ECHOES FROM THE SOUTH: ARGENTINA'S EARLY LEGISLATIVE DEBATES ON U.S.-STYLE JUDICIAL REVIEW

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I. INTRODUCTION

Argentina was the first country after the United States to adopt and vigorously apply the U.S. model of judicial review.[1] Argentine governmental institutions dramatically changed as a result of Argentina's Constitution of 1853 and its 1860 amendments, and judicial review of Executive and Legislative acts played a central role in this change. Between 1863 and 1930, decisions by the Argentine Supreme Court had a major impact on Argentine political life—an impact that matches the U.S. Supreme Court's impact on U.S. politics through the same period. Further, as one of the first countries to adopt U.S. constitutionalism with its model of judicial review, the history of Argentina's adoption reveals a lot about how the transplantation of legal and political institutions can work.[2]

However, while Argentina achieved a high level of judicial independence and effective judicial protection for many civil liberties, the origin and course of its constitutionalism varied substantially from

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HEORIES ON JUDICIAL REVIEW IN NORDIC

that of the United States. Argentine constitutionalism began with few roots in Argentine traditions—instead, it was aspirational in nature, borrowed extensively, and sometimes blindly, from the United States, and during a critical generation, depended on the prestige of its U.S. model for legitimacy.[3] Yet the Constitution also met the aims of its Framers. From 1853 to 1930, Argentine constitutionalism provided enough stability to facilitate extraordinary immigration, investment, and economic growth. This period stands in marked contrast to the erratic booms, busts, and instability that have plagued Argentina during most periods since.[4] The Constitution's Framers were motivated in large part by opportunities from abroad,[5] and in practice Argentina reaped the promised rewards. The success ended with Argentina's military coup of 1930 and Argentina's institutional inability to cope with the challenges of the Great Depression and war in Europe. The coup touched off an institutional decline that has moved in tandem with Argentina's economic decline.[6] But subsequent failure does not eliminate the institutional accomplishments and ro2kD5T493

shows that many legislators understood the political benefits and risks of judicial review under the U.S. model.

Unlike the U.S. Judiciary Act of 1789, the Argentine Confederation's 1858 law on the judiciary expressly provided for judicial review of unconstitutional legislation. Article 2 of the Argentine statute, hereafter referred to as the Confederation Judiciary Act, provided that the "Federal Courts will always proceed in accordance with the Constitution and national laws that are in conformity with it,"[20] and Article 3 provided that "the essential object of the Federal Judiciary is the enforcement of and compliance with the National Constitution in the contentious cases which occur, interpreting the laws uniformly in them and applying the law in accordance with the Constitution and nothing else."[21] These provisions were thought of as part of the constitutional package Argentina adopted from the U.S., and even Argentina's seminal political philosopher, Juan Bautista Alberdi, who generally opposed his contemporaries blindly copying the U.S. Constitution, acknowledged that Argentina had copied the U.S. system of judicial review when it copied Article III of the U.S. Constitution.[22] The

refuse to apply unconstitutional laws. Thus, the courts do not directly challenge the other branches of government, but merely refuse to act unconstitutionally within their own sphere.[33] Senator Arias' amendment was voted down, 17 to 1.[34]

Opposition to judicial review in the House of Deputies was led

publish over 30 books, primarily on history, diplomacy, and the places he visited in his travels. There was no economic interest group or political faction in Argentina during this time period that aligned itself against judicial review or had particular incentives to do so.

Judicial review received much more scrutiny in the House of Deputies, the Argentine equivalent of the U.S. House of Representatives, than in the Senate. The debate over Article 2 lasted nearly two full days and by the end of the debate every member of the House must have understood the principal risks as well as the benefits of judicial review. The Deputies voted 20 to 9 in favor of passage[36]—but the lopsided vote is not a reflection of who did a better job in the debate. Quesada was simply brilliant. The debate focused entirely on judicial review of acts of Congress. The absence of any discussion of federal judicial review of provincial legislation implies that even those opposing judicial review of Congressional action accepted judicial review of provincial action. Regarding acts of Congress, however, Quesada and his allies presented arguments that remain common today in law school classrooms.

Quesada did not offer the source of his arguments and some may have been original. While French culture exercised enormous influence in Argentina in the 19th century, France influenced the Argentine constitutional model far less than the U.S. France and French thinkers are never cited during the debate, with the exception of Tocqueville who is cited for his observations on the U.S.[37] This "oversight" by Quesada was significant, since the Argentine Constitution did provide for the drafting of a national civil code,[38] and

French's vehement opposition to judicial review may indicate that France, with its 19th century lurches between republican revolution and monarchy, lacked the prestige on issues of government organization to influence the debate. In the 1850s it was only an influence in the civil law sphere.

Quesada and his allies emphasized that judicial review undercuts Congress even though Congress is the best interpreter of the Constitution. Judicial review "implies admitting the infallibility of the members of the Federal Tribunal and assumes that the Congress and the Executive will engage in unconstitutional conduct."[40] Whailiviwnd hie Ex1 a6609,1t6

creature of the popular will, so it cannot possibly do a better job than Congress of interpreting what in practice are very general principles.[49] Judges will decide cases according to their personal political philosophy, and that philosophy may well differ from that of Congress.[50] When judges assert that they are "giving the true interpretation of the law" using their "wisdom" and "their science," there is no one in a position to question them.[51] Moreover, the Judiciary can be subject to party passions and interests. Even Tocqueville recognized the danger of imprudent judges, noting that the day that judges act arbitrarily the Union will find itself in danger.[52]

Quesada also emphasized that the U.S. did not offer a good model for the role of the judiciary. Simply citing the U.S. was not sufficient, since Argentina differed in important ways. First, Argentina, under its 1853 Constitution, had adopted a more centralized form of government than the U.S., and hence had less need for the Supreme Court to resolve disputes between the federal government and the provinces.[53] Further, the U.S. came from the British tradition of strong parliaments and therefore had a correspondingly greater need to restrict the power of Congress than Argentina.[54] Quesada questioned the growing addiction to everything American as the secret to prosperity. "To say that the prosperity of the United States depends on the organization of its Judiciary is as absurd as saying that slavery is the source of Brazil's prosperity and power. Other factors have raised the North Americans to their present

the Judiciary will always follow the written law."[58] Since many issues can be decided either for or against constitutionality, the validity of laws would become uncertain,[59] particularly when judges allow themselves to be guided by their conscience instead of the norms written by the legislature.[60] Parties would pick laws apart in search of grounds for constitutional attacks,[61] and the truly injured would be citizens who rely on legislation later found unconstitutional.[62]

In sum, not only did Quesada and his allies identify many of the tensions inherent in judicial review, but they questioned the two central features which would come to underlie judicial authority: the need to follow the U.S. model, and the view that the Constitution may be interpreted as autonomous law without reference to concerns outside its text and its Framers' intent. According to Quesada, the U.S. model would fail in Argentina because the U.S. was too different from Argentina to offer a model for the judiciary. Textual interpretation would fail because the Constitution only elaborates general principles and is therefore best interpreted by a body responsive to public needs, like the Congress. These are also the w[(e c.m.0079 Tc0 Tw(58)Tj10)n1(a)-

and the Province of Buenos Aires, which included the port of the City of Buenos Aires and therefore enjoyed customs revenues that placed it in a superior financial position. While the Confederation appointed Supreme Court judges, they never assumed office.[88] A judiciary as envisioned by the Confederation legislators only became reality once Buenos Aires defeated the Confederation and united the country, providing the nation with the funds from the Buenos Aires Customs House and the law graduates from its university. However, the 1858 debate over the Confederation Judiciary Act shows that while dependent on the U.S. for a model, judicial review did not enter

Legislators focused their most important discussions on determining the precise nature of U.S. practice,[99] and the question of the role of the judiciary vis-à-vis the other branches of government only arose once, during a debate on the issue of sovereign immunity--the immunity of the government from suits by individuals seeking damages. Here, because there was a tension between what many delegates felt was the essence of U.S. judicial review, protection of the individual from arbitrary government conduct, and actual U.S. practice of extensive sovereign immunity, the issue was debated and then left unresolved.[100]

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with U.S. Judiciary Act of 1789, §9. Second, unlike U.S. practice at that time, Supreme Court original jurisdiction (cases where the Supreme Court hears cases as a court of first instance) included more than just cases concerning Ambassadors, and disputes between Provinces, and disputes between Provinces and a foreign state. Rather, both the Argentine Constitution and LEY 48 followed U.S. practice as true before U.S. ratification of the 11th Amendment in 1798, with jurisdiction including cases between a province and a resident of a different province and cases between a province and a foreigner. *Compare* LEY 48, *supra* note 94, at

Congress and the Executive also financed a study of U.S. judicial review and the U.S. Constitution generally. Prior to the drafting of Laws 27 and 48, the government sent an attorney to the U.S. to study its procedural system first hand.[101] In 1863, Congress underwrote publication of a translation of Story's *Commentaries* through an advance purchase.[102] In 1864, it did the same in the case of James Kent's *Commentaries on American Law*,[103] and in 1869, President Sarmiento, in a decree later approved by Congress as a law, authorized translations of William Whiting's *War Power under the Constitution of the United States*, John Norton Pomeroy's *An Introduction to the Constitutional Law of the United States* (1868), George Paschal's annotated *The Constitution of the United States*, Luther S. Cushing's *Rules of Proceeding and Debate in Deliberative Assemblies* (1868), and Francis Lieber's *Civil Liberty and Self-Government* (1859).[104] The translators appointed included a future Supreme Court Justice, Luis Varela, a future President, Carlos

require the government to make a payment to an individual meant an important limitation on the powers of Congress and the Executive. *See id.* at 305–06 (statement of García); *id.* at 306 (statement of Zavalía); *id.* at 326 (statement of Elizalde). In the end the House passed language simply tracking the language of the Constitution, which provides for federal jurisdiction whenever "the Nation might be a party." CONST. NAC. art. 100. *Compare id.*, *with* LEY 48, art. 2 § 6, 1852–1880 A.D.L.A. 364. *See also House Debate-LEY 48, supra* note 96, at 338 (statement of García). The Argentine Supreme Court in *Gomez c/Nación Argentina*, 2 FALLOS 36 (1865), then took the position that Congress had left the issue of sovereign immunity to the discretion of the courts and ruled in favor of sovereign immunity. *Id.* at 43. There is some support for the position taken by the Supreme Court that the House vote to track the Constitutional text was a vote to leave the matter in the Supreme Court's hands and was therefore not a vote to allow actions against the federal government, but the intent of Congress is simply unclear. *See House Debate-LEY 48*, *supra* note 96, at 311, 334 (statements by Mármol). Given that the Court authored the original version of the statute, which provided for sovereign immunity, the Court's preference for sovereign immunity once a case came before it is no surprise.

101. *Justicia Federal*, LA NACIÓN ARGENTINA, Feb. 6, 1863, at 2. The study appears as a book by MANUEL RAFAEL GARCÍA, entitled ESTUDIOS SOBRE LA APLICACIÓN DE LA JUSTICIA FEDERAL NORTE AMERICANA A LA ORGANIZACIÓN CONSTITUCIONAL ARGENTINA (1863). *See also* HECTOR JOSÈ TANZI, EL PODER JUDICIAL EN LA PRESIDENCIA DE MITRE, 17 HISTORIA 67, 80, 91 n.21 (1997) (describing the works published by Manuel Rafael García as a result of his trip).

102. Law of Sept. 16, 1863, 5 REGISTRO OFICIAL DE LA REPÚBLICA ARGENTINA 73 (1884).

103. Law of Oct. 1, 1864, 5 REGISTRO OFICIAL DE LA REPÚBLICA ARGENTINA 160 (1884).

104. Decree of Mar. 2, 1869, 5 REGISTRO OFICIAL DE LA REPÚBLICA ARGENTINA

been permanently ceded by the Province to the Federal government.[109] Most of the debate was framed by dueling quotations from U.S. authorities. *La Nación Argentina*

heights have started to be practiced among us."[117] The paper concluded that "[o]nce the Supreme Court decides that the law establishing a direct tax has been properly established by Congress, there is nothing to do but to submit to the decision, even if it conflicts with our opinions."[118]

III. CONCLUSION

The process by which U.S.-style judicial review came to be adopted in Argentina owed far more to the prestige of the U.S. model than to any political calculations among members of the Argentine elite during the 1850s and '60s. While President Mitre, in 1862, appointed members of the opposition to the Supreme Court,[119] most likely as a way of reassuring the opposition that they would have a space on a key institution for resolving political disputes, such concerns were alien to the debates of 1857 and 1858. The key then, and to the ever-strengthening influence of the U.S. model during the early decades of the Constitution of 1853, was the authority that the model enjoyed through its prestige.

Ultimately even Vicente Quesada would have to adopt the voice of U.S. constitutionalism, at least for a time. In the 1860s and 1870s, Quesada co-edited a literary and legal periodical, and not surprisingly given his Argentine readership, the articles on constitutional law and the judiciary focused on U.S. practice.[120] He even engaged in *de rigueur* invocations of the U.S. model before the Argentine Supreme Court. In 1869, Quesada presented an appeal to the Supreme Court over a sentence of 10 years exile and a 2,000 peso fine for his client's participation in a provincial rebellion and acting as a leader in the rebel government, and in tune with the times he wrote:

> Ah, your Excellency, if instead of finding myself in the Argentine Republic, I might be before the Tribunals of the United

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117. *Sentencia Importante*, LA TRIBUNA NACIONAL, Mar. 4, 1865, at 2.

118. *Id.*

119. A description of the judges appointed by Mitre appears in ZAVALÍA, *supra* note 87 at 66–73, where the president of the Court was President Urquiza's former Vice President, Salvador María del Carril.

120. Vicente Quesada started *La Revista de Buenos Aires*

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> States of the North, whose institutions serve as a model for us and whose case law we so avidly study, it would be enough to recall the great example of moderation and good sense given by President Johnson, blocking the trial of the rebel president of the South. There, where free institutions are a fact, prudence is the great advisor of public men; and hardly had the great fight that convulsed that great nation ended then instead of terrifying the rebels with punishments, the first citizen, the President himself, bought time to let passions calm and restore to liberty the first of those responsible, the President of the rebel States.[121]

After describing the suffering of his client, he then concludes:

> What a difference between these two peoples! And we pretend to imitate the United States of the North, whose great lessons we