can not be argued: the institution is damaged."<sup>292</sup>

Reve Millar explained that during the government of President Alessandri the situation got worse: "Each day it was more difficult to reach an understanding between the President and the opposition, up to the point where government action was completely blocked."<sup>293</sup> In 1923, President Alessandri rejected parliament's mechanisms and tried to exercise governmental powers. Then, the opposition started to strictly scrutinize all actions of the Executive.<sup>294</sup> Eventually, this pattern led to a complete paralysis of the government.<sup>295</sup> President Alessandri tried to close Congress and, in September 1924, the parliamentary regime fell by a military coup.<sup>296</sup>

During the thirty-three years in which the parliamentary system was in effect, an incredible number of ministers, 530 total, fled through the Chilean government.<sup>297</sup> Surprisingly, however, Nino only mentions: "This period of Chilean parliamentarism was characterized by a strong tendency of the plurality of political parties to conciliate and negotiate. It was also a period of stability and respect for legal guarantees of individual rights."<sup>298</sup> Moreover, Valenzuela argues: "In the context of the times, Chile's parliamentary period was one of the most successful republican governments in the world."<sup>299</sup> In light of the evidence, these assertions of Professors Nino and Valenzuela are questionable.<sup>300</sup>

respect for the parliamentary regime, accepted certain measures and the change of cabinet imposed by the new coalition that ruled Congress. This is an indication that it was not the president but the Cabinet, appointed with the parliamentary majorities, that determined the policies of government.).

<sup>292</sup> *Id.* at 34.

<sup>293</sup> REVE MILLAR, *supra* note 285, at 292.

<sup>294</sup> *Id.* at 294.

<sup>295</sup> *Id.*

<sup>296</sup> Called "El sablazo." See SIAVELIS, *supra* note 255, at 6 ("The cabinet instability and deadlock that resulted from this unique institutional arrangement ultimately led again to Congress being closed following a military coup in September 1924.").

<sup>297</sup> CAMPOS HARRIET, *supra* note 276, at 285; see also SIAVELIS, *supra* note 255, at 6 ("[E]ven if new cabinets named by presidents upon assuming power are not included, 489 cabinet positions were vacated and filled between 1891 and 1925, with an average cabinet lasting 133 days.").

<sup>298</sup> Nino, *supra* note 255, at 161.

<sup>299</sup> LINZ & VALENZUELA, *supra* note 248, at 216.

<sup>300</sup> See RIVAS ACUÑA, *supra* note 284, at 74 (explaining how the system worked:

The defenders of parliamentarism claimed that a real parliamentary system never existed in Chile.<sup>301</sup> They argued that the Chilean system did not provide for the dissolution of Congress, which is a mechanism that constitutes one of the principal characteristics of the parliamentary regime.<sup>302</sup> This argument, though it looks persuasive, is false.

There are countries where no one denies the existence of a parliamentary system even though the countries do not have a provision that establishes the dissolution of the Parliament in their constitutions. For example, in Norway and Israel the Parliament cannot be dissolved and no one has ever dared to put in doubt that these countries have parliamentary regimes.<sup>303</sup> Moreover, in the Third Republic of France, even though there was a provision for the dissolution of Parliament in the constitutional laws, the mechanism was never used

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The ministerial instability forced a minister to urgently prepare the budget of his office but, generally, he rarely sent it to Congress. It was only his lucky successor, who could not study and review this budget, the one in charge of this duty. In the meantime, when the Bicameral Commission was reviewing this budget, two or three ministers were appointed and dismissed. Thus, another minister promulgated the law and executed it. This lack of continuity in the administration, implied an abandonment of the public services and a complete ignorance of the real needs of the country. Public administration was the responsibility of third line officers who, every two or three months, instead of receiving new orders, had to explain the budget to the new ministers so they could repeated it to the Parliament).

<sup>301</sup> See PEDRO PLANAS, *REGÍMENES POLÍTICOS CONTEMPORÁNEOS* (2d ed. 1997) (claiming that:

[A]fter 30 years of a semi-presidential regime (1861-1891), with ministers that came from the Parliament . . . Chile enters –after the defeat of Balmaceda– into a regime that has been considered parliamentarist. We agree with Arturo Valenzuela that this is not an authentic parliamentary regime. It is our understanding that this is a semi-presidential system, located in a basically presidential structure . . . but with a permanent lack of internal equilibrium of powers . . . phenomenon which may be denominated congressional government . . . but that must not be confused with a parliamentary regime).

<sup>302</sup> See LINZ & VALENZUELA, *supra* note 248, at 142.

<sup>303</sup> In Norway, the Parliamente (Storting) is directly elected for a four-year term by universal suffrage and proportional representation. It then selects one quarter of its own members to serve as the upper chamber (Lagting). Neither body is subject to dissolution. See NOR. CONST. art. 71. In Israel, the Basic Law restricts the Knesset from dissolution until after the term of office, unless a Law is adopted for that purpose (See 12 L.S.I. 85 (1958), available at The State of Israel, Basic Law: The Knesset, <http://www.mfa.gov.il/mfa/go.asp?MFAH00h80>) (last visited Sept. 11, 1999).

after the fall of President MacMahon.<sup>304</sup> Thus, the provision turned into a dead letter with no real application. Nevertheless, these countries are considered as having parliamentary systems<sup>305</sup> even though they have the same characteristics as the Chilean regime.

The problem is that those in favor of the parliamentary system do not want to admit the failure of parliamentarism in Chile. The alleged flexibility of this system, which allows the countries to adapt and overcome different crises by means of replacing the prime minister and the cabinet, is not present in Chile, thus resulting in complete failure.

The Chilean example fully demonstrates that parliamentarism cannot avoid revolutions in a Latin American country because the problems are far more complex than the institutional design. Thus, it is false to argue that presidential system is mainly responsible for political instability in Latin America.

### C. The Case of Brazil

In 1946, after the coup that overthrew President Vargas, Brazil enacted a constitution with a president as the head of the government.<sup>306</sup> Due to the influence of Raul Pilla,<sup>307</sup> there was a proposal for the introduction of a parliamentary system in the convention of 1946 that did not succeed. However, it is important to remark that, at least after 1933, there was an important debate among Brazilian scholars about the importance of establishing a parliamentary system as the solution to the political problems of Brazil.<sup>308</sup>

In 1954, Pilla proposed an amendment to the Constitution that had 176 signatures of approval from his fellow constituents. His proposal was rejected by a narrow margin of votes, because the mood in Brazil was adverse to the

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<sup>304</sup> See VILE, *supra* note 39, at 267-68.

<sup>305</sup> At least for statistical purposes.

<sup>306</sup> See generally Segundo V. Linares Quintana, *La Reforma Constitucional Brasileña*, 43 L.L. 1042 (1946) (Article 78 of the 1946 Constitution established: "The Executive Power is exercised by the President of the Republic."); see JORGE REINALDO VANOSSI, *PRESIDENCIALISMO Y PARLAMENTARISMO EN EL BRASIL* 38 (1964).

<sup>307</sup> See VANOSSI, *supra* note 306, at 45. As early as 1933, Pilla embraced the idea of a parliamentary system as the best solution to ameliorate the governmental structure for Brazil. He wrote many articles (*Pretensos Defeitos do Sistema Parlamentar de Governo*, Rio de Janeiro, 1946; *Pelo parlamentarismo*, Rio de Janeiro, 1946; *Presidencialismo, Parlamentarismo e democracia*, Rio de Janeiro, 1946; *Parlamentarismo e Presidencialismo*, Rio de Janeiro, 1946; *Sistema Parlamentar nos Estados*, Rio de Janeiro, 1947) and unsuccessfully defended two proposals for amendment of the Brazilian Constitution: one in 1948 and another one in 1952.

<sup>308</sup> See REAL, *supra* note 254, at 79.



replacement of the presidential structure for a parliamentary system.<sup>309</sup>

Between 1946 and 1961, the presidential system was characterized by abuses of power and electoral fraud.<sup>310</sup> These vices were making Brazilians think that parliamentarism might be the solution to unchecked presidential powers.<sup>311</sup>

A crisis arose in 1961 when President Kubitschek resigned when Vice-President Goulart was traveling abroad. The military opposed the idea of Goulart assuming the presidency.<sup>312</sup> In order to solve the crisis, Congress decided to amend the Constitution and establish a parliamentary form of government.<sup>313</sup>

The amendment was greatly influenced by Pilla's project<sup>314</sup> and approved on September 2, 1961. The system of government adopted by the 1961 Constitution was a parliamentary system.

The president exercised the Executive Power in a symbolic way.<sup>315</sup> The direction and political responsibility of the government was vested in the president of the Council of Ministers.<sup>316</sup> The president was elected for a fixed term of five years, by the majority of votes of the Congress in a joint session of both houses.<sup>317</sup> In case of vacancy, the president proposed the candidate for president of the Council of Ministers to the Chamber of Deputies. This chamber could accept or reject the president's proposal by the majority of votes of its members.<sup>318</sup> Once the Council of Ministers was formed, they had to submit their governmental plan to the Chamber of Deputies.<sup>319</sup> Then, this chamber, in its first session, had to approve the plan and issue a vote of confidence to the Council of Ministers. If the Chamber of Deputies rejected the plan and issued a vote of no-confidence, then a new Council of Ministers had to be appointed.<sup>320</sup>

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<sup>309</sup> See *id.* at 80 (quoting A. M. MACHADO PAUPERIO, *PRESIDENCIALISMO, PARLAMENTARISMO E GOVERNO COLEGIAL* 87 (1956)).

<sup>310</sup> See VANOSSE, *supra* note 306, at 68.

<sup>311</sup> See *id.* at 68.

<sup>312</sup> *Id.* at 69.

<sup>313</sup> *Id.*

<sup>314</sup> REAL, *supra* note 254, at 80.

<sup>315</sup> *Id.* at 81.

<sup>316</sup> CONSTITUÇÃO FEDERAL [hereinafter C.F.], art. 1 (1961).

<sup>317</sup> C.F., art. 2 (1961).

<sup>318</sup> C.F., art. 8 (1961).

<sup>319</sup> C.F., art. 9 (1961).

<sup>320</sup> C.F., arts. 9-12 (1961). This system was similar to the one in force during the Fourth Republic of France. See VANOSSE, *supra* note 306, at 71.

The Senate may oppose by a majority of votes of two thirds of its members to the approval of the Council of Ministers during the next forty-eight hours after the vote of confidence was issued. However, the Chamber of Deputies was able to reject the opposition of the Senate by the vote of an absolute majority in its first session.<sup>321</sup> The ministers depended on the confidence of the Chamber of Deputies. Thus, they were expelled when this confidence was lost.<sup>322</sup>

The procedure for the vote of non-confidence over the Council of Ministers and of censure of its members was inspired by article 64 of the 1931 Spanish Constitution. Thus, three requirements were necessary to issue a vote of non-confidence or a vote of censure: a) the motion of censure or non-confidence must be presented by a minimum of fifty deputies; b) except on some specific circumstances established by law, the proposal had to be discussed five days after its submission; and c) it had to get the approval of a majority of the members of the Chamber of Deputies.<sup>323</sup>

If the Chamber of Deputies rejected three successive Councils of Ministers, then the president was able to dissolve this chamber and call for new elections that had to be held in ninety days. Once the Chamber of Deputies is dissolved, the president appoints a provisional Council of Ministers. If elections are not held in the period of ninety days, the Chamber of Deputies is returned to office in full force.<sup>324</sup>

This modern and democratic parliamentary system only lasted 495 days.<sup>325</sup> Only sixteen months. This was because the amendment of 1961 did not achieve political stability and social peace with the parliamentary system.<sup>326</sup>

After a general strike, several rumors of a coup, and the resignation of the president of the Council of Ministers, in September 1962, Congress rapidly enacted a law calling for a referendum to decide whether the parliamentary regime would stay.<sup>327</sup> The results of the referendum overwhelmingly favored a return to the presidential system established in Brazil's 1946 Constitution.<sup>328</sup> On January 24, 1963, after the revocation of the previous amendment to the

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<sup>321</sup> C.F., art. 10 (1961).

<sup>322</sup> C.F., art. 11 (1961).

<sup>323</sup> C.F., art. 12 (1961).

<sup>324</sup> C.F., art. 14 (1961).

<sup>325</sup> REAL, *supra* note 254, at 88.

<sup>326</sup> *Id.* at 105.

<sup>327</sup> *Id.* at 75.

<sup>328</sup> VANOSSI, *supra* note 306, at 73.

Constitution,<sup>329</sup> President Goulart once again assumed the presidency of Brazil. He was overthrown in 1964 by a military coup that established an authoritarian government that ruled for almost twenty years.

This case serves as a lesson for scholars who blame presidential systems for the failure of democracy in Latin America. When a constitutional amendment is rapidly adopted as the solution to political problems, without preparing public opinion and the electorate, one should not expect the improvised institutions of a parliamentary regime to be successful.<sup>330</sup>

The bad experience of Brazil cannot be attributed solely to its constitutional structure, which was technically impeccable. Rather, Brazil's problems were more complex and exceeded the lack of cultural acceptance of a parliamentary regime. As Real stated:

The economic, social and cultural problems, the low rate of literacy among the population, the caudillismo, the influence of the church and the military, the influence of foreign capital, the typical Latin passionate temperament, the lack of tradition of democratic practices, the lack of commitment to the rule of law, the lack of coherent and disciplined political parties, made impossible the embracement of parliamentary regime [in Latin America]. This regime needs very different social, cultural and civic conditions, similar as those in Belgium, Great Britain, Holland, Luxemburg and the Scandinavian countries.<sup>331</sup>

Those countries that unsuccessfully, and sometimes incoherently, attempted to use parliamentary features as solutions to their political problems provide valuable examples. As Real says "Parliamentarism is still an 'exotic plant' with difficulties to the Latin American climate. It is going to fail miserably if it is imposed artificially . . . political life takes revenge of those theorists that elaborate unreal systems."<sup>332</sup>

The instability of a country cannot be attributed exclusively to the faults of its institutional system, but must be attributed to many other political and economic factors. Thus, the solution to a country's political problems is not to change its constitutional structure, but to improve the existing one. As

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<sup>329</sup> *Id.* at 76.

<sup>330</sup> REAL, *supra* note 254, at 45.

<sup>331</sup> *Id.* at 44-45.

<sup>332</sup> *Id.* at 45.

Sargentich claims, the idea that a nation "would be able to manage its way out of its political difficulties if its constitutional structure were changed is remarkably reductionist. It disregards key cultural, historical and political variables that provide the vital context of . . . any governmental model."<sup>333</sup>

It is not that the institutional framework has no relevance to the stability of democracy. Rather, the problem is far more complex.<sup>334</sup>

#### *D. The Case of Uruguay*

In Uruguay, several constitutions demanded that ministers of the Executive Branch have parliamentary support (the president could not designate ministers freely), and decisions were taken in Cabinet, where the president had a vote just as the rest of the ministers.<sup>335</sup> For example, the 1966 Constitution included some features of parliamentarism: the president exercised his executive power with the agreement of the Council of Ministers and could delegate functions to the appropriate minister. The Chamber of Deputies had the faculty to interpellate ministers, and the General Assembly to censure them. Parliament could be dissolved if it affirmed by three-fifths of its votes the censure of a minister that the president opposed. In such a case, president could call for new parliamentary elections, allowing the electorate to arbitrate the conflict.

Many ministers were censured but dissolution was never applied as a way to solve conflicts between the Executive and the legislative branch.<sup>336</sup> Several European countries developed a parliamentary system with much less parliamentary features than those Uruguay had embraced. Nevertheless, Uruguay was always considered as a presidentialist country.

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<sup>333</sup> Thomas O. Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 WM. & MARY L. REV. 679, 683 (1993).

<sup>334</sup> There is no need to argue about the international conflicts during the Cold War era and how they eventually helped to destroy the weak democratic regimes in Latin America. Many of the dictators that ruled this region during the 70's had international support, both political and financial. Moreover, some of them were trained in the School of Americas in Washington, D.C. See DIANA TAYLOR, *DISAPPEARING ACTS* 58 (1997). The military exercised a lot of power due to the increasing problem of Marxist terrorism in countries such as Uruguay (with the Tupamaros) and Argentina (with the ERP and Montoneros). The international perspective is particularly important in Chile where the CIA took an active role in the coup against the Marxist government of Allende. This is another important matter to take into account when reviewing the Latin America's problems during the 1970s.

<sup>335</sup> See generally HECTOR GROSS ESPIELL & JUAN JOSÉ ARTEAGA, *ESQUEMA DE LA EVOLUCIÓN CONSTITUCIONAL DEL URUGUAY* (2d ed. 1991).

<sup>336</sup> See *id.* at 123.

*E. The Case of Argentina*

During the twentieth century, Argentina's democracy failed.<sup>337</sup> The institutional system did not fail because of what it copied from the American presidential system, but because of what it did not copy.<sup>338</sup>

First, the separation of powers in Argentina, the country that followed the U.S. model most faithfully in Latin America, was more diluted than in the U.S., even in the text of the 1853 Constitution.<sup>339</sup> Like the U.S. Constitution, the 1853 Constitution provided for a federal system of government.<sup>340</sup> The power of the federal government was divided between a president, a judiciary, and a bicameral Congress (a Senate with an equal representation for each province and a Chamber of Deputies having representation based proportionately on population). Unlike the U.S. Constitution, there was no separation of church and State, the executive enjoyed stronger powers and the federal government possessed broader authority vis-a-vis the states, with explicit authorization to take over provincial governments (intervene) in the case of unrest.<sup>341</sup> Moreover, as Miller explains, the president had the authority to declare a state of siege and "to suspend most constitutional rights in the face of external attack or internal disorder, with the consent of the Senate required if it was in session, and . . . to detain individuals who threaten public tranquility for up to ten days . . ."<sup>342</sup> To the contrary, Congress enjoyed more

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<sup>337</sup> This Article does not consider all the economic and social problems faced by Argentina during the twentieth century that may, perhaps, give a valid explanation of why democracy failed.

<sup>338</sup> See Linares Quintana, *supra* note 20, at 642 (quoting the words of Doctor Nicolas Calvo who said "the Argentine federal Constitution, which has been copied from the United States Constitution . . . has no defects except precisely in those points in which it ceases to be a copy").

<sup>339</sup> See Banks & Carrio, *supra* note 193, at 13 (explaining that:

[d]espite North American influence, the Constitution retained the Spanish emphasis on centralization of powers. The president was made "supreme head of the Nation" for one six-year term, he was given power to appoint high-ranking officials without congressional approval, and . . . he was granted the authority to declare a "state of siege" and suspend constitutional rights when internal unrest endangered the Constitution or the government).

<sup>340</sup> See MANUEL JOSÉ GARCÍA-MANSILLA & RICHARDO RAMÍREZ CALVO, James Madison y la Constitución Nacional, in HOMENAJE A LA CONSTITUCIÓN NACIONAL DE 1853 139, 143 (2003).

<sup>341</sup> See ARG. CONST. art. 6; see also Miller, *supra* note 5, at 1511-12.

<sup>342</sup> Miller, *supra* note 5, at 1511-12; ARG. CONST. art. 99(16) (Article 99, section 16, sets forth the conditions under which the president may declare a state of siege. Moreover, it states that, with the consent of the Senate, the president may declare one or more districts of the Nation in a state of siege for a limited period in the event of a foreign attack. In the event of internal

powers in the U.S. than the corresponding Argentine body.<sup>343</sup> Linares Quintana explained that "since the constitutional organization, the political system bore the original sign of the marked executive preeminence in the play of governmental powers, and time accentuated even more this supremacy, diminishing the original rank of Congress."<sup>344</sup>

As Part II showed, the separation of powers is a vital feature of a presidential system. However, even in the text of the 1853 Constitution, presidents enjoyed more power in Argentina than in the U.S., leading to abuses of that power. These unconstitutional practices of the executive branch were a great problem in Argentina. Take the case of the federal intervention of the provinces.<sup>345</sup> Though the inclusion of the remedy of federal intervention is plausible if analyzed in the historical context in which the Constitution was written, it is unacceptable how this extraordinary remedy became ordinary by the sole will of the Executive.<sup>346</sup>

As Linares Quintana explained:

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disorder, he has this power only when Congress is in recess, since this is a power belonging to that body); see also ARG. CONST. art. 23 (Article 23 states that in the event of internal disorder or foreign attack endangering the operation of this Constitution and of the authorities created thereby, the Province or territory in which the disturbance of order exists shall be declared in a state of siege and the constitutional guarantees shall be suspended therein). In this sense, see *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), in which the U.S. Supreme Court stated:

[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.).

<sup>343</sup> See Linares Quintana, *supra* note 20, at 645.

<sup>344</sup> *Id.* at 654-55.

<sup>345</sup> The federal intervention is the power of the federal government to take over a provincial governments in the case of unrest. See ARG. CONST. art. 6.

<sup>346</sup> See Linares Quintana, *supra* note 20, at 650 (explaining that, between the constitutional organization of the country and the revolution of June 4, 1943, the Executive intervened in some provinces on ninety-five occasions by simple and convenient executive decree: San Juan was intervened by the federal government on fifteen occasions, La Rioja, Corrientes and Catamarca on fourteen occasions each, and Jujuy on eleven occasions, etc.).

It must be admitted . . . that the strengthening of the executive in general has been facilitated and stimulated by the weak action of Congress in the defense of its sphere of action and of its constitutional prerogatives, due, among other causes, to the fact that almost always the President has been a member of the political party which had a majority in the Legislative Branch, and many times party solidarity was more potent than the defense of the parliamentary body.<sup>347</sup>

Even Nino argued that "it is completely necessary that the Congress and the Judiciary Branch assume their functions that were absorbed by the President and that, together, restrict the abuses of the Executive in matters such as state of siege, federal intervention, DNUs . . ."<sup>348</sup>

These accurate statements lead us, both explicitly and implicitly, to other problems of the development of the Argentine constitutional practice.

### *1. The Weak Action of Congress*

In 1940, *La Nación*, one of the most important newspapers of Argentina, said:

The facts reveal that Congress is planning its own ruin in consenting to the usurpation of its privileges by the Executive Power. Not only does it fail to stop the advance, but it does not adopt measures designed to avoid it in the future. In its indifference toward the alteration of the constitutional balance, the chambers are permitting themselves to be despoiled even of the traditional prerogatives of parliaments.<sup>349</sup>

This weak action on behalf of the Argentina Congress and the acceptance of the Supreme Court of the de facto doctrine eventually led the Executive to govern by means of DNUs. This problem can not be attributed simply to the institutional design but to the deformation that the presidential system suffered in Argentina. As Banks and Carrio explained: "Instead of performing their constitutionally assigned role of checking executive abuses and protecting

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<sup>347</sup> *Id.* at 655-56.

<sup>348</sup> NINO, *supra* note 52, at 56.

<sup>349</sup> See Linares Quintana, *supra* note 20, at 656.

individual rights, the congresses and courts often have acquiesced in lawless presidential action, and at times have authorized or upheld presidential emergency powers."<sup>350</sup>

One example is the acceptance of broad legislative powers on behalf of the president: this dangerous behavior cannot be attributed to the presidential system itself but to the unconstitutional practice accepted in Argentina by the political parties, Congress, the Supreme Court and legal scholars themselves.

As Mainwaring and Shugart noted, "presidential systems vary in important ways, above all according to (1) the constitutional powers accorded to the president and (2) the kind of parties and party system."<sup>351</sup> These variations affected the performance of presidentialism in Argentina. Regretfully, political parties had an enormous responsibility in the failure of democracy in Argentina.

## 2. *Political Parties and the Electoral System*

A surprising critique is that the lack of serious political debate is caused by the presidential system.<sup>352</sup> The real reason is a simple matter of education and political culture. The problem in Argentina is the lack of seriousness of political parties and not the presidential system itself. For example, both "Radicales" and "Justicialistas"<sup>353</sup> say they accept DNUs because of their long running concern about gridlock in presidential systems, when the reality is that they are simply a convenient tool for the president in office.

The decadence and corruption of the political parties is another of Argentina's chronic problems. This has to do with the electoral system:<sup>354</sup> from 1853 until 1912, all political parties accepted fraudulent elections.<sup>355</sup>

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<sup>350</sup> Banks & Carrio, *supra* note 193, at 4.

<sup>351</sup> MAINWARING & SHUGART, *supra* note 73, at 1.

<sup>352</sup> See NINO, *supra* note 52, at 73-77.

<sup>353</sup> The two major political parties in Argentina. For a thorough explanation of the party system in Argentina, see MAINWARING & SHUGART, *supra* note 73, at 262-80.

<sup>354</sup> See Susan Rose-Ackerman, *Political Corruption and Democracy*, 14 CONN. J. INT'L L. 363, 364 (1999) (arguing that "The distinctive incentives for corruption in democracies depend on the organization of electoral and legislative processes . . .").

<sup>355</sup> See Miller, *supra* note 5, at 1537.

There is little doubt that competition for political power was primitive and corrupt. "Representative" government in Argentina had two essential characteristics: (1) provincial governors controlled their provinces, not only controlling access to provincial government employment and exercising influence over the state legislature, but also choosing the membership of the



One illustrative example is an observation made in 1911 by Joaquín V. González, one of Argentina's leading scholars; he aptly described Argentina as having "two completely distinct ways of life": a liberal economic and social order, on the one hand, and a corrupt political order on the other.<sup>356</sup> Another very illustrative example is an article written by Peter Smith about the factors that led to the breakdown of democracy in Argentina in 1930 (the year of the first coup d'état).<sup>357</sup> He specifically referred to the electoral system and the corruption of the political parties as the main factors of the coup.

Since 1930, there have been five military coups in Argentina: in 1943, 1955, 1962, 1966, and 1976. After the first coup d'état fraudulent elections were still common in Argentina. From 1930 to 1943, all congressional

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legislature and determining electoral outcomes; and (2) the president controlled the governors. José Nicolás Matienzo in *El gobierno representativo federal en la Republica Argentina*, a classic political analysis first published in 1910, describes Argentine governors as exercising the "mando"—the power of command, over all political activity in their province, and as maintaining control through a Tammany Hall style combination of electoral fraud and patronage. The governor controlled most elections in the province, both for provincial and national offices, through links that he in turn developed with local political bosses and officials. Voters were rounded up and taken to the polls in groups for better control. Electoral laws required voters to choose among closed lists of candidates, each list appearing on a separate voting ballot, and the local political boss then would ensure that voters were given the "right" ballot before entering the polls. If the governor enjoyed the loyalty of the local chief of police, the mayor, the tax collector, and the justice of the peace, then he could count on that district following his orders on election day. Each of those officials, who usually owed their loyalties to the local political boss, could use the powers of their office to the detriment of recalcitrant voters or to the benefit of cooperative ones. Voter rolls were a farce, excluding many eligible voters and including the names of nonexistent ones. Double voting was common, as were payments for votes. In the rare event that the opposition won a significant number of seats in the provincial legislature, staggered legislative terms, which were common in most provincial legislatures, permitted continuing legislators to vote to reject the credentials of incoming opposition members. Though a pre-eminent figure in the political establishment, even Joaquín V. Gonzalez admitted that 'suffrage in the Republic has only been an ideal aspiration of the revolution of ideas, a written promise in the constitutional documents of the nation and provinces' but never a reality.

<sup>356</sup> Joaquín V. Gonzalez, *Juicio del Siglo O Cien Años De Historia Argentina*, in 21 OBRAS COMPLETAS DE JOAQUÍN V. GONZALEZ 190 (1936); Miller, *supra* note 5, at 1534.

<sup>357</sup> See Peter H. Smith, *The Breakdown of Democracy in Argentina: 1916-1930*, in THE BREAKDOWN OF DEMOCRATIC REGIMES, LATIN AMERICA 3-27 (Juan J. Linz & Alfred Stepan eds., 4th ed. 1987).

elections were fraudulent. There was also fraud in the 1937 presidential election.<sup>358</sup>

After the second coup d'état in 1943, the military had an important role in the result of the elections. For example, with respect to the period between 1958-1966, Dockery explains that:

The first President of this period [President Frondizi] won an election in which the military forbid Peronist candidates [from] participat[ing]. When the civilian Government once again allowed the Peronists to participate in elections in 1961, the Peronists won ten of the fourteen contested provinces. The military demanded that the elections be annulled. When the President refused to comply, the military overthrew him. Instead of assuming control of the Government, the military appointed a provisorial president and held new presidential and congressional elections. The new elections involved even greater limitations of political participation and delivered a president with little public or military support.<sup>359</sup>

In 1966, the military overthrew the constitutional government of President Illia and ruled until 1973.<sup>360</sup> In 1973, there was an open presidential and congressional election. However, the problem of corruption and incompetence of political parties arose again before the 1976 coup d'état.<sup>361</sup> Ironically, or perhaps tragically, this problem is still unsolved today.<sup>362</sup>

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<sup>358</sup> See ROBERT A. POTASH, *THE ARMY & POLITICS IN ARGENTINA: 1928-1945* 74, 94 (1969).

<sup>359</sup> Dockery, *supra* note 198, at 1601.

<sup>360</sup> See Guillermo O'Donnell, *Permanent Crisis and the Failure to Create a Democratic Regime: Argentina, 1955-66*, in *THE BREAKDOWN OF DEMOCRATIC REGIMES, LATIN AMERICA* 138-77 (Juan J. Linz & Alfred Stephan es., 4th ed. 1987).

<sup>361</sup> See Marcelo Cavorozzi, *Patterns of Elite Negotiation and Confrontation in Argentina and Chile*, in *ELITES AND DEMOCRATIC CONSOLIDATION IN LATIN AMERICA AND SOUTHERN EUROPE* 208, 218 (John Higley & Richard Gunther eds., 1995).

<sup>362</sup> In 2001, there was a major scandal of alleged bribes paid by the executive branch through the S.I.D.E. (the *Secretaría de Inteligencia del Estado*, the national intelligence agency) to some legislators from the opposition (*Justicialistas*) to approve a Labor Law. This scandal led to the resignation of the vice president, Carlos Alvarez, due to his disagreement with the lax reaction of the president and apparent complicity on behalf of some officers of the executive branch. Eventually, this scandal combined with some bad economic measures that affected the population led to a strong reaction of the people that forced President De la Rúa to submit his resignation on December, 2001.

The decadence of the political parties is one of the most important things to take into account when reviewing the causes of the deterioration of democracy in Argentina.<sup>363</sup> As Real claims:

the effectiveness of a contemporary government depends, to a large extent, on the prevailing system of political parties, regardless of the institutional forms. The dynamic factors of political life are the parties, the powers in fact, the groups of pressure. Institutional forms only serve as a channel for unfolding their action; they regulate it, until a certain point, but their vitality, power and creative direction can never be replaced. Therefore, the goodness of a government will continue to depend, always, to the largest extent, on the civic virtues of governors and the electorate. The same can be said about the normality or disturbance of the social body that political forces reflect.<sup>364</sup>

During the twentieth century, would a parliamentary system in Argentina would have succeeded in protecting democracy with a reality of corruption in the political parties and fraudulent elections? The answer is simple: No. These matters should be taken into account when reviewing the failure of a system of government (either presidential or parliamentary) because the problems are not in the system *per se* but in its deformations.

Fortunately, Argentina has solved the problem of fraudulent elections. Today, fair elections are held regularly and legally. However, much work has to be done with respect to the political parties. The problem of the corruption of the political parties is not going to be solved by the simple establishment of a parliamentary system.<sup>365</sup> Even Nino accepted the importance of this issue.<sup>366</sup>

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<sup>363</sup> See Tom Farer, *Consolidating Democracy in Latin America: Law, Legal Institutions and Constitutional Structure*, 10 AM. U. J. INT'L.L. & POL'Y 1295, 1300 (1995) (explaining that one of the characteristics of Latin American politics is

the failure of political parties in most countries to serve as effective rationalizers of political life by aggregating the demands of the various sectors of the population and converting those demands into political programs, which, if implemented, would actually promote the demanded ends. Instead, Latin American political parties have served as vehicles for personalistic, paternalistic rule, in the first place by the chief executive and secondarily by local bosses, or 'Caciques,' dispensing government favors.).

<sup>364</sup> REAL, *supra* note 254, at 97.

<sup>365</sup> In this sense it is very important to note that few countries have been as vigilant as the United States in fighting corrupt practices. The U.S. Foreign Corrupt Practices Act of 1977, 15

This is another important reason to strengthen separation of powers, adding checks and balances, as a way to avoid factions.

### 3. *Argentine Jurisprudence on the De Facto Doctrine*

This jurisprudence in length in *supra* Part III. However, it is important to notice a historical fact: after the Supreme Court's impeachment in 1947, virtually every president has been able to choose the majority of the justices on the court, either because a previous Court chosen by a military government was removed, because new members were added, or both.<sup>367</sup>

Another reason why the separation of powers is distorted in Argentina can be found in the deterioration of the role of the Supreme Court. As Garay stated: "perhaps . . . as a result of a turbulent institutional past, many values and principles were lost—the original idea of a written Constitution, the Supreme Court as its final interpreter, the judicial branch as a power equal to Congress and the Executive . . ."<sup>368</sup> The government of President Fernando de la Rúa<sup>369</sup> was the first government since the recovery of democracy in 1983 where the Argentine Supreme Court was not chosen in accordance with the convenience of the president in office. Perhaps the court will fight its inferiority complex in the future and restore its dignity as a co-equal branch.

The only thing to add is that the Argentine Supreme Court's jurisprudence is not a consequence of the presidential system itself but a proof of its deformation.

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U.S.C. §§ 78dd-1, 78dd-2, 78ff(a), 78ff(c), 78m(b), is an attempt by the United States to outlaw bribery of foreign officials in an effort to win or retain business. However, European countries lack this kind of statute and bribes paid to foreign officials are tax-deductible for their companies. A CIA study (revealed to the press in 1995) reported that in 100 deals, representing US\$45 billion, from April 1994 to May 1995, overseas companies used bribes to win bids away from U.S. businesses. Foreign businesses ultimately won more than eighty percent of those contracts.

<sup>366</sup> See Nino, *supra* note 255, at 146.

<sup>367</sup> Miller, *supra* note 129, at 154.

<sup>368</sup> Alberto 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, 201 (1991).

<sup>369</sup> Elected in December 1999 and resigned in December 2001.

#### 4. *Other Considerations*

Going back to the problems of the text of the 1853 Constitution, one of the mistakes, at least in the author's opinion, was the president's duration in office: before 1994, the president was in office for 6 years and could not be re-elected. Now, after the 1994 Amendment, Argentina copied what the Framers of the U.S. Constitution thought about this issue more than 200 years ago.

One of the main critiques of the presidential system is its "rigidity" due to the fixed-term tenure in office. However, Mainwaring and Shugart correctly note that:

[T]here may be cases when this higher threshold for government change is desirable, since it would be expected to provide more predictability and stability to the policy-making process than the frequent dismantling and reconstructing of cabinets that afflicts some parliamentary systems—and that might especially be prevalent in the conditions of macroeconomic instability and scarcity that plagued much of the less developed world.<sup>370</sup>

This was exactly the case in Argentina with Menem's two consecutive presidencies (1989-1995):<sup>371</sup> due to the economic crisis provoked by hyperinflation during Alfonsín's government,<sup>372</sup> a long-term plan to bring a solution to this plague was needed. The Cavallo plan with the "Ley de Convertibilidad" (Convertibility Law) permitted Argentina to achieve economic stability for the first time in 60 years.

With a parliamentary system, this plan would have been of very difficult success: Cavallo and Menem had to suffer strong opposition even from their own party, which in a parliamentary system would surely have led to their removal from office by a vote of non-confidence. As Mainwaring and Shugart stated: "Argentina's ability to respond successfully to its economic and social problems while maintaining a functioning democratic system is an example of the ability of presidential systems to confront and resolve serious policy crises."<sup>373</sup>

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<sup>370</sup> MAINWARING & SHUGART, *supra* note 73, at 38.

<sup>371</sup> The first term was of six years and the second was four years, pursuant to the 1994 Amendment.

<sup>372</sup> In June 1989 the monthly rate of inflation was roughly of 190 percent.

<sup>373</sup> MAINWARING & SHUGART, *supra* note 73, at 261.

In the context of economic instability and political crisis, where heavy and long-term structural adjustments and reforms are needed as a condition to the access of developing countries gaining access to financial markets, presidential systems guarantee that the legislative and the executive powers sit for fixed terms and can therefore develop economic plans with a certain margin of time. Many of these plans are orientated to eliminate political expenditures that are associated with corruption and bureaucracy. Since "the survival in office of one branch does not depend on the other"<sup>374</sup> this kind of plan may be enforced without unduly interfering with the risk of removal associated with parliamentary systems because "maximizing representativeness through proportional representation almost ensures minimizing cabinet durability, since parliamentary confidence means the cabinet must assuage the interests of diverse parties."<sup>375</sup> Even though representativeness is enhanced in this form of parliamentarism, "it limits the possibility that the executive can articulate national policy goals transcending parochial partisan interests."<sup>376</sup>

Another main critique to the presidential systems made by many authors is that chronic conflicts between the Executive and the legislative branch may provoke the Executive to rule the country by decrees, causing instability.<sup>377</sup> This is what Professor Ackerman called the "crisis of governability." He explains that:

Once the crisis begins, it gives rise to a vicious cycle. Presidents break legislative impasses by "solving" pressing problems with unilateral decrees that often go well beyond their formal constitutional authority; rather than protesting, representatives are relieved that they can evade political responsibility for making hard decisions; subsequent presidents use these precedents to expand their decree power further; the emerging practice may even be codified by later constitutional amendments. Increasingly, the house is reduced to a forum for demagogic posturing, while the president makes the tough decisions unilaterally without considering the interests and ideologies represented by the leading political parties in congress.<sup>378</sup>

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<sup>374</sup> *Id.* at 17.

<sup>375</sup> SHUGART & CAREY, *supra* note 250, at 11.

<sup>376</sup> *Id.* at 12.

<sup>377</sup> *Id.* at 35-36.

<sup>378</sup> Ackerman, *supra* note 251, at 647.

Again, Argentina's reality proved that arguments made at a theoretical level may not be applied to the unique reality of the political life of a country. During both of Menem's presidencies "Justicialistas" had a majority in Congress.<sup>379</sup> However, President Menem issued more DNUs than all of the presidents in the history of Argentina together.<sup>380</sup>

Even without taking into consideration economic and social problems, and the lack of commitment to the rule of law, it may be valid to argue that democracy failed in Argentina because the separation of powers was never respected. As Glennon stated: "Arbitrary exercise of power, and the concomitant danger of autocracy, pose an ever-present danger to democratic processes."<sup>381</sup>

The central safeguard against the danger of autocracy is the cornerstone of the Framers' political architecture: a structured separation of powers with checks and balances that derives from the premise that "ambition must be made to counteract against ambition."<sup>382</sup>

The serious error of the 1994 Amendment was doing the exact opposite of what should have been done: instead of reaffirming the separation of powers, it diluted them even more. DNUs are an example of this. It is unacceptable that the president can exercise the lawmaking power vested in Congress.

In a parliamentary system, the executive power is exerted by a commission of the Parliament. The exercise of legislative power by this commission does not create tension in the institutional system. Nevertheless, in a system of separation of powers like the one adopted in Argentina, where presidents can neither be censured nor dismissed by a vote of non-confidence, to accept the exercise by the executive power of legislative faculties through DNUs, such as laws affecting individual rights directly as in the *Peralta* case, subverts the very basis of the system and opens the door for autocracy.

One cannot embrace a system of separation of powers in which that separation does not exist. That system is doomed and destined for failure.

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<sup>379</sup> Menem was the candidate of the Justicialista's party.

<sup>380</sup> Professor Ackerman erroneously claimed that: "This dismal cycle is already visible in countries like Argentina . . . which have only recently emerged from military dictatorships." See Ackerman, *supra* note 251, at 647. The acceptance of DNUs has nothing to do with this crisis of governability but with other complex factors such as the acceptance of the *de facto* doctrine by the Argentine Supreme Court, the influence of European law among Argentine administrative law scholars, etc.

<sup>381</sup> See Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 YALE J. INT'L L. 5, 20 (1988).

<sup>382</sup> FEDERALIST No. 51, at 289-290 (James Madison) (Clinton Rossiter ed., 1999).

In Argentina, DNUs have destroyed the separation of powers and checks and balances between Congress and the executive branch. Moreover, at some level, the Supreme Court has done little to enforce requirements that legislation come from the legislative branch and not from presidents. The courts never acted as controllers due to their permanent changes and manipulation after its first impeachment in 1947.<sup>383</sup> This undermines the core of democracy and has caused many problems in Argentina.

As a solution to these problems, Nino proposed a semi-parliamentary government.<sup>384</sup> To the contrary, Argentina does not need to move to the fusion of powers<sup>385</sup> but to a U.S. system of separation of powers where the president has to respect that lawmaking power is an exclusive faculty of Congress.

Parliamentarism cannot be imposed as a solution for the problems of Argentina. As Warwick states: "If Parliamentary government can seem superior to presidential government at times, it can also seem far worse: not only ineffective but unstable to boot."<sup>386</sup>

Scholars cannot come to a universal agreement on the best type of government.<sup>387</sup> Thus, "different conditions—including party system and levels of social conflict and economic development—may make one form of government fit better in one country, while another form of government would be more suitable elsewhere."<sup>388</sup> Albeit with distortions and interruptions, Argentina has over a 150 year tradition of presidential democracy. Recently, there has been no debate in Argentina about the alleged advantages of moving

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<sup>383</sup> See Miller, *supra* note 129, at 153.

<sup>384</sup> See Nino, *supra* note 255, at 164. But see Stotzky, *supra* note 264, at 115-25 (refuting the arguments presented by Nino).

<sup>385</sup> See Schlesinger, Jr., *supra* note 45, at 61 (explaining "A system in which a rubber-stamp legislature delivers whatever the Executive requests is only as good as the Executive and his requests").

<sup>386</sup> PAUL V. WARWICK, *GOVERNMENT SURVIVAL IN PARLIAMENTARY DEMOCRACIES* 1 (1994).

<sup>387</sup> Perhaps the system of government proposed by Bruce Ackerman, in his thoughtful piece could be a model of constitutional structure to be applied by some country in the future. See Ackerman, *supra* note 251. But see Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman Is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENTARY 51, 103 (2001). This system is unlikely to be applied in Argentina. Even Ackerman recognized that "[S]ome societies are so divided that it would be fatuous to seek salvation through constitutional engineering. In all cases, constitutional engineering must be combined with cultural sensitivity and economic realism." Moreover, the experience of Brazil in 1961 and Austria in 1920 showed that the success of even a perfectly designed governmental structure, as the one proposed by Ackerman, can be a complete failure when it faces the particular reality of a country.

<sup>388</sup> See MAINWARING & SHUGART, *supra* note 73, at 3.



to a parliamentary system, not even among the legal and political science scholars.

Rather than formulating magic solutions to Latin America's problems, the importance of all the scholars' critique on the presidential system<sup>389</sup> is that they have revealed many aspects that ought to be improved in the Argentine constitutional structure to avoid future problems and consolidate democracy.

Parliamentarism cannot prevail by law. The presidential system is deeply rooted in Argentina's society so the need to improve on it and not experiment with a parliamentary system.

## V. CONCLUSION

First of all, a caveat: this Article not arguing that the presidential system is better than the parliamentary one.<sup>390</sup> The success of many parliamentary systems throughout the world is undeniable. Some American scholars are taking their own successful system for granted and are taking their critique too far.<sup>391</sup> Undoubtedly, the presidential system has many failures and vices in the

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<sup>389</sup> Particularly the work of Carlos Santiago Nino. Though this Article does not embrace his proposals, it shares and have deep respect for his diagnosis and explanation of some of Argentina's problems.

<sup>390</sup> WARWICK claims

Typically, the presidential system—I take the United States as the prototype—is praised for its elaborate separation and balancing of powers, its constitutionally enshrined protection of individual rights and freedoms, and its government stability. There is a price to be paid for these advantages, however, and it is usually. Seen the multifarious possibilities for stalemate or deadlock between formally separate institutions of government (Congress vs. president, Senate vs. House of Representatives, etc.). When these stalemates becomes serious, U.S. observers occasionally turn an admiring eye toward the parliamentary regime of Britain, where the fusion of executive and legislative powers under a disciplined, majoritarian party appears to open the door to rapid and coherent government action—even if the lack of checks on the executive power is regretted.

WARWICK, *supra* note 386, at 1.

<sup>391</sup> See, e.g., Schlesinger, Jr., *supra* note 45, at 60.

At any rate, let us concentrate on the harm allegedly wrought in the United States by the separation of powers. After all, we have had the checks and balances since the founding of the Republic. Has it really been such a damaging thing? The existence of an independent Congress and of an independent Supreme Court has not prevented competent Presidents in the past from acting with decision and dispatch. The separation of powers did not disable Washington or Jefferson or Jackson or Lincoln or Wilson or Truman

United States and around the world, especially in Argentina.<sup>392</sup> No one can deny that. But one thing is to criticize your system in order to improve it and quite another to justify the failure of a system by use of doubtful statistics and experiences which are not really comparable.

Surprisingly, there is a lack of a thorough analysis of the terrible experience suffered by Chile, Uruguay, and Brazil with parliamentary features in their past constitutions.<sup>393</sup> No serious study of the development of democracy in Latin America can avoid this issue. Again, a caveat: this Article does not neglect the bad experience that Latin America has had with presidential systems. The factors to consider in the analysis of the duration and stability of a democratic government are far more complex than mere structural ones. In view of the complex political, economic and social process of Latin America during the twentieth century it seems remarkably overstated to argue that the failure of democracy resulted from mere constitutional structures.

Some countries in Latin America, such as Brazil, Chile, Uruguay and Argentina, are facing the twenty-first century with many problems but with relatively strong democratic institutions. The military forces, one of the main concerns addressed by scholars to the consolidation of democracy, are not playing a key role at this particular moment. Elections are being held regularly in these countries and it seems that the strength of democracy is becoming deeply rooted in the mind and spirit of citizens of this part of the world. However, new problems arise and much work has to be done in the future to develop better structures for the definitive success of democracy.

In Argentina, there is a strong sense of disappointment in the population with respect to the institutions and political parties. However, the presidential system is not responsible, as many scholars argue, for the failure of democracy in Argentina. Parliamentarism would have also failed under similar conditions because the problems exceed constitutional engineering. As Stotzky stated: "This is not to say, of course, that institutional arrangements are unimportant.

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or the two Roosevelts. Why is it so much more harmful today?

*Id.*

<sup>392</sup> See Carlos S. Nino, *The Debate over Constitutional Reform in Latin America*, 16 FORDHAM INT'L L.J. 635, 643 (1993) (explaining "In a presidential system that is carefully calibrated, like that of the United States, the dysfunctionalities are less problematic. Apart from the case of Mexico, the current system in Argentina is possibly the most extreme form of presidentialism in the world, placing it in line with semi-authoritarian systems.").

<sup>393</sup> More surprising were Nino's and Valenzuela's argument about the successful experience of these countries with parliamentary features. See Nino, *supra* note 255, at 161; see also LINZ & VALENZUELA, *supra* note 248, at 142. These arguments are untenable.

Rather, the argument is that they are only the form and not the substance of the problem."<sup>394</sup> In order to consolidate democracy in Argentina the separation of powers needs to be adjusted, among other things.

There has been a presidential system in Argentina since 1853, but it needs improvement. The constitutional solution for the institutional problems faced by Argentina is to strengthen the separation of powers by adding checks and balances in accordance with the U.S. model. If the president can elude Congress opposition by the issuance of DNUs then the Argentine democratic system is doomed: it will solely depend on the good will of the president in office.

This is the problem that Argentina is currently facing and this is why it is suffering institutional problems due to the lack of strength of Congress and the unjustifiable increase of presidential authority. As Fisher accurately states "without the power to resist encroachments by another branch, a department might find its powers drained to the point of extinction."<sup>395</sup>

Shugart and Carey correctly state that, more than the presidential system, it is the balance of executive-legislative powers that has hampered democratization in many countries.<sup>396</sup> Argentina suffers from democratic dictatorships by presidents who can do almost anything: they can exercise lawmaking power and they can appoint the Judges that are going to review their DNUs. Thus, there are essential checks and balances that are missing in the Argentine separation of powers.

Regretfully, since the 1994 Amendment, the Argentine Constitution expressly admits the prerogative of the executive branch to issue DNUs (*lege data*). Thus, the Argentine Supreme Court should develop a strict standard of review to reduce the excesses of the executive branch (*lege ferenda*).<sup>397</sup> It could be a good opportunity for the Argentine Supreme Court to regain the legitimacy and prestige that it has lost since 1990.<sup>398</sup>

This judicial activism will help to preserve institutional credibility and to prevent abuses of power by future presidents. As Chemerinsky states:

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<sup>394</sup> Stotzky, *supra* note 264, at 119.

<sup>395</sup> FISHER, *supra* note 61, at 10.

<sup>396</sup> SHUGART & CAREY, *supra* note 250, at 38.

<sup>397</sup> Even the most flexible approach of the U.S. Supreme Court may be more plausible in terms of preventing abuses by the executive branch than the approach made by the Argentine Supreme Court in similar cases.

<sup>398</sup> See Miller, *supra* note 129, at 80 (arguing that the Court has suffered "a particularly striking loss of prestige since President Carlos Menem expanded its membership in order to pack it").

"although judicial review is often criticized as being 'countermajoritarian', the courts actually perform a 'promajoritarian' function when they act to control unconstitutional Presidential acts. The courts by preserving congressional powers, help to insure rule by the majority."<sup>399</sup>

The experience of the U.S. might be very enlightening as to how to address the issue of separation of powers and the presidential authority. As Sunstein explains:

In America, judicial review, and the constitutional culture more broadly, have been important as a check after-the-fact and, perhaps even more, as a before-the-fact deterrent to presidential illegality. A culture of constitutionalism and the rule of law, spurred by judicial review, has helped deter presidential lawlessness in cases in which the need for action seemed great to the President, and the legal technicalities seemed like an irritating irrelevance.<sup>400</sup>

This point of view can contribute to the solution of the problems in Argentina by studying, understanding, and explaining the different problems that eventually led Argentina to disaster. Improving the Argentine system of separation of powers in order to avoid problems in the future. Moreover, the rule of law needs to be enforced. However, it is clear that the solution is not going to be a simple constitutional amendment that creates a parliamentary system.

Jiménez de Aréchaga correctly claimed:

don't think that the source of all problems is in the institutional design. Our problems are so grave, so sad, so contrary to our national prestige and even so absurd that we have to realize that we are not going to resolve them with the magical solution of a constitutional amendment. Democracy has no other value than the one of the individuals that form it. Thus, it is only in ourselves where the original source of the problems that worries and harms us should be investigated: in our egoisms, our appetites, our weaknesses, our excessive tolerance and our stubborn intolerance. Once all the individual rights and liberties

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<sup>399</sup> Chemerinsky, *supra* note 171, at 894-95.

<sup>400</sup> Sunstein, *supra* note 240, at 21.

are assured, with the free exercise of public opinion, any community of virtuous men can be properly developed; however, the best political structure has no value at all if this structure is not vitalized, defended and taken with pride by honest and dedicated people, with pride of its purity, justice and work. It is easier to create institutions than to create men. However, what we really need is to create men.<sup>401</sup>

The only way to “create men” is to teach respect for the rule of law; still a pending matter in Argentina. This is the illness. The good thing is that the first step towards curing this illness is to acknowledge the disease. Argentines should focus all their future efforts on the cure.

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<sup>401</sup> Justino Jiménez de Aréchaga, *Discurso Pronunciado por J. Jiménez de Aréchaga al Recibir el título de Profesor Emérito, Conferido por la Facultad de Derecho y Ciencias Sociales de la Universidad de la Republica*, in GROSS ESPIELL & ARTEAGA, *supra* note 335, at 114-15.

