

# Washington University Global Studies Law Review

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Volume 8 | Issue 3

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January 2009

## Don't Copy Me, Argentina: Constitutional Borrowing and Rhetorical Type

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### Recommended Citation

Mitchell Gordon, *Don't Copy Me, Argentina: Constitutional Borrowing and Rhetorical Type*, 8 WASH. U. GLOBAL STUD. L. REV. 487 (2009),  
[https://openscholarship.wustl.edu/law\\_globalstudies/vol8/iss3/3](https://openscholarship.wustl.edu/law_globalstudies/vol8/iss3/3)

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# DON'T COPY ME, ARGENTINA: CONSTITUTIONAL BORROWING AND RHETORICAL TYPE

MITCHELL GORDON\*

## INTRODUCTION: WHEN "WE THE PEOPLE" IS SOMEONE ELSE

In a satire of contemporary literary criticism, Jorge Luis Borges reviews the work of Pierre Menard, a twentieth-century French symbolist who, we are informed, has successfully produced his own version of *Don Quixote*.<sup>1</sup> The text of Menard's version is identical, word for word, to Cervantes's original, but Borges explains that Menard's version is "almost infinitely richer" in meaning since it was written with Menard's knowledge of three hundred years of history unknown to the original author.<sup>2</sup>

We hear the echo of Pierre Menard in an ancient question of comparative law: Can one nation's constitution be successfully copied by another? Although the issue has arisen more frequently since the Second World War—particularly in the twentieth century's last decades, which saw an unusually large number of new constitutions—our generation is neither the first nor the last to grapple with the problem of constitutional borrowing.<sup>3</sup>

Georg Hegel, for instance, thought failure inevitable because "the constitution of any given nation depends in general on the character and development of its self-consciousness."<sup>4</sup> In this self-consciousness "[the

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1. Jorge Luis Borges, *Pierre Menard, Author of the Quixote*, in COLLECTED FICTIONS 88 (Andrew Hurley trans., Viking Penguin 1998) (1989).

2. *Id.* at 94.

3. See Barry Friedman & Cheryl Saunders, *Symposium: Constitutional Borrowing*, 1 INT'L J. CONST. L. 177, 178 (2003); Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOBAL STUD. L. REV. 345, 347–48 (2005); Mark Tushnet, *Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 325, 325 (1998).

4. GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT ¶274 (T.M. Knox trans.,

nation's] subjective freedom is rooted and so, therefore, is the actuality of its constitution."<sup>5</sup> In Hegel's view, borrowed constitutions are unsustainable because they lack not only sufficient self-consciousness but also the special character that elevates constitutions above the normal course of human events:

[I]t is absolutely essential that the constitution should not be regarded as something made, even though it has come into being in time. . . . It must be treated rather as something simply existent in and by itself, as divine therefore, and constant, and so as exalted above the sphere of things that are made.<sup>6</sup>

Hegel believed that, since borrowed constitutions are both unselfconscious and unexalted, they not only are destined to fail, but are also unlikely even to cause meaningful societal change.<sup>7</sup>

But constitutional borrowing has its defenders, who argue that, while blind copying is inappropriate, judicious borrowing may benefit nations that have yet to solidify their political institutions.<sup>8</sup> Horacio Spector, for example, has argued that in the right circumstances "transplanting" a foreign constitution can work,<sup>9</sup> and Jonathan Miller has argued that Argentina's Constitution of 1853—which copied, in large part, the Constitution of the United States—endured for seven decades precisely because it *was* a copy and therefore enjoyed extra authority.<sup>10</sup> The "prestige of the foreign model" gave the Argentine Constitution what Miller calls a "talismanic" authority, "a sense that, if the document is followed, problems almost miraculously will be overcome."<sup>11</sup>

For the interpreter, the inherent challenge of constitutional borrowing lies in a Janus dilemma. A borrowed constitution has two faces: one turned

Oxford Univ. Press 1953).

5. *Id.*

6. Michael Halley, *Breaking the Law in America*, 19 *LAW & LITERATURE* 471, 474–75 (quoting HEGEL, *supra* note 4, at ¶ 273).

7. 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, 1488 (1997). Similarly, Montesquieu believed that borrowed constitutions were, if not doomed to fail, at least unlikely to succeed. He reasoned that "[l]aws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another." CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 8 (Anne M. Cohler et al. trans. & eds., 1989).

8. Miller, *supra* note 7, at 1484.

9. Horacio Spector, *Constitutional Transplants and the Mutation Effect*, 83 *CHI.-KENT L. REV.* 129, 129–30 (2008).

10. Miller, *supra* note 7, at 1487–88.

11. *Id.* at 1484, 1488–89.

to the past, the other to the future. Doubtless both the original constitution and the copied constitution are distinct texts, and we may presume generally that only the copy is binding authority. Yet we may presume also that the borrowed constitution's framers, that is, the copyists, had sound reasons for copying those words in particular. How, then, should one weigh the relative authority of the parent text? What light do the words of the U.S. Constitution shed on the words of its Argentine adaptation? Must we know the borrowers' original understanding of the parent text? What if they misunderstood the parent text? Does it matter how they saw the parent text or its subsequent history—whether as an oracle, deserving full deference, or instead as a guidebook, providing a helpful historical account of common experience?<sup>12</sup>

The answers to these questions are disputed even between the borrowers themselves. They dispute, in a sense, the effect of time on the process of constitutional borrowing. In constitutional borrowing, an authority from yesterday (as currently understood) is used today to set a course for tomorrow. But when we undertake later to follow that course, what do we do? Do we mainly inquire into the past, or do we deliberate about the future?<sup>13</sup> Two constitutional drafters may concur in borrowing the same words from some other nation's constitution—that is, they may agree in their choice of materials from the past—but disagree later about how those same words are to be interpreted.<sup>14</sup> Where the two constitutions differ, the borrowers might disagree about how much attention those differences deserve. Even where the texts are identical, the borrowers may disagree about the importance of the particular context, including the distinctive culture and history of the borrowing nation. In either event, they may disagree about how much deference is owed to the parent text.<sup>15</sup> Thus despite their initial agreement to borrow, they may disagree later over just what it was they decided.<sup>16</sup>

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12. Cf. Mitchell Gordon, *Adjusting the Rear-View Mirror: Rethinking the Use of History in Supreme Court Jurisprudence*, 89 MARQ. L. REV. 475, 485 (2006).

13. Cf. *id.*

14. Cf. James Lupo, *Court Speech As Political Action: Isocrates' Rhetorical Ideal and the Legal Oratory of Daniel Webster*, 3 J. ASS'N LEGAL WRITING DIRECTORS 48, 57–58 (2006); Gordon, *supra* note 12, at 484–85.

15. Cf. Marie A. Failinger, *Not Mere Rhetoric: On Wasting or Claiming Your Legacy*, *Justice Scalia*, 34 U. TOL. L. REV. 425, 434–44 (2003); Lupo, *supra* note 14, at 57–58.

16. Cf. Failinger, *supra* note 15, at 435–36. Whether borrowed constitutions can thrive on foreign soil is more than an academic question; interest in the answer goes beyond the cozy circle of comparative legal scholars. See, e.g., Alicia L. Bannon, *Designing a Constitution-Drafting Process: Lessons from Kenya*, 116 YALE L.J. 1824 (2007); Zachary Elkins, Tom Ginsburg & James Melton, *Baghdad, Tokyo, Kabul . . . : Constitution Making in Occupied States*, 49 WM. & MARY L. REV. 1139 (2008); James Thuo Gathii, *Popular Authorship and Constitution Making: Comparing and*

Part I of this Article concerns the relationship between rhetoric and law, outlining the classical distinction between the forensic and deliberative modes of rhetoric. Part II describes the basic vision of Juan Bautista Alberdi, the father of Argentine constitutionalism. Part III discusses how Alberdi's proposed constitutional ideas, borrowed heavily from the Constitution of the United States, influenced the text of Argentina's Constitution of 1853. Part IV examines the subsequent debate between Alberdi and his contemporary and associate, Domingo Faustino Sarmiento, to illustrate how their different rhetorical modes resulted in differing interpretations of the Argentine Constitution.<sup>17</sup> Part V offers some thoughts on rhetorical problems inherent in the interpretation of borrowed constitutions. My stance, essentially Hegelian, is that the rhetorical muddles presented by borrowed constitutions are unavoidable, placing on borrowers and their descendants the added obligation to link the borrowed text to a surrounding culture of constitutionalism.

#### I. RHETORICAL TYPE AND LEGAL TEXT

Although classical rhetoric has won new interest among contemporary students of legal discourse, the relationship between rhetoric and law is in fact quite old.<sup>18</sup> More than two thousand years have passed since the first encounter between the study of law and the study of rhetoric.<sup>19</sup> Rhetoric originated, in fact, through legal conflicts: in 465 BCE, when the tyrant Thrasybulus was overthrown in Syracuse, the courts were flooded by disputes over property the dictatorship had stolen; this led Corax and other early rhetoricians to develop a systematic approach to persuasive discourse, a system that might benefit litigants arguing their own cases in court.<sup>20</sup>

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*Contrasting the DRC and Kenya*, 49 WM. & MARY L. REV. 1109 (2008); J. Alexander Thier, *The Making of a Constitution in Afghanistan*, 51 N.Y.L. SCH. L. REV. 557 (2006–07).

17. In early Argentine jurisprudence, it was Sarmiento's forensic approach that ultimately prevailed.

18. See Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. CAL. INTERDISC. L.J. 613, 615 (1999); John B. Mitchell, *Why Should the Prosecutor Get the Last Word?*, 27 AM. J. CRIM. L. 139, 203–04 (2000); Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717, 1720 (1995).

19. See Frost, *supra* note 18, at 615; Gordon, *supra* note 12, at 483 n.29; Scallen, *supra* note 18, at 1722–23.

20. See PATRICIA BIZZELL & BRUCE HERZBERG, *THE RHETORICAL TRADITION: READINGS FROM CLASSICAL TIMES TO THE PRESENT* 20–21 (1990); EDWARD P.J. CORBETT & ROBERT J. CONNORS, *CLASSICAL RHETORIC FOR THE MODERN STUDENT* 595 (2d ed. 1971); Frost, *supra* note 18, at 613; Gordon, *supra* note 12, at 483 n.29; Scallen, *supra* note 18, at 1722–23.

The definition of rhetoric has been continually contested. Probably the most widely recognized definition was proposed by rhetoric's great systematizer, Aristotle (384-322 BCE), who defined rhetoric as "the ability, in each [particular] case, to see the available means of persuasion."<sup>21</sup> Understood generally as "the art of using language to persuade, that is, to seek agreement, cooperation, or action,"<sup>22</sup> rhetoric soon became central to both Greek and Roman education and survived in substantially the same form for over four centuries, peaking with Cicero and Quintilian.<sup>23</sup> Since ancient days, the study of rhetoric has contributed in many ways to the study of law, though it has contributed less to legal theory, perhaps, than to legal practice. Although it soon blossomed into "the most comprehensive, adaptable, and practical analysis of legal discourse ever created,"<sup>24</sup> ultimately influencing not just legal decision-making but also matters of state, rhetoric was, after all, invented for a specific, practical task: to "help ordinary men plead their claims in court."<sup>25</sup>

But while Aristotle and other classical rhetoricians acknowledged rhetorical training's concrete benefits in the courtroom, they also considered rhetoric more than merely a compilation of tricks of the trade. Rhetoric played a part, for instance, in interpreting written laws. To the ancients, the reduction of the laws to written words was unsettling: they feared that "by mak[ing] laws wholly independent of their author," written texts could become an instrument of tyranny.<sup>26</sup> For Aristotle, it was impossible to understand the law fully without accounting for the rhetorical process, since legal outcomes often turn on the outcomes of arguments about how to define or interpret a text: "[For men] often admit having done an action and yet do not admit to the specific terms of an indictment or the crime with which it deals."<sup>27</sup> Aristotle thought pure text too brittle to effect justice among men—he held that "fairness is justice that goes beyond the written law"<sup>28</sup>—and he argued that the law "could be

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21. ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 36 (George A. Kennedy trans., 1991); Eileen A. Scallen, *Evidence Law As Pragmatic Legal Rhetoric: Reconnecting Legal Scholarship, Teaching and Ethics*, 21 QUINNIPIAC L. REV. 813, 830 (2003).

22. Scallen, *supra* note 21, at 829.

23. See Frost, *supra* note 18, at 614–16; Scallen, *supra* note 18, at 1724–30.

24. Frost, *supra* note 18, at 614.

25. *Id.* at 616 (quoting CORBETT & CONNORS, *supra* note 20, at 595) (emphasis omitted).

26. Scallen, *supra* note 18, at 1727 (quoting DEBORAH TARN STEINER, *THE TYRANT'S WRIT* 236 (1994)).

27. *Id.* at 1728 (quoting ARISTOTLE, *supra* note 21, at 104).

28. *Id.* (quoting ARISTOTLE, *supra* note 21, at 105–06).

made more flexible and equitable through the use of rhetoric.”<sup>29</sup> The act of interpreting laws was an act of rhetoric.

Rhetoric thus left a legacy to legal education that was less a source of practitioner’s tips than a school of practical reasoning—an all-encompassing inquiry into the persuasive uses of language. As Eileen Scallen has written, it also suggested a particular worldview that was “close to the philosophical perspective of pragmatism, the basis of the ‘school’ of interpretation called practical reasoning.”<sup>30</sup> Unlike his teacher, Plato, Aristotle saw rhetoric as inherently neither good nor bad, but as “a tool or faculty that can be used for good or ill,”<sup>31</sup> and, also unlike Plato, he “adopted the sophistic emphasis on the contingent, the contextual, and the practical elements of rhetoric.”<sup>32</sup> Like the sophists, Aristotle “envisioned an incomplete, ambiguous, and uncertain world, interpreted and understood by means of language.”<sup>33</sup>

In his practical treatise, *On Rhetoric*, Aristotle divided all persuasive speech into three distinct types: forensic, deliberative, and epideictic.<sup>34</sup> Forensic rhetoric focuses on the past.<sup>35</sup> The forensic speaker looks backward at past actions or events, and attempts to persuade an audience about things that have already happened. An advocate might need to persuade a jury about things that took place in the past, for example, before the jury can decide upon a just response. Because forensic rhetoric is often used in litigation, it is sometimes called “judicial” rhetoric (although I avoid that term here); it is the rhetoric of the courtroom, “but it can be extended to cover any kind of discourse in which a person seeks to defend or condemn someone’s actions,” including one’s own.<sup>36</sup> What makes this rhetoric forensic is its temporal focus on things that have already happened.

As forensic rhetoric focuses on the past, deliberative rhetoric focuses on the future, seeking mainly to persuade an audience about decisions to

29. *Id.*

30. *Id.* at 1724.

31. Scallen, *supra* note 21, at 835.

32. Scallen, *supra* note 18, at 1725.

33. *Id.* at 1724 (quoting SONJA K. FOSS ET AL., CONTEMPORARY PERSPECTIVES ON RHETORIC 1 (2d ed. 1991)).

34. See Marie A. Failingler, *The Justice Who Wouldn’t Be Lutheran: Toward Borrowing the Wisdom of Faith Traditions*, 46 CLEV. ST. L. REV. 643, 648 & n.25 (1998); Fred A. Simpson & Deborah J. Selden, *When to Welcome Greeks Bearing Gifts—Aristotle and the Rules of Evidence*, 34 TEX. TECH. L. REV. 1009, 1010 (2003).

35. See Robert H. Schmidt, *The Influence of the Legal Paradigm on the Development of Logic*, 40 S. TEX. L. REV. 367, 384 (1999).

36. CORBETT & CONNORS, *supra* note 20, at 39–40.

be made about the future.<sup>37</sup> Since deliberative rhetoric is often addressed to assemblies authorized to choose among competing policies, it is sometimes called “political” rhetoric (although I avoid that term here); it is the rhetoric of the political forum, but it also describes any rhetoric that “look[s] forward to the future and giv[es] counsel as to ‘advantage or harm’ entailed in one or another course of proposed action.”<sup>38</sup> What makes this rhetoric deliberative is that it looks more to the future than to the past; it addresses anyone responsible for charting a future course.<sup>39</sup>

Aristotle’s third type of rhetoric—epideictic—focuses on neither past nor future; its specific concern is with praise or blame, with the worthy and unworthy.<sup>40</sup> Epideictic rhetoric is sometimes called “ceremonial rhetoric” or “display rhetoric,” since its main aim is that the audience be pleased or inspired, rather than persuaded in the forensic or deliberative sense.<sup>41</sup> (For now, I shall focus on the forensic and deliberative types of rhetoric; I shall return to epideictic rhetoric in Part V.)

While almost all law-related rhetoric can be classified, in Aristotle’s terms, as either forensic or deliberative, things get more complicated when we try to classify borrowed constitutions. What complicates matters is that the past can be used for different purposes, both past-focused and future-focused; merely invoking the past does not transform the argument into a forensic inquiry. Thus, while two interpreters of a borrowed text may cite the parent text’s history, and in this sense “use” the past, they may nevertheless be on entirely different rhetorical roads.

He who takes the forensic road looks mainly to the past. He seeks to know the original understanding of the parent text, and perhaps the history of its interpretation. He believes that the borrowers meant to copy not just the words of the parent text, but also the ways those words had been interpreted. In contrast, she who takes the deliberative road looks mainly to the future. She seeks to know *why* the parent text was borrowed. (For this reason, she also takes more interest in the differences between the two texts.) She denies that the parent text’s original understanding, or subsequent interpretation, is in any way authoritative, and she denies that identical words are proof of identical intent. She focuses not on the

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37. See Failing, *supra* note 34, at 648 n.25.

38. Geoffrey C. Hazard, Jr., *The Rhetoric of Disputes in the Courts, the Media, and the Legislature*, 40 GA. L. REV. 559, 570 (2006) (emphasis omitted); see also Schmidt, *supra* note 35, at 372.

39. Hazard, *supra* note 38, at 570.

40. *Id.* (referring to epideictic rhetoric as “display rhetoric”); Schmidt, *supra* note 35, at 372; Failing, *supra* note 15, at 434–44.

41. CORBETT & CONNORS, *supra* note 20, at 40; Failing, *supra* note 15, at 435 n.45.



particular words that the borrowers chose, but on the future effects the borrowers aimed to produce. As Part II will illustrate, she looks to future effects to assess which possible reading is preferable today.<sup>42</sup>

## II. ALBERDI'S CONSTITUTIONAL VISION

The overthrow of Argentine dictator Juan Manuel de Rosas in early 1852 prompted calls for an authentic national constitution, even though Argentina had never had a successful experience with constitutional rule.<sup>43</sup> Among the voices calling for change was the leader of the revolutionary forces, General Justo José de Urquiza.<sup>44</sup> Under the Pact of San Nicolás, signed by regional leaders in May 1852, Urquiza was granted all governmental powers until a constitutional government could be established.<sup>45</sup> Urquiza then appointed a representative committee to draft the rules for a constitutional convention, with all provinces at the convention to receive equal representation.<sup>46</sup>

The men who gathered at Santa Fé to write a new constitution for a new Argentina were deeply impressed by the writings of a forty-two-year-old exile named Juan Bautista Alberdi.<sup>47</sup> Like other members of his intellectual circle, known collectively as the Generation of '37, Alberdi was inspired by the model of the United States.<sup>48</sup> His book *Bases y puntos de partida para la organización política de la República Argentina* (*Bases and Points of Departure for the Political Organization of the Argentine Republic*), published in 1852, has been called the *Federalist Papers* of Argentina, and Alberdi is remembered today as the father of the Argentine Constitution.<sup>49</sup> Although Alberdi was absent from the convention, through *Bases* he became its leading intellectual influence.<sup>50</sup>

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42. Scallen, *supra* note 18, at 1726–27.

43. Miller, *supra* note 7, at 1499.

44. See Christopher J. Walker, *Toward Democratic Consolidation? The Argentine Supreme Court, Judicial Independence, and the Rule of Law*, 18 FLA. J. INT'L L. 745, 767 (2006).

45. Miller, *supra* note 7, at 1509–10.

46. *Id.* at 1510. Predictably, the most populous province, Buenos Aires, opposed equal representation; Buenos Aires ultimately seceded and refused to join the new Argentine Confederation. William C. Banks & Alejandro D. Carrió, *Presidential Systems in Stress: Emergency Powers in Argentina and the United States*, 15 MICH. J. INT'L L. 1, 12 (1993).

47. Banks & Carrió, *supra* note 46, at 12.

48. Miller, *supra* note 7, at 1501.

49. Robert S. Barker, *Constitutionalism in the Americas: A Bicentennial Perspective*, 49 U. PITT. L. REV. 891, 892 (1988); Banks & Carrió, *supra* note 46, at 12; 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, 131–32 (1997).

50. Miller, *supra* note 49, at 131.

In *Bases*, Alberdi argued that a thoughtful blueprint for Argentine political liberty would also unleash Argentine economic prosperity.<sup>51</sup> Above all, Argentina needed people: when it became an independent nation in 1816, Argentina had only half a million inhabitants,<sup>52</sup> while its territory covered an area roughly the size of the entire United States east of the Mississippi. By 1852, its population was still only one million, and the land itself remained a wilderness with no notable industry or agriculture, no canals, no railroads, and no urban energy beyond Buenos Aires.<sup>53</sup> At that time, Argentina desperately needed a growing economy and the people to build it.

Alberdi's slogan was *gobernar es poblar* (to govern is to populate).<sup>54</sup> He believed Argentina would continue to stagnate unless it attracted European immigrants and the foreign investment needed to build industry and infrastructure. His comrade in the Generation of '37, Domingo Faustino Sarmiento, likewise contended that Argentina needed a national government that "proposes as its sole objective to devote itself to populating the country and creating riches."<sup>55</sup> As Jeremy Adelman has written, the reformers' goal was "to create a republican regime for the political capital while concocting a monetary regime for private capital."<sup>56</sup>

Alberdi looked to the dazzling prosperity of the United States for examples of the riches that hyper-population could bring. He had an astounding knowledge of foreign constitutions and had studied closely the U.S. Constitution and the constitutions of several states (especially Massachusetts and California) as possible roadmaps to a prosperous future.<sup>57</sup> Alberdi was convinced that prosperity in the United States had resulted specifically from the liberties and opportunities afforded by the U.S. Constitution, and he contended that Argentina, too, would prosper if it patterned its new constitution after the Constitution of 1787.<sup>58</sup> Another model for Alberdi was the new State of California, which had just enjoyed

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51. JUAN BAUTISTA ALBERDI, *BASES Y PUNTOS DE PARTIDA PARA LA ORGANIZACIÓN POLÍTICA DE LA REPÚBLICA ARGENTINA*, in 3 *OBRA COMPLETAS DE J.B. ALBERDI* 385, 409 (1886).

52. *See id.* at 427.

53. *Id.* at 451, 456.

54. Barbara Hines, *An Overview of Argentine Immigration Law*, 9 *IND. INT'L & COMP. L. REV.* 395, 395 (1999) (citing ALBERDI, *supra* note 51, at 527).

55. DOMINGO FAUSTINO SARMIENTO, *ARGIRÓPOLIS*, in 13 *OBRA COMPLETAS DE SARMIENTO* 17-18, 93 (Luz del Día ed., 1950).

56. JEREMY ADELMAN, *REPUBLIC OF CAPITAL: BUENOS AIRES AND THE LEGAL TRANSFORMATION OF THE ATLANTIC WORLD* 254 (1999).

57. *See* Robert S. Barker, *Background Notes and Constitutional Provisions Concerning Argentine Federalism*, 43 *DUQ. L. REV.* 539, 540 (2005).

58. *See* Manuel José García-Mansilla, *Separation of Powers Crisis: The Case of Argentina*, 32 *GA. J. INT'L & COMP. L.* 307, 311 (2004).

a sudden boom, fueled largely by offering unparalleled opportunities to its settlers.<sup>59</sup> For Sarmiento, Alberdi, and the other members of the Generation of '37, emulating the progress of the United States, and of California in particular, was Argentina's blueprint for the future.<sup>60</sup>

Prosperity would begin with immigration and investment; immigration and investment would, in turn, begin with liberty. Alberdi's view of liberty, as an incentive for foreign immigration and foreign capital, was reflected in his draft constitution, which contained protections for individual liberties similar to those in the U.S. Bill of Rights, but with added attention paid to enumerated economic liberties. Alberdi was not alone. In fact, most members of the Generation of '37 "shared a basic constitutional vision consisting of free immigration, economic growth, and the full protection of the individual liberties necessary to encourage immigration and investment."<sup>61</sup>

Certainly Alberdi was not the only liberal thinker who admired the United States; what set him apart was that he combined his borrowing with a deliberative rhetorical approach. Rather than meeting the situation with forensic rhetoric (i.e., simply ascertaining and then wholly adopting the same words from the U.S. Constitution), Alberdi considered the details, the differences, and the role of Argentine history:

[T]he only [constitution] 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.<sup>62</sup>

Alberdi focused less on particular patterns of words than on the ideas that had sparked wealth in North America, ideas that Argentina might adapt to its own ends without losing sight of the arc of Argentine history. For this reason, Alberdi's draft constitution gave (both to citizens and to foreigners) the same fundamental rights as those contained in the U.S. Bill of Rights,<sup>63</sup> but then went further in stressing particular economic liberties.

59. ALBERDI, *supra* note 51, at 403, 411–13, 453, 457.

60. SARMIENTO, *supra* note 55, at 101; *see also id.* at 17, 81.

61. Miller, *supra* note 7, at 1501.

62. A.E. Dick Howard, *The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383, 403 (1996) (citing Barker, *supra* note 49, at 892–93).

63. Banks & Carrió, *supra* note 46, at 12–13.

### III. FRAMED: THE CONSTITUTION OF 1853

Does a constitutional borrower, like Alberdi, look chiefly to the past, or to the future? In *Bases*, Alberdi distinguished between two types of constitutions: “There are constitutions of transition and creation, and definitive constitutions which conserve. The [constitutions] which South America asks for today are of the first type; they are for exceptional times.”<sup>64</sup> It is tempting of course to call Alberdi’s “definitive” constitution the forensic type, and the “transition and creation” constitution the deliberative type, but that interpretation misses the point. Our temporal focus (past, present, or future) when we draft a constitution differs completely from our temporal focus when we later interpret that constitution. In Alberdi’s terms, a constitution that aims to conserve existing institutions (or restore old ones) is a “definitive constitution,” while a constitution that aims to transform existing institutions (or invent new ones) is a “constitution of transition and creation.”

In the Argentine case, the framers sought to transform their society. Their Constitution of 1853 drew heavily from another nation’s past, but was unquestionably a “constitution of transition and creation.” The constitutional convention itself was a deliberative body; it is hard to see how any constitutional convention can be otherwise.<sup>65</sup>

Interpreting that constitution later, however, is a rhetorical act that can take either the forensic or the deliberative approach. The forensic interpreter focuses on original understanding, believing we can know the constitution’s present-day meaning by knowing what it meant (or was meant to mean) in the past. The deliberative interpreter focuses more on the likely future effects of a particular reading, believing that interpretation is more than archaeology. Note that these approaches hold regardless of whether the constitution is borrowed; constitutional borrowing only scrambles the concepts of “past” and “future” even more.

The Argentine framers of 1853 were, in a sense, deliberative. They fixed their eyes on the horizon, the future they hoped to create. They knew their constitution was one of “transition and creation,” the design of a system wholly new to Argentina, and they made no claim to a “definitive” constitution that preserved the system already in place. In the words of one delegate:

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64. ALBERDI, *supra* note 51, at 410.

65. Even if it largely codifies past practice, a constitutional convention’s role is not to approve a “restatement” but to enact rules with future effect.

Constitutions are sometimes the result and many other times the cause of the moral order of Nations.—In England, in the United States, the Constitution has been the result of [existing] order and good custom.—Among us, as in many other parts, the Constitution will be the cause, she will be the instrument which tempers our habits and which educates our Peoples.<sup>66</sup>

The Constitution of 1853 was “a forward-looking vision of what its drafters wished Argentina to become.”<sup>67</sup>

But, as constitutional borrowers, the framers, like Janus, had a second face that looked to the past—in this case, to Philadelphia in the summer of 1787. The new Constitution of Argentina borrowed heavily from the U.S. Constitution. The government it established was both republican and federalist. Its design was based on the principle of separation of powers, dividing the federal government’s power between the President, judiciary, and Congress. The bicameral Congress comprised a Senate, where each province received equal representation, and a House of Deputies, where representation was apportioned by population.<sup>68</sup>

Of course, many of these borrowings from the United States had been proposed earlier by Alberdi. Yet his rhetoric had been deliberative, examining multiple foreign constitutions to weigh the likely effects of the borrowings on Argentina’s own future. The framers’ rhetoric was different. They asked not *why* something had been done in the United States, nor *how*; they asked only *what* had been done, so they could adopt it. José Benjamin Gorostiaga indicated this forensic focus when he introduced the Drafting Committee’s version of the Constitution to the Convention, stating that this new draft had been “cast in the mold of the Constitution of the United States, the only model of a true federation which exists in the world.”<sup>69</sup>

We might say about constitutions what William James said about men: “There is very little difference between one and another, but what little

66. Miller, *supra* note 7, at 1515 (quoting Congreso General Constituyente de la Confederación Argentina, Session of Apr. 20, 1853, in 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS, 1813–1893, at 483 (Emilio Ravignani ed., 1937) (statement of Huergo)).

67. *Id.* at 1501.

68. Banks & Carrió, *supra* note 46, at 12–13.

69. García-Mansilla, *supra* note 58, at 312; Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT’L J. CONST. L. 269, 270 (2003) (quoting Congreso General Constituyente de la Confederación Argentina, Session of Apr. 20, 1853, in 4 ASAMBLEAS CONSTITUYENTES ARGENTINA, 1813–1893, at 468 (Emilio Ravignani ed., 1937) (statement of Goratiaga)).

there is, is very important.<sup>70</sup> The forensic/deliberative distinction goes to the root of the matter of borrowed constitutions. The forensic view stresses the resemblances between borrower and borrowee, whereas the deliberative view sheds light on their differences. While they scavenge from the same past, the forensic borrower is more attuned to law, the deliberative borrower more to history.

For example, while Alberdi had proposed a tripartite national government modeled after the United States, his deliberative approach led him to balance power differently among the three branches. His particular knowledge of South American history, and the region's persistent tendencies toward strongman rule, for instance, had persuaded Alberdi that Argentina required a stronger executive than the United States:

Give to the executive all the power possible, but give it to him by means of a constitution. This kind of executive power constitutes the dominant need in constitutional law at this time in South America. The attempts at monarchy, [and] the tendency . . . towards dictatorship are the best proof of the need we speak of.<sup>71</sup>

Alberdi's belief that Argentine traditions made strong executives inevitable led him to propose an especially vigorous and powerful presidency, stronger than its counterpart in North America.<sup>72</sup>

Besides balancing power differently between the three branches, Alberdi's deliberative approach also led him to balance power differently between the national and provincial governments. While he patterned his proposed constitutional design after the federal model of the United States, he chose nonetheless to work within the Castilian tradition of strong central power. As a result, Alberdi favored giving Argentina's national government more power relative to the Argentine provinces than the U.S. national government enjoyed relative to its states.<sup>73</sup> In his draft constitution, Alberdi also authorized the President to declare a "state of siege," suspending most constitutional rights in the event that the constitution or government were jeopardized by external attack or internal unrest.<sup>74</sup>

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70. LINDA SIMON, WILLIAM JAMES REMEMBERED 144 (1999). Actually, James overheard this statement from a carpenter, but he usually gets credit.

71. ALBERDI, *supra* note 51, at 491.

72. García-Mansilla, *supra* note 58, at 312.

73. CONST. ARG. § 6.

74. *Id.* § 99.

Alberdi's constitution also deviated from the U.S. Constitution by devoting more attention to economic liberties. While Alberdi thought the U.S. Constitution had helped stimulate economic growth, he nevertheless doubted whether Argentina could replicate the prosperity of the United States simply by copying the words of its constitution. Alberdi's proposed list of individual rights was longer than the U.S. Bill of Rights. While this was partly due to the influence of France's Declaration of the Rights of Man and Citizen of 1789, it also reflected the Alberdian vision of prosperity-through-liberty. *Bases* is Alberdi's salute to the promise of capitalism (one commentator has claimed it was "as though the equivalent of *The Federalist* was devoted entirely to laissez faire economic theory"),<sup>75</sup> and it is logical that Alberdi's constitution was more explicit than the U.S. Constitution in its protections of property and commerce.<sup>76</sup> Thus Alberdi's constitution granted "[a]ll the inhabitants of the Nation" the right "to work and perform any lawful industry," the right "to navigate and trade," the right "to make use and dispose of their property," and so on,<sup>77</sup> in order to promote one of its chief aims—a thriving Argentine economy.

Another of Alberdi's deviations from the U.S. model is the set of specific incentives he offered to immigrants. Alberdi was not alone in thinking that immigrants could be attracted to Argentina if the nation offered them robust individual liberties. Sarmiento, for example, wrote that capital followed liberty (it "was through the liberty offered to their citizens that the great economic powers achieved their success"<sup>78</sup>), and he later went as far as describing liberty itself as a type of capital. But it was Alberdi's particular deliberative approach—and his willingness to take goal-oriented departures from the parent text—that led Alberdi to incorporate the right to immigrate and the protection of immigrants as explicit constitutional principles.<sup>79</sup>

Unlike the U.S. Constitution, the Argentine Constitution sounds at times as if penned by Emma Lazarus: it explicitly declares the nation's commitments to "allow all foreigners to enter Argentina who will work the

75. Miller, *supra* note 49, at 133.

76. *See generally id.* at 131–34.

77. CONST. ARG. § 14.

78. DOMINGO FAUSTINO SARMIENTO, COMENTARIOS DE LA CONSTITUCIÓN DE LA CONFEDERACIÓN ARGENTINA, *reprinted in* 8 OBRAS COMPLETAS DE SARMIENTO 101 (Luz del Día ed., 1950) [hereinafter SARMIENTO, COMENTARIOS].

79. As with economic liberties, Alberdi thought copying the text of the U.S. Constitution would be insufficient if Argentina hoped to emulate the success of the United States in attracting immigrants. Alberdi was second to none in his admiration of the U.S. Constitution, but he did not think its words were magical in themselves.

land, improve industry, or teach the arts and sciences,” and to “provide equal rights for all foreigners.”<sup>80</sup> It “extend[s] the rights of liberty, general welfare, and justice to ‘all men in the world who wish to dwell on Argentine soil,’” giving even to noncitizens equal rights and freedom from military service.<sup>81</sup> According to Miller’s count, the specific rights accorded to immigrants are tolerance of religious practices, legislation allowing marriage of persons of different religions, freedom of movement within Argentina, equal rights in private law matters, access to the lower ranks of public employment, the right to property, freedom to work and engage in industry, freedom of commerce, easy transfer of property, and an efficient judicial system to provide redress.<sup>82</sup>

As with the provisions on economic liberty, these liberties are particular textual departures from the U.S. Constitution, though even these differences were adopted to emulate U.S. conditions. This explicit constitutional emphasis on immigration would shape Argentina’s immigration and population policies for decades to come.<sup>83</sup>

In the Constitution of 1853, we see the problem that confronts those who would interpret a borrowed constitution. The Argentine Constitution’s provisions may be divided into two groups: those that directly copy the U.S. Constitution, and those that do not. Provisions that do not directly copy the U.S. Constitution may be subdivided into two smaller groups: those geared to accomplishing the same effects achieved by similar sections of the U.S. Constitution (but that simply make that goal more explicit, as with the economic liberty provisions or the provisions on immigration), and those addressed particularly to Argentine needs (as with the strong executive, for example, or the balance of powers between national and subnational governments).

Knowing all this, how much weight should be given to the U.S. Constitution when interpreting the Constitution of Argentina? Whether the words we examine are copied or entirely new, are we to look mainly to the past (i.e., the original understanding of the parent text, and perhaps how it was later interpreted), or to the future (i.e., focusing on the effects that the copiers hoped to achieve, and favoring a reading that best accomplishes those goals)? Is our inquiry forensic or deliberative?

Even borrowers who agree on the initial copying may disagree on its later interpretation, depending upon whether the approach they take to the

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80. Hines, *supra* note 54, at 395 (citing CONST. ARG. ch. I, §§ 20, 25 (amended 1994)).

81. *Id.* (citing CONST. ARG. pmb. (amended)).

82. Miller, *supra* note 7, at 1503.

83. Hines, *supra* note 54, at 395.



parent text is forensic or deliberative. In the Argentine case, this disagreement is shown in the debate between Alberdi and Sarmiento following the enactment of the Constitution of 1853.

#### IV. REFRAMED: SARMIENTO, ALBERDI, AND THE CONSTITUTION OF 1860

In the 1850s, Argentina's showdown over interpretation approached its high noon, as Sarmiento and Alberdi now permanently parted ways. One of their open disputes concerned the proper role of the U.S. Constitution in shaping Argentina's new constitutional order. While both agreed that Argentina could learn much, and borrow much, from the U.S. model, they ultimately differed over how much deference was owed the parent constitution. This divergence was probably inevitable, given their disagreement about what constitutional borrowing could (and could not) accomplish. The surprise, rather, is that they had ever concurred on the decision to borrow in the first place.

##### A. *Sarmiento's Forensic Stance: The Transformational Promise of Borrowing*

Sarmiento's deference to the U.S. Constitution was presaged by his lifelong infatuation with the United States,<sup>84</sup> which he saw as "the highest point of civilization thus far attained by the most noble part of the human species."<sup>85</sup> This admiration, formed initially from afar, was immeasurably deepened by Sarmiento's first visit to the United States in 1847.<sup>86</sup> That

84. See, e.g., Domingo Faustino Sarmiento, *The Condition of the South American Republics in the Middle of the Century* (report to the Historical Institute of France, 1852), reprinted in A SARMIENTO ANTHOLOGY 314 (Allison Williams Bunkley ed., Stuart Edgar Grummon trans., 1948) [hereinafter A SARMIENTO ANTHOLOGY] ("There is no other principle in prospect for South America, no other north star"); ELDA CLAYTON PATTON, SARMIENTO IN THE UNITED STATES 121 (1976) ("There is no republic in the world but that of the United States"). Many of Sarmiento's post-1847 writings, such as *Argirópolis* (1850), reflect his view of "North America" (the United States) as a desirable model. See, e.g., ALLISON WILLIAMS BUNKLEY, THE LIFE OF SARMIENTO 321 (1952) [hereinafter THE LIFE OF SARMIENTO]. Then and now, Sarmiento has been criticized for his unquestioning admiration for the United States. See Michael Aaron Rockland, *Sarmiento's Views on the United States*, in SARMIENTO AND HIS ARGENTINA 45–46 (Joseph T. Criscenti ed., 1993). But see Harrison E. Salisbury, *Introduction*, in PATTON, *supra*, at xi–xii (contending that Sarmiento "was no blind admirer of the United States").

85. NICOLAS SHUMWAY, THE INVENTION OF ARGENTINA 159 (1991); see also A SARMIENTO ANTHOLOGY, *supra* note 84, at 313.

86. "[Sarmiento's] American trip is somewhat comparable to a college experience. . . . [T]he United States was his alma mater from which he drew his political inspiration and to which he would be glad to return." FRANCES G. CROWLEY, DOMINGO FAUSTINO SARMIENTO 103 (1972); see also Allison Williams Bunkley, *Introduction*, in A SARMIENTO ANTHOLOGY, *supra* note 84, at 36–37; PATTON, *supra* note 84, at 1.

visit “was the turning point in his thinking”<sup>87</sup> and convinced him that the United States was a model civilization.<sup>88</sup>

In *Comentarios de la Constitución de la Confederación Argentina de 1853*,<sup>89</sup> Sarmiento advocated an interpretation in which the U.S. Constitution loomed large in Argentine constitutional law and practice. Citing the *Federalist Papers*, the *Commentaries* of Joseph Story, and numerous other authorities,<sup>90</sup> Sarmiento argued that the Argentine Constitution must be interpreted in agreement with U.S. constitutional law and practice: “North American constitutional law, the doctrine of its statesmen, the declarations of its tribunals, the constant practice in analogous or identical points, are authority in the Argentine Republic, can be alleged in litigation, . . . and adopted as genuine interpretation of our own Constitution.”<sup>91</sup> In Sarmiento’s view, the Argentine Constitution was meant to be interpreted in exact accord with U.S. constitutional law.

In *Comentarios*, Sarmiento made several distinct but mutually supporting arguments to build his case. He argued from the text’s plain meaning, for example, noting that the preambles of the two constitutions are identical: “[I]t would be monstrous, if not to say ridiculous, to pretend that the same ideas, expressed with the same words, for the same ends, might produce different results in our Constitution or have a different meaning.”<sup>92</sup> Sarmiento reasoned that, by adopting language that matched

87. See THE LIFE OF SARMIENTO, *supra* note 84, at 303–04.

North America replaced France and Europe as [Sarmiento’s] model for civilization. The United States became his idol. . . . His idea of civilization suffered a sad disillusionment at the hands of Thiers, Guizot, and the France of Louis Philippe. Now that ideal was renovated by the United States. It was brought once more to life, and he had a living model in the Republic of the North.

*Id.*; see also PATTON, *supra* note 84, at 2.

88. Sarmiento was particularly impressed by California—a model of what immigration could accomplish—and by the town meetings of New England. See Samuel L. Baily, *Sarmiento and Immigration: Changing Views on the Role of Immigration in the Development of Argentina*, in SARMIENTO AND HIS ARGENTINA, *supra* note 84, at 134; Noel F. McGinn, *The Failure of Modernization Theory in Nineteenth-Century Argentina*, in SARMIENTO AND HIS ARGENTINA, *supra*, at 164–65 (“For [Sarmiento], civilization was at its peak in Massachusetts.”).

89. SARMIENTO, *COMENTARIOS*, *supra* note 78.

90. Miller, *supra* note 7, at 1516.

91. *Id.* at 1517 (quoting SARMIENTO, *COMENTARIOS*, *supra* note 78, at 59).

92. *Id.* at 1516 (quoting SARMIENTO, *COMENTARIOS*, *supra* note 78, at 60). Besides noting these strict textual similarities, Sarmiento made a broader argument about the intent of the drafters. He reasoned that since the new nation had lacked any history as a federal republic, the Argentine framers had sensibly chosen to copy the constitution of the one such republic in the world. Logic therefore suggests that they intended also to copy that nation’s constitutional interpretations and practice: “The [Constitutional] Congress wanted the young Federation, inexperienced in the practice of the form of government which it embraced, not to launch itself on a new path blindly and without a guide, and

exactly the U.S. Constitution, the framers of the Argentine Constitution had adopted U.S. constitutional practice in its entirety: “North American commentary becomes Argentine commentary; North American practice, Argentine rules, and the decisions of its federal tribunals become antecedents and norms for our own.”<sup>93</sup>

### *B. Alberdi’s Deliberative Stance: The Limits of Borrowing*

While Sarmiento’s approach to borrowing was shaped by his longstanding admiration of foreign models, Alberdi’s approach was the product of long-held convictions about constitutions and history.<sup>94</sup> In *Fragmento preliminar al estudio del derecho* (*Preliminary Fragment to the Study of Law*), written when he was only twenty-five, Alberdi distinguished two categories of law: *derecho*, the organic law of a people, and *ley*, the material manifestations in collected written laws.<sup>95</sup> “Knowing written laws is not the same as knowing organic law,” he wrote, “because written laws are merely the imperfect and frequently distorted image of organic law which lives in lively harmony with the social organism.”<sup>96</sup> Echoing Hegel’s emphasis on national “self-consciousness,” Alberdi held that a “nation is not a nation except by the profound and reflective awareness of those elements that comprise it. Only at that moment is a nation civilized; prior to that moment it had been instinctive, spontaneous, developing without knowing itself, without knowing where, how or why.”<sup>97</sup>

These formulations, while abstract, nonetheless led Alberdi to concentrate on practical realities.<sup>98</sup> Later, in *Bases*, he argued that “the form of the constitution in itself was less important than its correspondence to the realities and needs of the nation.”<sup>99</sup> Although such a

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therefore gave it all the science and all the practice of the only federation which exists.” *Id.* at 1517 (quoting SARMIENTO, COMENTARIOS, *supra* note 78, at 60).

93. *Id.* (quoting SARMIENTO, COMENTARIOS, *supra* note 78, at 60).

94. Alberdi’s ideas about history and progress were especially influenced by the writings of Giambattista Vico, Johann Gottfried von Herder, and Adam Smith, which Alberdi had studied as a young man. See John E. Dougherty, *Juan Bautista Alberdi: A Study of His Thought*, 29 THE AMERICAS 489, 492 (1973); Harold Eugene Davis, *Juan Bautista Alberdi, Americanist*, 4 J. INTER-AM. STUD. 53, 58 (1962).

95. SHUMWAY, *supra* note 85, at 123; ADELMAN, *supra* note 56, at 179–80.

96. *Id.* at 123.

97. *Id.*

98. “[W]e must recognize that legislators cannot make constitutions . . . [Their] proper role is to discover and formulate . . .” Davis, *supra* note 94, at 63 (citing Alberdi, *supra* note 51).

99. *Id.* “According to [Alberdi’s] criterion, a constitution is not a body of doctrines or theories reflecting the learning of a legislator, but the true and faithful expression of the history of a people, its

sentiment could point toward federalism, Alberdi understood that there is nothing magical about the U.S. Constitution per se. The point was not to copy the U.S. or any other model, but to adopt a constitution that addressed Argentine realities and Argentine needs.<sup>100</sup>

In *Estudios sobre la Constitución Argentina de 1853*, published several months after Sarmiento published *Comentarios*, Alberdi decried Sarmiento's interpretive approach and urged instead a more deliberative reading.<sup>101</sup> Alberdi denied that the Argentine framers had merely duplicated the U.S. Constitution. He acknowledged that the words of both constitutions were identical in places, but he argued that the Argentine Constitution was nevertheless an original work because it had been drafted "with Argentine history in mind."<sup>102</sup> (Somewhere, Pierre Menard was smiling.) It would be improper, therefore, to treat the U.S. Constitution or its later elaborations as binding authority: "To falsify or bastardize the National Constitution of the Argentine Republic, one need only interpret it with the commentaries of the Constitution of the United States."<sup>103</sup>

For Alberdi, the originality of any constitution lay in its consciousness of national history; the Argentine constitution must therefore be interpreted, as it was drafted, "with Argentine history in mind."<sup>104</sup> For Argentina, history meant a long experience under either imperial rule or indigenous dictatorship, including the laws enacted during that time: "[We are] the product of this legislation; and while we should change the ends, the *means* for a long time must be those under which we were educated."<sup>105</sup>

Because Alberdi did his reading in light of Argentine history, the differences between the Argentine and U.S. texts loomed larger for him

customs, of its prevailing manner of life and feeling." RICARDO LEVENE, *A HISTORY OF ARGENTINA* 451 (William Spence Robertson ed. & trans. 1937).

100. See Davis, *supra* note 94, at 63.

101. JUAN BAUTISTA ALBERDI, *ESTUDIOS SOBRE LA CONSTITUCIÓN ARGENTINA DE 1853*, in 5 *OBRAS COMPLETAS DE JUAN BAUTISTA ALBERDI* 148 (1886). In his responses to Sarmiento, Alberdi wisely answered [Sarmiento's] attacks by pointing to the difference between the two nations. What would be suitable for one would not work for the other. The history and the tradition of North America were to Alberdi's way of thinking sufficiently distinct from that of South America to require differences in the basic law and differences in the organization. *THE LIFE OF SARMIENTO*, *supra* note 84, at 357.

102. Miller, *supra* note 7, at 1520 (citing ALBERDI, *supra* note 101, at 159). Alberdi argued that "everything is different in the two constitutions," notwithstanding their similar language, and that "the federal form which is common to both makes them appear similar to the eyes of the inattentive and superficial observer." Segundo V. Linares Quintana, *Comparison of the Constitutional Basis of the United States and Argentine Political Systems*, 97 U. PA. L. REV. 641, 642 (1949).

103. Miller, *supra* note 7, at 1519 (quoting ALBERDI, *supra* note 101, at 148).

104. *Id.* at 1520 (quoting ALBERDI, *supra* note 101, at 159).

105. *Id.* (quoting ALBERDI, *supra* note 101, at 151).

than they did for Sarmiento. Indeed, even in those instances when the two constitutions were identical, Alberdi cautioned strenuously against downplaying the many differences between the histories of the two texts. Argentina had spent three hundred years under a system in which all power rested with the Spanish Crown, followed by homegrown tyranny; this was why, he argued, Argentina needed a stronger presidency than that of the United States.<sup>106</sup> For the four preceding decades, Argentina had careened through chaos and civil war; this was why Argentina's central government needed more control over the provinces than the U.S. government had over the states.<sup>107</sup> Alberdi did not view Argentine history and tradition as authoritative, but he firmly believed that they afforded the only workable foundations on which to build toward the future. At the same time, he was not constrained by the past: his own constitution had been written with the future ever in mind, and it was natural that Alberdi would take a more future-oriented—i.e., deliberative—approach to the subsequent task of interpretation.

### C. *The Constitution of 1860*

The Alberdi/Sarmiento debate was resolved—in Sarmiento's favor—in the constitutional reforms that followed. Buenos Aires, the largest Argentine province, had refused to take part either in the convention that adopted the Constitution of 1853 or in the resulting Argentine Confederation. During the 1850s, Buenos Aires and the Confederation collided in both direct and indirect ways,<sup>108</sup> each enlisting foreign powers to destabilize the other, each deploying its own forces in battle.<sup>109</sup> Buenos Aires was eventually defeated by Confederation forces led by General

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106. *Id.* at 1519. On differences between the U.S. and Argentine presidencies, see JOHN W. WHITE, ARGENTINA: THE LIFE STORY OF A NATION 114 (1942); SHUMWAY, *supra* note 85, at 154; Linares Quintana, *supra* note 102, 645.

107. Miller, *supra* note 7, at 1519–20 (quoting ALBERDI, *supra* note 101, at 157–59). On differences between the U.S. “states’ rights” model and the Argentine balance of power between national and provincial governments, compare CONST. ARG. arts. 5, 6, with U.S. CONST. art. IV, § 4; see also Miller, *supra* note 7, at 1520 (citing ALBERDI, *supra* note 101, at 182–83); WHITE, *supra* note 106, at 113; ADELMAN, *supra* note 56, at 205; SHUMWAY, *supra* note 85, at 154; Linares Quintana, *supra* note 102, at 645; Gabriel L. Negretto & José Antonio Aguilar-Rivera, *Rethinking the Legacy of the Liberal State in Latin America: The Cases of Argentina (1853–1916) and Mexico (1857–1910)*, 32 J. LATIN AM. STUD. 361, 378 (2000).

108. On confrontations between Buenos Aires and the Confederation provinces in the 1850s, see generally DAVID ROCK, ARGENTINA 1516–1987: FROM SPANISH COLONIZATION TO ALFONSIN 121–23 (1987).

109. Miller, *supra* note 7, at 1521.

Urquiza.<sup>110</sup> As a condition of peace, Buenos Aires agreed to join the Confederation, but subject to changes in the constitution.<sup>111</sup> Under the agreed-to process,<sup>112</sup> proposed constitutional changes were subject to approval by (1) a provincial Examining Committee for the Buenos Aires province and (2) a new constitutional convention for the Argentine nation, with each province represented in proportion to its population.<sup>113</sup>

The provincial Examining Committee that reviewed proposed constitutional changes used rhetoric that was markedly forensic, accepting Sarmiento's view that the Argentine Constitution would "lack meaning" without U.S. legislation and constitutional doctrine.<sup>114</sup> Had Hegel been eavesdropping, he might have characterized the discussion as "good news, bad news." The good news is that the Argentinians do speak of a constitution as something divine and exalted; the bad news is that the constitution they are talking about happens to belong to someone else.

Moreover, while acknowledging that it is proper to consider the circumstances of particular nations and that "every People has its own way of being," the Committee members believed such considerations are trumped by universal principles: "Free peoples share a political morality and certain fixed principles whose essence cannot be modified," and these fixed principles were contained in the U.S. Constitution.<sup>116</sup> It was "the democratic government of the United States," not that of Argentina, that "has been the ultimate result of human logic."<sup>117</sup> The constitution for the ages, Committee members believed, had been created by the solons in Philadelphia in 1787, not by the borrowers at Santa Fé in 1853. Indeed, the Committee members' words almost suggest an inferiority complex: since the U.S. Constitution "comes closer to eternal constitutional principles than anything Argentina might write on its own,"<sup>118</sup> Argentina must not "pretend to innovate in constitutional law, casting aside the lessons given

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110. ROCK, *supra* note 108, at 123.

111. Miller, *supra* note 7, at 1522.

112. The process was set forth in the Pact of San José de Flores (Nov. 11, 1859). *See, e.g.*, LEVENE, *supra* note 99, at 460.

113. Miller, *supra* note 7, at 1521–23.

114. *Id.* at 1524 (quoting Convención del Estado de Buenos Aires encargada del examen de la Constitución Federal [hereinafter Buenos Aires Convention], *Informe de la Comisión Examinadora de la Constitución Federal*, Apr. 3, 1860, in 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS, 1813–1898, at 769 (Emilio Ravignani ed., 1937)).

115. Miller, *supra* note 7, at 1523–24.

116. *Id.* at 1524–25.

117. *Id.*

118. *Id.* at 1524.

by the experience, the truths, accepted by the conscience of humankind.”<sup>119</sup>

Forensic rhetoric was also in full voice at the subsequent constitutional convention.<sup>120</sup> Indeed, the delegates made clear that they sought to reform the constitution by bringing it more in line with the sacred model, undoing the deviations of 1853 by erasing the differences between the two texts.<sup>121</sup> One delegate described the 1860 constitution as having “done nothing more than restore the constitutional law of the United States in the part that was changed.”<sup>122</sup> The framers of 1853 took the U.S. Constitution as a model, “but . . . did not respect this sacred text, and an ignorant hand made deletions or alterations of great importance, pretending to improve it.”<sup>123</sup> For example, the deletion of the Ninth Amendment<sup>124</sup> from the Argentine text just showed that “those who deleted it knew less than those who made that great [United States] Constitution.”<sup>125</sup> One of the Committee members, Vélez Sársfield, even suggested that the drafters of the Constitution of 1853 had been ignorant compared to the drafters of the U.S. Constitution.<sup>126</sup>

As he had in *Comentarios*, Sarmiento argued that it was even irrelevant whether the drafters had understood the reasoning behind the provisions they adopted. Asked to explain the meaning of one provision, he admitted that it was “nebulous and obscure” and confessed that he himself could not explain it. He replied, however, that it was enough “to know that it [was] literally copied from the Constitution of the United States, and [because it is an exact copy,] if there is anything which is clear and luminous, it is this part which seems nebulous and obscure to us right now.”<sup>127</sup>

119. *Id.* (quoting Buenos Aires Convention, *Informe de la Comision Examinadora de la Constitución Federal*, Apr. 3, 1860, in 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS, *supra* note 114, at 769).

120. The Buenos Aires Convention met from January 5 to May 12, 1860, and made twenty-two alterations to the text of the 1853 Constitution. WHITE, *supra* note 106, at 107.

121. See also THE LIFE OF SARMIENTO, *supra* note 84, at 382 (noting that at the 1860 convention Sarmiento, following *Comentarios*, sought to “adopt wherever possible the spirit, if not the actual text, of the basic law of the United States”).

122. Miller, *supra* note 7, at 1525 (quoting Buenos Aires Convention, Session of Apr. 25, 1860, at 791 (statement of Vélez Sársfield)).

123. *Id.*

124. The Ninth Amendment of the U.S. Constitution was adopted, almost verbatim, as article 33 of the amended Argentine Constitution of 1860. Linares Quintana, *supra* note 102, at 648.

125. Miller, *supra* note 7, at 1525 (quoting Buenos Aires Convention, Session of May 1, 1860, at 843 (statement of Vélez Sársfield)).

126. *Id.*

127. *Id.*

As in *Comentarios*, Sarmiento argued that Argentina should treat U.S. constitutional case law as controlling authority: “[H]aving adopted the organization of the federal Supreme Court of the United States we must adopt its attributions and its case law.”<sup>128</sup> At times, Sarmiento focused less on the sanctity of the U.S. Constitution and more on the jurisprudential certainty that will be gained by adopting U.S. case law: “not because it is more or less applicable to us, but because we will find ourselves with a case law to which no one will be permitted to say, ‘this is my opinion.’”<sup>129</sup> Whether we side with Sarmiento or Alberdi on these issues is beside the point; the point is that they *are* on different sides, and that this reality is reflected in their rhetoric.

By 1860, Sarmiento’s position had carried the day. In an 1877 case, *De la Torre*,<sup>130</sup> the Argentine Supreme Court noted:

The system of government which rules us is not of our own creation. We found it after it had long years of practice, and we appropriated it. Rightfully it has been said that one of the main advantages of this appropriation has been the vast body of doctrine, practice, and jurisprudence which illustrate and complement the fundamental rules that we can and ought to use in everything which we have not decided to change with specific constitutional provisions.<sup>131</sup>

The forensic approach dominated Argentine jurisprudence into the twentieth century.<sup>132</sup>

#### D. Sarmiento and Alberdi

In some ways, there is little difference between Alberdi and Sarmiento. Both seek essentially the same future for Argentina, and both seek to effect that future through a written constitution, in particular a U.S.-style constitution.<sup>133</sup> But what little difference there is, is very important.<sup>134</sup>

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128. Jonathan M. Miller, *Courts and the Creation of a “Spirit of Moderation”: Judicial Protection of Revolutionaries in Argentina, 1863–1929*, 20 HASTINGS INT’L & COMP. L. REV. 231, 241 (1997) (quoting Buenos Aires Convention, Session of May 7, 1860, at 870 (statement of Sarmiento)).

129. Rosenkrantz, *supra* note 69, at 273.

130. Corte Suprema de Justicia [CSJN], 1877, “De la Torre/recurso de habeas corpus,” Fallos (1877-19-231) (Arg.).

131. *Id.* at 236.

132. See Miller, *supra* note 7, at 1546–47.

133. Concerning common ground between Sarmiento and Alberdi, see Joseph T. Criscenti, *Introduction*, in SARMIENTO AND HIS ARGENTINA, *supra* note 84, at 13; ADELMAN, *supra* note 56, at



They differ not about the initial decision to borrow, but about the subsequent question of interpretation, specifically how much weight to assign the parent text. Sarmiento concerns himself with the past: the meaning of the parent text. Alberdi concerns himself with the future: the effects sought by the borrowers.

Sarmiento defined “model” in a decidedly forensic way. For him, the U.S. Constitution was not just something to “learn from” or even “borrow from”; it was something to *copy*, with the aim of achieving the same effects.<sup>135</sup> “We must work to make the forms and institutions more closely related to those of North America.”<sup>136</sup> Because one of Sarmiento’s “chief strategies for overcoming Latin American traits” was “wholesale adoption of the U.S. political structure, beginning with copying its Constitution,”<sup>137</sup> it was natural that he ultimately took a forensic approach to constitutional interpretation.

Miller has aptly called Sarmiento’s interpretive approach “talismanic”; at times, Sarmiento practically depicts the U.S. Constitution as an amulet.<sup>138</sup> He would treat U.S. practice as authority in every possible case, varying only if the Argentine Constitution specifically provided

212; WILLIAM H. KATRA, *THE ARGENTINE GENERATION OF 1837: ECHEVERRÍA, ALBERDI, SARMIENTO, MITRE* 141, 167 (1996). Their break, when it came, had various causes—philosophical, political, and personal. For instance, one of Sarmiento’s central ideas—the struggle between the “civilization” of the cities and the “barbarism” of the countryside—was characterized by Alberdi as simplistic and dangerous. *See* CROWLEY, *supra* note 86, at 73–74.

134. As one of Sarmiento’s leading biographers, Allison Williams Bunkley, has explained, “Both [Alberdi and Sarmiento] had the same end in view: the unity, the peace, and the constitutional organization of their nation[.]” but “Alberdi . . . believed that the means of achieving this end would have to be adapted to the circumstances,” while “Sarmiento would allow no compromise in means. A clean sweep was necessary.” *THE LIFE OF SARMIENTO*, *supra* note 84, at 357.

135. Domingo Faustino Sarmiento, Address Delivered Before the Rhode Island Historical Society (Dec. 27, 1865), *reprinted in* A SARMIENTO ANTHOLOGY, *supra* note 84, at 315, 327–28 (arguing that Latin American nations had persisted in “adopting a form of government [federalism] that had no precedent in their history” because “the only stable republic,” “the Republic of our age” wore the “Federal garb”). Long before his first visit to the United States in 1847, Sarmiento had concluded that “North America is our model”—that Argentina should study and copy the United States. *See, e.g.*, *THE LIFE OF SARMIENTO*, *supra* note 84, at 184.

136. PATTON, *supra* note 84, at 121. Sarmiento’s fascination with U.S. constitutional law and practice was alive and well in 1868, as he concluded a three-year tour of the United States and prepared to assume the Argentine presidency. Among the books Sarmiento was reading and annotating at that time were Thomas Hare’s *The Election of Representatives*, Joseph Story’s *Commentaries on the Constitution of the United States*, Horace Burney’s *The Privilege of the Writ of Habeas Corpus*, Alfred Conkling’s *The Power of the Executive Department*, and Francis Lieber’s *On Civil and Self Government*. *THE LIFE OF SARMIENTO*, *supra* note 84, at 430–31.

137. McGinn, *supra* note 88, at 164–65. Sarmiento’s other strategies included massive immigration from “civilized” nations, as well as universal basic education. *Id.*

138. Miller, *supra* note 7, at 1518.

otherwise.<sup>139</sup> The U.S. Constitution is not just authority, it is controlling authority; it is much “more than a source of new ideas; it is a talisman.”<sup>140</sup>

For Sarmiento, the purpose of constitutional borrowing thus went far beyond mere “noble emulation.”<sup>141</sup> He genuinely believed that transplanting the U.S. constitutional system to Argentina would have a transformative effect. To become “the United States of South America,”<sup>142</sup> Argentina would need to break completely with the “Spanish way of life,” and the best way to “North Americanize” was to mimic the North American system of government.<sup>143</sup>

Such faith in the transformative power of law is what makes Sarmiento the ultimate forensic interpreter. In Miller’s words, under Sarmiento’s approach one is “not expected to focus on Argentine reality, but to trust U.S. law to construct a new Argentine reality.”<sup>144</sup> Sarmiento’s theories of law “had a touch of magic in them,” to use the words of one biographer.<sup>145</sup> “Politically the superior law was expressed in a Constitution; and, once the ‘right’ constitution was discovered by members of a society and transcribed in a document, it could not be basically changed; and it was impervious to differences of time or place.”<sup>146</sup> A more suitable description of the forensic view of borrowing is difficult to imagine.

As Sarmiento’s particular preoccupation was with the United States, Alberdi’s was with realities “on the ground.”<sup>147</sup> Alberdi scorned

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139. *Id.*

140. *Id.* at 1518. Even sympathetic biographers acknowledge the naiveté of Sarmiento’s belief that the “right” institutions could transform Argentine society and culture. *See, e.g.,* THE LIFE OF SARMIENTO, *supra* note 84, at 470–71.

141. The phrase is from *Argirópolis*. *See* CROWLEY, *supra* note 86, at 47.

142. *See* CROWLEY, *supra* note 86, at 47. “Sarmiento believed that Argentina’s most exalted destiny was to become a mirror image of the United States on the other extreme of the hemisphere.” SHUMWAY, *supra* note 85, at 160.

143. Bunkley, *supra* note 86, at 5–6, 22, 35.

144. Miller, *supra* note 7, at 1517.

145. Bunkley, *supra* note 86, at 41–42. Bunkley was referring more broadly to Sarmiento’s “theories of educational reform, immigration, economic reform, and political reform,” but the same point can be made narrowly about Sarmiento’s faith in constitutional borrowing: “The ‘democracy’ that Sarmiento believed in . . . was not something that was to grow naturally out of a culture or a history. It was something that had to be learned from books or from foreign example and superimposed upon an alien civilization.” *Id.* at 41.

146. *Id.* at 34; *see also* THE LIFE OF SARMIENTO, *supra* note 84, at 171 (“Sarmiento did not see the problems and destiny of each separate country as distinct and independent. He saw a basic similarity in the histories of all segments of the Spanish world in the nineteenth century, and the only explanation that he could find for such a fact was a common Spanish heritage.”); SHUMWAY, *supra* note 85, at 160 (quoting THE LIFE OF SARMIENTO, *supra* note 84, at 322) (calling *Argirópolis* “typical of Sarmiento’s thought. It was a blueprint concerned wholly with the abstract” and “an intellectual ideal that was far removed from reality.”).

147. *See* KATRA, *supra* note 133, at 161.

revolutionaries who embraced ideological abstractions while they disregarded the concerns and influence of Argentina's leading economic interests.<sup>148</sup> Nation-building was the art of the possible: Argentina should aim not for "an ideal republic and perfect liberty," but for "a possible republic and imperfect liberty."<sup>149</sup> To build the "*patria* you have, and not the one you wish you had, you must accept the principle of 'imperfect liberty.'"<sup>150</sup>

Accepting the principle of "imperfect liberty" meant recognizing that you can only build on "the *patria* you have."<sup>151</sup> In Nicolas Shumway's words, "Argentina's unique population (gauchos), government (caudillos), and heritage (colonial Spain) were the only possible points of departure from which to build a country."<sup>152</sup> This helps explain why Alberdi was a more forgiving observer of the Rosas dictatorship than were most of his contemporaries—Alberdi's view of Argentine history led him to view Rosas as a necessary stage in the gradual historical evolution from civil war to liberal constitutionalism.<sup>153</sup> Alberdi thought one reason that previous liberal experiments had failed in Argentina was that, by over-relying on strong legislatures and weak executives, earlier leaders had attempted a complete break with the nation's authoritarian past, rather than working within the limits imposed by Argentine realities.<sup>154</sup> This critique was part of Alberdi's larger point that Argentina could not succeed by blindly copying foreign models; rather, a sturdy constitution could only be built on the foundations of Argentina's own history.<sup>155</sup> Not surprisingly,

148. See *id.* at 22; Criscenti, *supra* note 133, at 10 (describing Alberdi's criticism of Sarmiento for misjudging the influence of Latin American economic interests). Cf. Iván Jaksic, *Philosophy and University Reform at the University of Chile: 1842–1973*, 19 *LATIN AM. RES. REV.* 57, 62–63 (1984) (noting that, while studying philosophy at the University of Chile, Alberdi had argued that philosophy was irrelevant to Latin American problems unless understood in political terms and addressed to specific needs: "He thought that metaphysics was too abstract and predicted that it would never find roots in the region.").

149. ADELMAN, *supra* note 56, at 288.

150. SHUMWAY, *supra* note 85, at 184. Alberdi's words recall, of course, those of a recent U.S. Secretary of Defense. See *Troops Put Rumsfeld in the Hot Seat*, CNN.COM, Dec. 8, 2004, <http://www.cnn.com/2004/US/12/08/rumsfeld.kuwait/index.html>.

151. See Davis, *supra* note 94, at 65; KATRA, *supra* note 133, at 141.

152. See SHUMWAY, *supra* note 85, at 153–54, 184; KATRA, *supra* note 133, at 164–65; ADELMAN, *supra* note 56, at 179.

153. Davis, *supra* note 94, at 59; SHUMWAY, *supra* note 85, at 125.

154. Negretto & Aguilar-Rivera, *supra* note 107, at 370–71.

155. On dissimilarities between the English and Spanish legacies in the Americas, see, e.g., ROCK, *supra* note 108, at xxvi; Bunkley, *supra* note 86, at 42; *THE LIFE OF SARMIENTO*, *supra* note 84, at 185; ADELMAN, *supra* note 56, at 205, 213–14; WHITE, *supra* note 106, at 113–14; LEVENE, *supra* note 99, at 452.

this apprehension about over-reliance on “exotic” foreign models led Alberdi to a very different view of constitutional copying.<sup>156</sup>

#### V. WHAT'S A CONSTITUTION FOR?

The curious case of the Argentine framing raises some deceptively simple questions. What counts as “success” in borrowing, and why does borrowing make us nervous? To think about what counts as success in constitutional borrowing, we might first ask what counts as borrowing at all. On this point, Argentina is not a close case, as the words of its constitution are so close to those of its U.S. counterpart. But what about instances where the relationship between texts is far more subtle? Is it “borrowing” whenever the institutions established by both texts are similar? What if the influence is less intentional?

Moreover, is it “borrowing” when the decision to adopt particular words is not wholly voluntary? When the sphere of choice is restricted severely, is a constitution truly the nation's own? Was it borrowing, for example, when the new nations of Poland and Romania, after the First World War, were required to adopt specific constitutional provisions as a condition of their independence?<sup>157</sup> Similarly, after the Second World War, the Allies designed the constitutional structure to be imposed on occupied Germany, and the United States played a large role in shaping the constitution of Japan.<sup>158</sup> Do terms of surrender necessarily fall outside our definition of borrowing? Why?

Many new nations have felt similarly pressed, if not compelled, to adopt constitutions that appeal to the agendas of foreign powers. During the decades of decolonization after the Second World War, some new nations' constitutions strongly resembled the constitutions of their former colonial power; as the framers of those new constitutions knew, the resemblances between texts would smooth the new nations' path to self-determination.<sup>159</sup> Similarly, the Eastern European nations that abandoned communism after 1989 were more likely to be welcomed to the family of European nations if their constitutions met certain expectations of the European Community and the Council of Europe.<sup>160</sup> Of course, such forms

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156. See ADELMAN, *supra* note 56, at 171, 179, 203–04; SHUMWAY, *supra* note 85, at 123–24; KATRA, *supra* note 133, at 22, 51; Dougherty, *supra* note 94, at 493.

157. On such questions, see Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1 INT'L J. CONST. L. 244, 248–49 (2003).

158. *Id.*

159. *Id.*

160. *Id.*

of coercion are not the same as terms of surrender; still, it is hard to argue that the coerced nations acted in complete freedom when they wrote their new constitutions.<sup>161</sup>

Even if we can agree on what counts as constitutional borrowing, what counts as success? In several respects, the Argentine Constitution of 1853/1860 might be considered a success: before 1930 (when the civilian government was brought down in a military coup), Argentina enjoyed seven decades of unbroken constitutional rule, despite being part of a region where wobbly constitutions are common. Not only did the Argentine Constitution succeed in its longevity, but it also succeeded in accomplishing the prosperity longed for by its framers. By any measure, between 1860 and 1930 Argentina did indeed succeed in attracting a spectacular influx of foreign immigrants and foreign capital.<sup>162</sup> The Argentina that Alberdi, Sarmiento, and their contemporaries dreamed of did come to fruition. If Sarmiento saw the U.S. Constitution in talismanic terms—if he “sense[d] that, if the document is followed, problems almost miraculously will be overcome”<sup>163</sup>—then he was arguably vindicated if we define the problem as how to create a prosperous Argentina. If, however, we define the problem as how to establish and enable an enduring, flourishing participatory democracy, then it is harder to call the Argentine case a clear success. While Argentina was being transformed from an underdeveloped wasteland into a booming modern economic power, Argentine politics nevertheless remained anemic.<sup>164</sup> In short, what counts as success depends on the question asked.

Constitutional borrowing unnerves us because we sense that, to succeed, a constitution must take root in a supportive surrounding culture of constitutionalism.<sup>165</sup> Such a culture recognizes that a successful constitution involves more than introducing the best mechanisms and institutions. It recognizes that constitutional law “touches on our lives more deeply and more coercively than all other branches of law,” that not all elements of a constitution’s meaning are equally able to cross national

161. *Id.* at 249.

162. See Miller, *supra* note 7, at 1541. Argentina received more than 600,000 permanent immigrants during 1881–1890 and more than 1.1 million during 1901–1910; its total population doubled every twenty years, growing from 1.7 million in 1869 to nearly 4 million in 1895 and nearly 7.9 million in 1914. That year (1914), the percentage of the population born abroad peaked at 42.7%. *Id.* (citing GINO GERMANI, *ESTRUCTURA SOCIAL DE LA ARGENTINA* 21, 81–82 (1955)); see also Spector, *supra* note 9, at 133.

163. Miller, *supra* note 7, at 1489.

164. See generally García-Mansilla, *supra* note 58, at 375–82.

165. On constitutional culture generally, see Rett R. Ludwikowski, *Constitutional Culture of the New East-Central European Democracies*, 29 GA. J. INT’L & COMP. L. 1 (2000).

borders, and that words, in any event, are imperfect vessels for international transport.<sup>166</sup> Hegel's point was that the most important elements of a constitution are impossible to borrow because a national constitution signifies national identity, national values, and national goals. Whatever its specific words, the question of whether a constitution is enforceable, the question of whether it endures the inevitable storm and stress, and the question of whether it is taken seriously by judges, politicians, and citizens—in short, the question of whether the constitution works—are questions of constitutional culture.

At the heart of constitutional culture lies the idea of taking part, of participating in self-rule.<sup>167</sup> The need for self-rule, for a citizens' ownership stake in the constitution, requires that, as Aristotle might have argued, a true understanding of the law means more than knowing the text alone. It means looking beyond the particular machinery of the constitution to see who may be at the controls. The particular structures of the national and subnational governments are important, of course, as are the particular limitations on what those governments may lawfully do; but so are principles of inclusion and participation, and so is the size of the circle of those who genuinely may exercise political power.<sup>168</sup>

Here, the history of the Argentine constitution is instructive, as its framers took more interest in commerce than in political participation. Alberdi and other members of the Generation of '37 emphasized economic liberty far more than political liberties; as Alberdi himself stated, they sought to attract “those endeavoring to populate, enrich and civilize these countries, not the political liberties, an instrument of agitation and ambition in our hands, never longed for or useful to the foreigner, who comes to us seeking well-being, family, dignity, and peace.”<sup>169</sup> This lack of political commitment during the economic boom years helps explain both that era's high level of electoral fraud and its low level of political participation. Both the military coups of 1930 and 1943 were caused in part by unrest relating to political participation, and the rise of Juan Perón was fueled by the mobilization of the working class as a political force.<sup>170</sup>

Taking part is central to constitutional culture because constitutions purport to be evidence of collective choice. In itself, a constitution

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166. Rosenkrantz, *supra* note 69, at 284.

167. *Id.*

168. Osiatynski, *supra* note 157, at 268.

169. JUAN BAUTISTA ALBERDI, SISTEMA ECONÓMICO Y RENTÍSTICO DE LA CONFEDERACIÓN ARGENTINA SEGÚN SU CONSTITUCIÓN DE 1853, in 4 OBRAS COMPLETAS DE JUAN BAUTISTA ALBERDI 143, 188 (1886) (1854).

170. *See generally* ROCK, *supra* note 108, at 214–61.

epitomizes collective choice; it also purports to guarantee that in the future those governed by it shall remain free to continue choosing collectively. This helps explain why borrowing is problematic: it means accepting the collective choice of someone else. Even if an instance of borrowing is completely voluntary, by definition borrowing means deferring to the collective choices made by others with whom the borrowers are politically unconnected.

Viewing constitutions as a form of collective choice recalls the work of scholars, such as James Boyd White, who describe law itself as constitutive rhetoric.<sup>171</sup> As Marie Failinger has written, the idea of law as constitutive rhetoric means more than a culture of argument; it means creating a rhetorical community.<sup>172</sup> Without a meaningful rhetorical community, a democracy is unstable, particularly during times of divided government—the executive, legislative, and judicial branches are perpetually at war with each other, so that in every moment of conflict “all of the stakes are placed on the table” and “the troops are called out.”<sup>173</sup> A stable democracy, by contrast, remains “a project of warranted trust” even during times of divided government, since “each branch must understand itself in relationship to each other.”<sup>174</sup>

In antiquity, the constitutive role of rhetoric was suggested indirectly by Isocrates, a leading rhetorician. Isocrates’ ideal orator demonstrated three qualities of authority: artistry, morality, and practicality.<sup>175</sup> Credibility was gained in part through artistry and command of the language, and in part by expressing common values.<sup>176</sup> Practicality, however, meant linking the audience’s goals to *logos politikos*, the preservation of the polis.<sup>177</sup>

Isocrates urged the pursuit of practical wisdom as a part of the rhetorical art.<sup>178</sup> He believed that encouraging students in “the study of speech and politics . . . [could] help to encourage and train moral consciousness,”<sup>179</sup> which would enable leaders to “deliberate and advocate in the best interests of the community,” helping them to steer the ship of

171. See, e.g., James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985); see also Anthony T. Kronman, *Rhetoric*, 67 U. CIN. L. REV. 677 (1999).

172. Failinger, *supra* note 15, at 438–40.

173. *Id.*

174. *Id.* at 438–39.

175. Lupo, *supra* note 14, at 55.

176. *Id.*

177. *Id.*

178. Scallen, *supra* note 18, at 1725.

179. *Id.*

state through seas of “uncertainty and complexity.”<sup>180</sup> Isocrates’s idea of *logos politikos*, and the idea of law as constitutive rhetoric, both imply that the rhetorical task of interpreting a nation’s laws can aid a broader project: statecraft.

The staying power of the U.S. Constitution owes something to the statecraft of lawyers of the early Republic. For America’s first lawyers, the authors and the first explainers of that constitution, rhetoric was essential to the lawyer’s role as public citizen, and was meant to be used not just to advocate on behalf of private interests, but also in the public forum on issues of public moment—“public eloquence on political themes.”<sup>181</sup> Because of its role in deciding public issues, rhetoric had a direct role in creating and transforming the principles by which citizens were governed, and in shaping the nation’s identity.<sup>182</sup> As the “process by which the commonweal conversed with itself,” law as constitutive rhetoric was central to the project of democratic statecraft.<sup>183</sup> In particular, the link between law, politics, and rhetoric assigned a special role to lawyers as natural guardians of the laws—“sentinels over the constitutions and liberties of the country”—as educators, edifiers, and explainers of republican government to the people.<sup>184</sup>

The role of interpretation in statecraft returns us to epideictic rhetoric, Aristotle’s third and final type.<sup>185</sup> As mentioned in Part I, epideictic rhetoric, sometimes called ceremonial rhetoric, is the oratory of display, in which “one is not so much concerned with persuading an audience as with pleasing it or inspiring it.”<sup>186</sup> Its specific concern is with praise and blame, with the worthy and unworthy.<sup>187</sup> As Geoffrey Hazard has written, the epideictic orator’s specific subjects are the virtues, such as “justice, courage, restraint . . . liberality, prudence and wisdom.”<sup>188</sup> The role of epideictic rhetoric is “to strengthen a consensus around certain values,” to “intensify adherence to values” that “one wants to see prevail and [that] should orient action in the future.”<sup>189</sup> That phrase, “action in the future,” is

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180. Scallen, *supra* note 21, at 842.

181. *Id.* at 847 (quoting ISOCRATES, *ANTIDOSIS* 275 (George Norlin trans., 1929)).

182. *Id.* (quoting ROBERT FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 72–84 (1984)).

183. John E. Simonett, *Forensic Rhetoric and Irving Younger*, 73 *MINN. L. REV.* 805, 805 (1988–1989).

184. *Id.* at 811 (quoting FERGUSON, *supra* note 182, at 25).

185. CORBETT & CONNORS, *supra* note 20, at 23.

186. *Id.*

187. *Id.* at 24.

188. Hazard, *supra* note 38, at 570–71 (quoting ARISTOTLE, *THE ART OF RHETORIC* 105 (H.C. Lawson-Tancred trans., 1991)).

189. Failingler, *supra* note 15, at 435 n.45 (quoting CHAIM PERELMAN, *THE REALM OF RHETORIC*



significant: the epideictic speaker seeks not to incite immediate action, but “to create a feeling or disposition to [act] at the appropriate moment.”<sup>190</sup> Sometimes our rhetoric about constitutions is neither deliberative nor forensic, but epideictic. When epideictic rhetoric is deployed to serve public ends, such as statecraft, it is better characterized as edifying rhetoric.

A constitution without edifying discourse is a thirsty constitution, as endangered as a garden that lacks water, tilling, air, or sun. No constitution, borrowed or homegrown, can survive long without voices that intensify adherence to its values. Interpreting a constitution can be deliberative or forensic, but it can also be epideictic, or edifying, if it affords an occasion to reflect on that constitution’s cherished place in society. When we use edifying discourse to extol the constitution, to “mirror or strengthen national shared beliefs,”<sup>191</sup> to argue that the constitution contains “ideas that are worth fighting for,”<sup>192</sup> we deepen the citizens’ ownership of those ideas, and we increase the chances that citizens will indeed fight for those ideas and for that constitution when the time comes. Any constitution, borrowed or not, might behave as a magnet for common values, but common sense tells us that it is harder for a nation to engage in edifying discourse when the words of the organic law are not the nation’s own.

This is another way of expressing Hegel’s argument that borrowing is problematic because the constitution of a given nation “depends . . . on the character and development of its self-consciousness.”<sup>193</sup> A borrowed constitution is not strong evidence of national self-consciousness. A borrowed constitution is harder to extol because it can easily be seen as “something made,” something that has “come into being in time.”<sup>194</sup> It is hard to see it as “something simply existent in and by itself, as divine therefore, and constant, and so as exalted above the sphere of things that are made.”<sup>195</sup> If a meaningful democratic constitution is meant in some measure as an invitation to take part, to exercise the prerogatives of membership in “We the People,” then the difference between a homegrown constitution and a borrowed one is the difference between a handwritten note and a mass-produced greeting card: even when the words

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19–20 (William Kluback trans., 1982)) (emphasis omitted).

190. *Id.*

191. *Id.* at 437.

192. *Id.* at 437–38 (quoting *Texas v. Johnson*, 491 U.S. 397, 439 (1989) (Stevens, J., dissenting)).

193. See HEGEL, *supra* note 4, ¶¶ 178–179.

194. *Id.* ¶ 178.

195. *Id.*

are indistinguishable, the sincere note means more, and has a better chance of drawing a positive response.

Yet we need not share Hegel's dim view that successful borrowings are logically impossible. There is a middle ground. We can allow a place for borrowed constitutions, but also acknowledge that they pose special challenges. As Rett Ludwikowski has written, the most effective borrowers have been those who understood their role as constitutional gardeners, "pick[ing] seedlings from different gardens and implant[ing] them, piece by piece, into living and constantly changing vegetation composed of rules, norms and institutions," and thereby creating a constitution of "a mixed character, blending together features produced by different tastes, cultures, and styles," but, in the process, making something genuinely new.<sup>196</sup>

#### CONCLUDING THOUGHTS

While we may never wholly escape the Pierre Menard dilemma posed by constitutional borrowings, we may nonetheless learn from Pierre Menard's example. If we can write and read the words of our constitution by the light of our nation's own history, we can persevere in the task of making that text our own, even if the words happen to be identical to those used by someone else. Such an accomplishment, though, is impossible unless we constantly bear in mind Hegel's essential point that constitutional culture is part of national culture.

In the end, this is the real reason why interpretation is complicated by constitutional borrowing. A constitution's meaning is not limited to the particular words used; what matters is whether We the People sense that the vows we have written are our own. What matters is whether We the People take those words as a self-addressed invitation to take part. What matters is not whether the words of our constitution were born on foreign soil, but whether we have granted them citizenship.

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196. Ludwikowski, *supra* note 165, at 9–10.