Courts and the Creation of a Spirit of Moderation: Judicial Protection of Revolutionaries in Argentina, 1863-1929

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Courts and the Creation of a "Spirit of Moderation": Judicial Protection of Revolutionaries in Argentina, 1863-1929

By Jonathan M. Miller*

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I. Introduction

Academic literature on Latin American politics almost completely ignores the political role of the judiciary, and never offers a detailed analysis of the political influence of the judiciary in individual Latin American countries. Moreover, the little work that has been done generally focuses on Latin America as a whole, and carries the implicit assumption not only that the political role of the judiciary is limited today, but that it has always been limited.\(^1\) This assumption may well be true for many Latin American countries, but some Latin American countries had important periods of political competition among members of the oligarchy before they entered twentieth century cycles of alternating military governments and populist politics.\(^2\) Given that these countries developed sophisticated institutional structures based on the U.S. Constitution, it seems odd that scholars write-off the judiciary so quickly. This Article focuses on Argentina, and in Argentina at least, the courts had a very important influence on political developments.

Any analysis of Argentine politics that ignores the courts is simply incomplete. For seven decades, the 1860’s through the 1920’s, the Argentine Supreme Court acted as a stabilizing political influence and a soother of political passions in a way that even the U.S. Supreme Court probably did not. Certainly The Federalist theorized that the U.S. federal courts, and particularly the Supreme Court, would play

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2. Larry Diamond & Juan J. Linz, *Introduction: Politics, Society, and Democracy in Latin America, in Democracy in Developing Countries: Latin America* 1, 7-9 (Larry Diamond et al. eds., 1989).
an important role in maintaining social peace. James Madison argued that judicial review by the Supreme Court was "clearly essential to prevent an appeal to the sword and a dissolution of the compact," while Alexander Hamilton noted the "benefits of the integrity and moderation of the judiciary" in the States and that the absence of a strong judiciary would "sap the foundations of public and private confidence" and "introduce in its stead universal distrust and distress." Alexis de Tocqueville validated their position in the 1830's, describing the U.S. Supreme Court as playing a vital role in maintaining "the peace, the prosperity and the very existence of the Union."

But there have also been plenty of doubters. Judge Learned Hand, for example, questioned the utility of judicial review, noting that "a society so riven that the spirit of moderation is gone, no court can save." Certainly historic mistakes like *Dred Scott* and the confirmation of the imprisonment of Eugene Debs show the Supreme Court as anything but a moderating force.

Argentina in the late nineteenth century offers many instances where the Argentine Supreme Court unequivocally acted as a moderating political influence. While there were serious political crises, it is possible to identify a long period of Argentine history during which the courts, and particularly the Supreme Court, played an important role in moderating government repression of political opponents, and

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5. *Alexis de Tocqueville, Democracy in America* 156 (Henry Reeve trans., Alfred A. Knopf, Inc. 1945) (1835,1840). His observations on the federal courts echo *The Federalist* papers:

   "The executive appeals to them for assistance against the encroachments of the legislative power; the legislature demands their protection against the assaults of the executive; they defend the Union from the disobedience of the states, the states from the exaggerated claims of the Union, the public interest against private interests, and the conservative spirit of stability against the fickleness of the democracy."

*Id.* at 156-57.


by doing so, helped instill a “spirit of moderation” among important political actors.

Argentina in the late nineteenth century offers surprising contrasts. On the one hand, in addition to disruption provoked by an unpopular war against Paraguay, Argentina endured countless small provincial revolts in the 1860s and 1870s and national revolts in 1874, 1880, 1890, 1893 and 1905. On the other hand, Argentina also enjoyed one of the highest rates of economic growth in the world. By the 1920s, Argentina was among the wealthiest countries in the world, at least on a par with the wealthier nations of Western Europe. The economy averaged growth of at least five percent per year from 1865 to 1914, and grew at even faster levels from 1919 through 1929. Immigrants came at an extraordinary rate, with a net gain of 638,000 immigrants in the decade of the 1880s alone, and social indicators, such as the literacy rate, improved dramatically. One reason political unrest and economic growth could exist together was that the unrest was comparatively confined and controlled. The Constitution, finally accepted in 1860 by all of Argentina’s provinces, was never respected in its entirety. Although the Constitution provided for a representative form of government, most elections before 1916 were fraudulent. While the Constitution provided for a

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9. This war allied Argentina with Brazil and Uruguay against Paraguay, then an important regional power, and lasted for five years (1865-1870) before Paraguay was finally defeated.

10. These revolts involved small but significant battles, with 3000 battlefield deaths in the 1880 revolt. 2 Luis H. Sommariva, Historia de las intervenciones federales en las provincias 88-89 (1931); David Rock, Argentina, 1516-1987, at 131 (1987). The revolts also involved several days of street battles and shelling within the city of Buenos Aires in 1890. See generally Juan Balestra, El Noventa: Una evolución política Argentina 153-92 (2d ed. 1935); Enrique Germán Herz, La Revolución del 90, at 191-234 (1991).


14. Id. at 424 (table). Total immigration without subtracting emigration was 841,000 from 1881-1890. Id. Immigration dropped to only a 320,000 net gain from 1891-1900 due to the economic depression and perhaps due to the political instability, but then hit a peak net gain of 1,120,000 for the decade from 1901-1910. Id.

15. Id. at 56-57 (illiteracy dropped from 77% in the 1869 census to around 25% in 1929).


17. The classic analysis of the system of electoral fraud is José Nicolás Matienzo, El gobierno representativo federal en la República Argentina 196-200, 214, 221-38 (2d ed. 1917); see also Natalio R. Botana, El orden conservador: la política argentina entre 1880 y 1916, at 178-84 (1977).
federal system with substantial provincial autonomy, in practice much of what happened in provincial politics was controlled by the President. But those limitations do not change the fact that the Constitution successfully established many rules that moderated the government’s behavior—rules that created a sense in both the government and in the opposition that certain types of repression were off limits. The existence of almost constant electoral fraud in the nineteenth century makes it easy to take a jaundiced view of Argentine constitutionalism. However, the Argentine elite that produced its 1853 Constitution had little interest in clean elections, merely in individual liberty. Moreover, that emphasis on individual liberty was probably sufficient to gradually establish a sense in both those in government and the opposition that certain types of repression would not occur. The acceptance over time by both the government and the opposition of rules protecting individual liberties helped create the confidence necessary to convince the governing party to permit free, competitive elections. The Supreme Court and the federal judiciary in general, were key to this process. The federal courts protected even revolutionaries from any form of repression not explicitly provided for by law. Not surprisingly, given the trust that the courts must have enjoyed, when a clean electoral system was finally established, it was established with the judiciary as the guarantor of the electoral process.

Several key features marked the Supreme Court’s treatment of political instability between the 1860’s and 1929. First, not only did the Supreme Court successfully maintain its independence during a period of frequent political violence, but it managed to arbitrate rules that restrained the level of repression. The Court accomplished this by: (a) developing what later became known as de facto doctrine, to govern the legal consequences of a province or the entire nation falling under the control of a revolutionary force; (b) limiting the repression of rebels after unsuccessful revolts by protecting their due process rights, keeping their sentences light, keeping military jurisdiction in check and giving liberal scope to amnesties; and (c) offering some protection from detention to opposition political figures even during a state of siege.

There were limits on what the Court could accomplish as a promoter of peaceful political change. Free elections were simply not

18. MATTENZ, supra note 17, at 199-200, 209, 211, 285-91; BOTANA, supra note 17, at 127, 131.
19. BOTANA, supra note 17, at 129-31.
part of the constitutional bargain accepted by the Argentine elite and the Constitution itself gave the Executive substantial latitude during states of siege. But the Court successfully placed restraints on political repression and sometimes directly challenged the Executive.

Understanding why the Argentine Supreme Court was successful is quite complex, however, and involves variables very different from those underlying U.S. judicial review. The key lies not so much in the fact that Argentina adopted judicial review as prescribed in Marbury v. Madison, but in the Argentine Court's underlying sociopolitical sources of authority and legitimacy. That authority came from three principal sources. First, the Argentine elite stood firmly behind the use of the United States as a constitutional model, and the authority of the U.S. model was such that any Argentine court decision that could definitively invoke U.S. law and practice enjoyed instant support. As this author has developed in other work, U.S. constitutional practice often acted as a talisman, providing a solidifying, though often irrational, ingredient to Argentine constitutionalism. Second, because of Argentine perceptions of the importance of judicial review in the United States, the individuals chosen to serve on the Court tended to be persons who would be perceived as neutral arbiters because of their political stature and independence from the person appointing them. Third, particularly as Continental European influences increased with Argentina's adoption of a Civil Code in 1869, the Argentine judiciary became increasingly wedded to the rational interpretation of the constitutional text. Rationalism and rational interpretation are referred to here as methods of interpretation that present themselves as offering a definitive interpretation of the Constitution that may be obtained from the constitutional text or its legislative history, as opposed to methods that focus on contemporary social needs and leave the interpreter with greater freedom from tex-

23. Many Argentine legal historians have noted that adoption of the Civil Code led to a gradual change in the legal mentality of judges, and the profession generally, toward mechanical interpretations of the law isolated from its social context. See, e.g., Victor Tau Anzoategui, La codificacion en la Argentina 29-30 (1977); Bernardo Bravo Lira, Arbitrio judicial y legalismo, Juez y Derecho en Europa Continental y en Iberoamérica antes y después de la codificacion, 28 Revista de Historia del Derecho “Ricardo Levene” 7, 14-17 (1991); 2 Abel Chaneton, Historia de Velez Sarsfield 412-16, 418 (1937).
tual restraints. In the period examined in this Article, rational interpretation generally benefited judicial independence, as when the Executive violated a clear constitutional or statutory provision the Supreme Court had little choice but to stand its ground.

Copying the United States and adopting rationalism did come with a cost, however, as with limited exceptions, the Court's emphasis on rationalism and on following U.S. practice also prevented it from assuming a leadership role in pointing Argentine society in new directions. The clearest opportunity came in 1893, when an assertive Supreme Court might have helped end electoral fraud and unnecessary federal interventions in the provinces and hence improved the mechanisms for the peaceful transfer of political power. Instead, when given the opportunity, the Argentine Supreme Court refused to move beyond the case law of the U.S. Supreme Court, which largely treated such matters as nonjusticiable political questions. The Argentine Supreme Court only rarely demonstrated the ability of a common law court to develop rules not established in the constitutional text, and decreasingly so as rationalism strengthened.

Most of this Article will progress in chronological order, examining discrete events in Argentina's political history and the Supreme Court's participation in them. Section II will offer necessary background on the history of the Argentine Constitution, and the importance placed on judicial review and appointments to the Supreme Court. Section III will offer a brief introduction to the legal issues that this Article focuses on habeas corpus during states of siege, the trial of rebels, and de facto doctrine. Section IV focuses on the Rebellions of 1866-1867 in the Argentine Northwest, the first time the Supreme Court had to deal with the aftermath of a failed rebellion, and Section V examines the doctrine developed by the Supreme Court in various isolated cases involving rebellions and military jurisdiction during the 1870s and 1880s. Section VI, the bulk of this Article, examines the intervention of the Supreme Court during the period from 1890 through 1893, a unique time of strong pressures for reform of Argentina's political system, where the Court played a central role in limiting repression of individuals seeking changes through revolution, but only a limited role in pushing for reform. Section VII offers an analysis of what was and was not accomplished by the federal judiciary as an agent of moderation and an agent for ending electoral fraud. Section VIII seeks to explain how the Court's important political role during the 1863-1930 period was nevertheless consistent with the Court's acceptance of a de facto government in 1930. The Article
supports the conclusion that the Argentine Supreme Court played a central role in limiting the level of government repression in Argentina during a long period of time, and hence acted as an important moderating influence. Because of its limited view of its own role, however, it failed to use its influence to move beyond the intentions of the Framers of the Argentine Constitution to also usher in political reform.

II. The Origins of the Argentine Supreme Court

When the Argentine Supreme Court began to hear cases in 1863, it did so after fifty years of civil wars and disregard for basic human rights. However, the Court assumed its functions amid extremely high expectations. The Argentine elite saw judicial review as central to the U.S. constitutional model that it had decided to adopt and was therefore willing to show the Supreme Court extraordinary respect as an institution. Moreover, through the 1930s the membership of the Court came from the highest ranks of the political elite, and the earliest appointments in particular are noteworthy because the President did not name political allies.

The fifty years that followed Argentina’s declaration of independence from Spain in 1812 were so violent that constitutional consolidation was only a dream. Even during the War for Independence, the country fractured among different caudillos—local warlords who mustered militias of peons and gauchos who worked on their ranches and those of allies. The consequence was continuous battles among caudillos, as different caudillos sought to expand their influence, and between the Province of Buenos Aires, which through the City of Buenos Aires controlled most international commerce, and different alliances of provinces led by their caudillos. For most of the period from 1829 through 1852, General Juan Manuel de Rosas exercised such absolute control over the City and Province of Buenos Aires that he was able to dominate most events in the interior of the country as well. However, Rosas also represented perhaps the greatest extreme in caudillo government. Rosas received a formal grant of “the entire sum of public power” from the Legislature of the Province of Buenos Aires. He used terror as a weapon, acted as his own judiciary, and

24. See generally Rock, supra note 10, at 84-123 (offering an overview of Argentine history from 1812-1861).
intimidated his political adversaries through a murder squad known as the *Mazorca*, a group that openly brandished long knives that it used to cut the throats of opponents.  

The situation began to improve in 1852, with the defeat of Rosas by General Justo José de Urquiza, the *caudillo* of the Province of Entre Ríos, who led a coalition of *caudillos* and exiles with support from Brazil. Urquiza, who looked to George Washington as his model, sought to establish a national constitution, and along with much of the Argentine elite was attracted to a vision of Argentina put forward by Juan Bautista Alberdi in 1852 in a book entitled *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]. In its essence, the Alberdian vision called for protection of civil liberties as the key to encouraging immigration and foreign investment along the lines of that received by the United States, but showing little interest in political rights. The Constitutional Convention of 1853 implemented Alberdi’s ideas, in a Constitution that largely followed that of the United States. The Province of Buenos Aires boycotted the 1853 Convention and refused to join the Argentine Confederation, the entity that the Convention produced. However, after battlefield reverses and various constitutional amendments made at the Province’s request, the Province finally accepted the Constitution at a new Constitutional Convention in 1860. Lasting stability, however, only began in 1861, when a battlefield victory by

26. *See generally id.* at 166-83, 216-19 (describing Rosas’s absolute authority and various terror tactics).

27. John Pendleton, *Dispatch No. 1 to the Secretary of State*, Buenos Aires, Sept. 22, 1851, microformed on Dispatches from the United States Ministers to Argentina, 1817-1906, microcopy No. 69, reel 9 (National Archives Microfilm Publications) (characterizing the Rosas regime as “the most simple and rigorous despotism in the entire world”).


29. Juan Bautista Alberdi, *Bases y puntos de partida para la organización política de la República Argentina* (1852), reprinted in 3 Obras completas de Juan Bautista Alberdi 371 (La Tribuna Nacional, 1886) [hereinafter Alberdi].


31. 3 Alberdi, *supra* note 29, at 429-32, 449-51, 454-55 (on the need to offer civil liberties to attract immigrants and investment).

32. 3 id. at 523 (on the utopian nature of political liberties given Argentina’s state of development); Miller, *supra* note 21.

General Bartolomé Mitre, the Governor of the Province of Buenos Aires, over federal forces placed Mitre in control of the federal government and ushered in a period of continuous constitutional government that lasted until 1930.

Aside from having military training, Bartolomé Mitre was one of the most important Argentine intellectuals of his day, and had played an important role in 1860 in drafting changes to Argentina’s Constitution of 1853 to make it acceptable to the Province of Buenos Aires.\(^{34}\) Almost all of those changes brought a Constitution already modeled after that of the United States even closer to its model.\(^{35}\) In 1862, Mitre became the first President chosen on the basis of a national election that included all of Argentina’s provinces, and while he had to deal with many national emergencies during his Presidency, particularly revolts by caudillos in the interior of the country and a long war against Paraguay, he was remarkably respectful of Congress and the Supreme Court as independent political institutions. A Supreme Court consisting of five justices (a number that would remain unchanged until 1960) was appointed in 1862 and started hearing cases the following year, once Congress passed legislation governing its jurisdiction.

Argentina’s Constitutional Conventions of 1853 and 1860 shed little light on Argentine judicial review. The Constitutional Convention of 1853 adopted provisions almost identical to Article III of the U.S. Constitution with little discussion,\(^{36}\) and the debates do not indicate whether in adopting the U.S. constitutional text the delegates planned to allow judges to review the constitutionality of executive and legislative action. (Article III of the U.S. Constitution does not explicitly address judicial review, but merely notes that federal court jurisdiction extends to all cases “arising under this Constitution, the Laws of the United States and Treaties.”\(^{37}\) A Convention held by the Province of Buenos Aires in 1860 to propose constitutional changes to the national Constitutional Convention held later that year eliminated most of the few differences between the Argentine and U.S. provisions on the judiciary, but likewise never discussed judicial review.\(^{38}\)

\(^{34}\) ~JAMES R. SCOBIE, LA LUCHA POR LA CONSOLIDACIÓN DE LA NACIONALIDAD ARGENTINA, 1852-62, at 262-64, 273-75 (2d ed. 1964).

\(^{35}\) Miller, supra note 21.

\(^{36}\) Constitutional Convention of 1853, Session of Apr. 20, 1853, in 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS 535 (Emilio Ravignani ed., 1937).

\(^{37}\) U.S. CONST. art. III, § 2.

\(^{38}\) The Convention called for eliminating the requirement that the Supreme Court reside in the Capital, so that Supreme Court judges could ride a circuit as in the United
The only reference to judicial review at the Buenos Aires Convention comes in a passing comment by a future President, Domingo Sarmiento, that "having adopted the organization of the federal Supreme Court of the United States we must adopt its attributions and its case law."  

However, the Argentine elite was well aware of what judicial review involved. In the period from 1853 through 1860, when all of the country except for the Province of Buenos Aires was part of the Argentine Confederation, the Confederation's Congress held an extensive debate on judicial review when it debated and passed a law establishing a federal court system. Moreover, both this law and the law that ultimately came into effect in 1862, explicitly provided for judicial review. The 1862 law, parts of which remain in force today, entrusts the judiciary with "the observance of the national Constitution, avoiding applying in its decisions any disposition of any of the other branches of the national [government] which might be in opposition with it."

Congress and the Executive were well aware that judicial review was a new endeavor for Argentina and did their best to copy the United States correctly. Prior to drafting the laws governing the jurisdiction of the federal courts, the Argentine government sent an attorney to the United States to study its procedural system first hand. Then, in 1863 Congress underwrote publication of a translation of Story's *Commentaries* through an advance purchase; in 1864 it did the same in the case of James Kent's *Commentaries on American Law,* and in 1869 President Sarmiento, in a decree later approved by Congress as a law, authorized translations of William Whiting, *War Power under the Constitution of the United States,* John Norton Pom-
roy, An Introduction to the Constitutional Law of the United States (1868), George Paschal's annotated The Constitution of the United States, Luther S. Cushing, Rules of Proceeding and Debate in Deliberative Assemblies (1868), and Francis Lieber, Civil Liberty and Self-Government (1859).46

Even though it was alien to Argentine tradition, judicial review was seen as a panacea to conflict. La Nación Argentina, the leading morning newspaper, welcomed the naming of judges to the Supreme Court with abundant quotes from de Tocqueville on the importance of the judiciary in the United States, and described the Court as “a force of equilibrium for the power of Congress, the National Executive, and those same branches of Provincial government,” reducing disputes between government authorities “to the conditions of a common lawsuit,” and offering “the primordial guarantee for the Constitution.”47 La Tribuna, its rival, responded a few years later to a federal court decision validating a federal property tax in the City of Buenos Aires by publishing six different editorials tearing the decision apart and calling it extraordinarily “sophist.”48 But the loss in court was softened with the boast that “we cannot refrain from congratulating ourselves upon seeing how the theories and principles of the institutions that have raised the United States to its present heights have started to be practiced among us,” and the paper concludes that “[o]nce the Supreme Court decides that the law establishing a direct tax has been properly established by Congress, there is nothing to do but to submit to the decision, even if it conflicts with our opinions.”49

President Mitre responded to Argentine expectations when he appointed the first Supreme Court in 1862, appointing very well known, intellectually talented, political figures. President Mitre did have one individual reject a place on the Court. The Presidency of the

46. Decree of Mar. 2, 1869, 5 Registro Oficial de la República Argentina 449 (1884); Ley 375, 3 Leyes Nacionales 120, sanctioned on June 17, 1870; see also Alberto F. Garay, Federalism, the Judiciary, and Constitutional Adjudication in Argentina: A Comparison with the U.S. Constitutional Model, 22 U. Miami Int’l & Comp. L. Rev. 161, 175 n.100 (1991).

47. La corte federal, La Nación Argentina, Oct. 24, 1862, at 1.

48. Sentencia importante, La Tribuna, Mar. 4, 1865, at 2; La sentencia del Dr. Ocanto, La Tribuna, Mar. 5, 1865, at 2 (calling the decision “sophist”); La sentencia del juez nacional, sobre la ley de contribución directa, La Tribuna, Mar. 7, 1865, at 2 (calling the decision “sophist”); La sentencia del juez nacional, sobre la ley de contribución directa, La Tribuna, Mar. 8, 1865, at 2; La sentencia del juez nacional, sobre la ley de contribución directa, La Tribuna, Mar. 9, 1865, at 2; Jurisdicción y soberanía, La Tribuna, Mar. 10, 1865, at 2.

49. Sentencia importante, supra note 48, at 2.
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Court was offered to Valentín Alsina, Mitre’s most powerful political competitor in the Province of Buenos Aires, and was declined. However, the individuals who accepted places were almost as important. The post of President of the Court was then given to Salvador María del Carril—a former Vice-President of the Argentine Confederation during the period when Buenos Aires stood apart, and a former Governor of the Province of San Juan. Two judges came from the Province of Buenos Aires, but neither owed their prominence to Mitre. One, Francisco de las Carreras, had served as Chief Prosecutor of the Province of Buenos Aires during six months in 1852 and as Provincial Minister of Finance in 1852-1853, long before Mitre became governor. The other, José Barros Pazos, had served as Buenos Aires Minister of Government (the most important position in the provincial Cabinet) and as Minister of Foreign Relations, when Valentín Alsina was Governor of the Province. The other justices, like del Carril, both came from the Argentine Confederation that Mitre and the Province had just defeated. The first, Francisco Delgado, had served as a Senator from the Province of Mendoza during the Argen-

50. Valentín Alsina was the leader of Buenos Aires political interests seeking to maintain the autonomy of the Province of Buenos Aires, and had earlier been known for his confrontational attitude toward Urquiza and the Confederation. See 10 Víctor D. Sierra, Historia de la Argentina 33, 55-56, 232, 293, 409 (1980); 2 Carlos Alberto Floria & César A. García Belsunce, Historia de los Argentinos 75, 59 (1992). He served as Governor of the Province of Buenos Aires in 1852 and from 1857 to 1859 and headed a political faction that had often successfully competed in the Province with Mitre’s more nationalistic faction. 10 Sierra, supra, at 232-33.

51. Clodomiro Zavaleta, Historia de la Corte Suprema de Justicia de la República Argentina 59 (1920).

52. Salvador María del Carril had been known as a supporter of a strong national government since the 1820s, when he served as Governor of the Province of San Juan and as Minister of Finance in President Bernardino Rivadavia’s failed attempt at unitarian government. Id. Further, after a long exile during the Rosas years, he served as vice-president of the Confederation during Urquiza’s presidency (1854-1860). Id. His past marks him as a supporter of provincial, not Buenos Aires interests, but in the context of a strong central government. See generally 7 Sierra, supra note 50, at 428, 492; Zavaleta, supra note 51, at 66-68 (describing del Carril’s career). As a supporter of a strong central government, he was the diametric opposite of Valentín Alsina, but unlike Mitre, came from the interior and therefore would not have seen the central government as a tool of the interests of the Province of Buenos Aires. Cf. Rock, supra note 10, at 122 (describing Mitre’s concept of national unity as seeking the supremacy of Buenos Aires).

53. Francisco de las Carreras’s first important post was appointment in March 1852 as chief prosecutor for the Province of Buenos Aires, but he was dismissed after only five months for taking an excessively independent stand in his briefs. Zavaleta, supra note 51, at 64; 2 Vicente Osvaldo Cutoolo, Nuevo Diccionario Biográfico Argentino 159 (1978). Shortly thereafter he served as Buenos Aires Minister of Finance from 1852 to 1853. Id. Mitre only became Governor of the Province in 1860.

54. 1 Cutoolo, supra note 53, at 343.
Hastings Int'l & Comp. L. Rev.

Confederation,\textsuperscript{55} and José Benjamín Gorostiaga, the judge who was later selected to the seat Valentín Alsina declined, had been one of the two key draftsmen of the Constitution of 1853 and subsequently served as the Confederation's Minister of the Interior.\textsuperscript{56} Incredibly, none of the persons selected could be described as Mitre allies. Given that Mitre's two potential sources of political opposition were politicians associated with the old Argentine Confederation and Valentín Alsina's forces in Buenos Aires politics, Mitre appears to have selected individuals who would satisfy these groups as figures who would, if anything, tend to oppose the government.

Mitre got what he probably expected: a very independent Court, whose decisions on the most politically provocative issues—problems of habeas corpus, fair trials for revolutionaries, and de facto doctrine—were frequently against the Government. Moreover, the Court would continue to act as an important moderator on these issues at least through the 1930s.

\section*{III. The Issues: Habeas Corpus, Fair Trials, and De Facto Doctrine}

Courts are rarely in a position to reorder a political system. One may criticize the nineteenth century Argentine Supreme Court for operating within a political system that regularly used electoral fraud to deny most of the population a political voice, but it is hardly clear

\textsuperscript{55} Francisco Delgado, like del Carril, came from Mitre's old Confederation opposition. He had served in the Confederation Senate representing Mendoza and been selected to serve in the never established Supreme Court of the Confederation. \textit{Id.} at 511-12.

\textsuperscript{56} As a draftsman of the Constitution of 1853, José Benjamín Gorostiaga was a natural choice for the Supreme Court, but he had also served as Urquiza's chief legal advisor and had assisted him as Minister of Finance of the Province of Buenos Aires during a short period of domination by Urquiza after his defeat of Rosas in 1852, and as the Confederation's Minister of the Interior in 1854. He left Paraná in late 1854 to practice law in Buenos Aires and remained apolitical until after Mitre's victory over the Confederation in 1862. Afterwards, he returned to politics, but never jumped on the Mitre bandwagon. Gorostiaga served in the House of Deputies between 1862 and 1864 as the representative of his home province of Santiago del Estero, and his voting record shows that he remained independent of the government on important issues. \textit{See generally} Eduardo Martirí, \textit{Gorostiaga y la Constitución de 1853}, \textit{11 Revista Histórica del Instituto Histórico de la Organización Nacional} 3 (1982); Jorge Reinaldo Vanossi, \textit{La influencia de José Benjamín Gorostiaga en la constitución argentina y en su jurisprudencia} 16-19, 51-54 (1970) (describing Gorostiaga's political career with Urquiza). Gorostiaga voted against a bill presented by the Mitre Administration to federalize the entire Province of Buenos Aires. \textit{Id.} at 69-70. Gorostiaga also insisted on Congressional authority to issue resolutions criticizing the Executive's conduct of foreign policy. \textit{Id.} at 76. \textit{See generally id.} at 63-96 (describing Gorostiaga's activity in Congress).
what the Supreme Court could have done. The Supreme Court heard a handful of cases prosecuting electoral fraud, and consistently decided these cases in favor of cleaning up the system.\(^{57}\) However, the occasional criminal case cannot clean up a political system by itself. Ending electoral fraud depends on a political consensus that such fraud should not occur and that when it does occur it shall be brought to the courts’ attention. It also requires legislation designed to limit the possibilities for fraud in the system, neutral officials to run elections, and a public unwilling to tolerate irregularities. The occasional prosecution is meaningless when the fraud is massive in scale—just as the occasional prosecution is usually meaningless to enforce compliance with laws whose violation is accepted by important parts of the population. Courts were relevant in halting electoral fraud mainly at times and places where Argentine society was likewise mobilized to halt it.\(^{58}\)

However, certain types of political issues do regularly appear in the courts in situations where the courts find it easier to assert their authority. Political unrest inevitably produces questions of who may be detained by the government, and accordingly produces petitions for writs of habeas corpus. Armed rebellions and their aftermath produce questions of who should try the rebels, the fairness of the tribunal trying them, and the grounds on which rebels and their collaborators may be tried. These are areas where Argentine society did look to the judiciary for answers.

The issue of the legality of detentions usually appeared in the context of declarations of a state of siege. Article 23 of the Argentine Constitution provides:

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57. The Supreme Court’s decisions were fairly assertive in the limited context of the cases before it. “Ortiz,” 9 Fallos 211 (1870) (allowing prosecution of persons casting ballots in the name of others even though the relevant criminal statute does not specifically address such conduct); “Lagraña,” 9 Fallos 314 (1870) (affirming convictions for improper conduct by election officials, even though in this case the conduct consisted of failure to appear at the voting site on election day, which made it impossible to open the site, and not directly tampering with the voting); “Montiel,” 21 Fallos 211 (1879) (affirming conviction of defendant for voter intimidation); “Sandes,” 31 Fallos 218 (1887) (affirming federal jurisdiction to prosecute a local police chief who detained 31 citizens in a corral on election day to prevent them from voting). “Montiel” was a particularly significant case, as the defendant was an important local political boss. ZAVALIA, supra note 51, at 225-26 (1920).

58. The best example is Judge Tedfn’s role combating electoral fraud in the City of Buenos Aires in 1892, which helped lead to clean elections under President Luis Sáenz Peña and frequent clean elections thereafter. See infra Part VLC. Given its wealth and large professional class, the City of Buenos Aires inevitably had the most politically sophisticated electorate in the country and hence was the first part of the country to successfully combat electoral fraud.
In the event of internal disturbance or foreign attack which place in danger the exercise of this Constitution and the authorities created by it, the province or territory in which the disturbance of order exists will be declared in state of siege, suspending all constitutional guarantees there. But during that suspension, the President of the Republic may not sentence [an individual] on his own or apply a penalty. His power with respect to persons is limited to arresting them or transferring them from one part of the Nation to another, provided that they do not prefer to leave Argentine territory.\textsuperscript{59}

Thus, constitutional guarantees may be suspended through a state of siege in the event of internal disturbances or foreign attack, but anyone detained by the Executive during unrest may leave the country, and presumably the Executive may not exile an Argentine citizen if he prefers detention in Argentina. Further, when the subject of the detention is an opposition member of Congress, issues of congressional immunities also appear.\textsuperscript{60} These are questions on which Argentine courts could clearly act without exceeding their authority, particularly since habeas corpus is a traditional area of judicial intervention under the U.S. model.

The issue of trying rebels after an unsuccessful rebellion is another traditional judicial function. Here, while the federal courts by the nature of their function enforce the law against rebels, they may nevertheless develop a reputation for independence from the Executive and offer better prospects for rebels than a military tribunal. They are also able to enforce pardons and amnesties that may have been part of an agreement for ending a rebellion, and in the Argentine case, avoid application of penalties going beyond the comparatively light penalties for rebellion provided for under federal law. Perhaps most important of all, courts, and particularly the Supreme Court, offer the opportunity for publicizing a cause. While lower Argentine courts followed the Continental European system of extended trials dependent on the collection of evidence in a dossier rather than a continuous oral proceeding, the Press often prominently published the full text of both attorneys’ briefs and court decisions,\textsuperscript{61} and the

\textsuperscript{59} Const. Arg. art. 23 (1860).
\textsuperscript{60} Id. art. 61.
\textsuperscript{61} For example, La Prensa published the entire case record of Leandro Alem’s detention, including all attorneys’ briefs and interlocutory orders. Dr. Leandro Alem, La Prensa, Apr. 3, 1893, at 3 and articles that follow (giving the text of Leandro Alem’s habeas corpus petition, a letter by Leandro Alem to the federal court, Judge Tedín’s orders to the police to respond, and the response of the police); Los sucesos de actualidad, La Prensa, Apr. 8, 1892, at 3 and articles that follow (text of Judge Tedín’s decision ordering
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Supreme Court in the 19th century regularly permitted public oral argument in addition to written briefs.62

Perhaps the trickiest area for the Supreme Court, however, was de facto doctrine. This doctrine has arisen in four basic contexts in Argentina: (1) de facto public officers or entities acting under color of legal authority; (2) de facto national governments resulting from successful national revolutions; (3) de facto provincial governments resulting from successful provincial revolutions; and (4) revolutions seeking to overthrow the national government that, while unsuccessful, nevertheless managed to hold and govern a portion of Argentine territory for a period of time. The four situations vary enormously from each other, but all four involve the common question for courts of whether to give legal effect to illegal conduct.

The first of the situations, involving de facto officers or entities, occurs even in the most stable of political systems. An office holder's election may be ruled invalid by the courts after he has already taken office, or some other event may occur leading an individual to create the impression that he legally holds office when in fact he does not. Supposing that the individual's lack of credentials to hold the relevant government office is later discovered, a doctrine is required to determine how the acts performed by the "phony" official during his period in office should be treated.63 Given that citizens are not expected to constantly inquire into the validity of the title of public officials, many legal systems, including the Argentine, have permitted citizens to rely on the actions of persons who act under color of authority.64 The final

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62. The "Tribunales" section of La Nación Argentina in the 1860s regularly listed the cases scheduled for argument. See, e.g., La Nación Argentina, Oct. 8, 1864, at 3, Oct. 7, 1864, at 2, and Oct. 11, 1864, at 2. The cases were all listed under the headline La Corte Suprema de Justicia; Cuestión Calvete, La Nación Argentina, Oct. 11, 1864, at 2. The most famous oral argument in the Supreme Court's history was that presented by Arístóbulo del Valle in 1893 in Coronel Espina, discussed infra at notes 345-59.

63. See generally Albert Constantineau, Public Officers and the De Facto Doctrine 3-4 (1910) (describing the situation where de facto doctrine comes into play in similar terms, but distinguishing between de facto public or private corporate bodies and de facto officials).

64. See generally id. at 8-20 (sketching de facto doctrine through the early 20th century in England, the United States and Canada). The Argentine Supreme Court recognized the
three situations place much greater stress on the legal system. When an entire government, national or provincial, has been taken over by rebels, the issue is no longer one of actions under color of authority. In such a situation, the issue becomes one of expectations or non-expectations of resistance by citizens, the right of citizens to rely on de facto authorities in the absence of constitutional authority, and the authority of public acts and laws of de facto rulers once there is a regime change to constitutional government or provincial rebellions.

The Argentine Supreme Court would come to deal with all of these issues, though the problem of de facto national governments would not become a significant issue until the coup of 1930. The Court almost immediately found itself dealing with localized rebellions, however, placing limits on government suppression of rebels and protecting those who passively cooperated with de facto governments in rebel-held territory.

validity of decisions of such officials. "Moreno Postigo," 148 Fallos 303 (1927) (giving effect to a decision of a provincial judge in San Juan handed down after the Province's judiciary had already been removed from office during a federal intervention). In the United States, the leading 19th century case was Norton v. Shelby County, 118 U.S. 425, 441-49 (1886) (extensively describing the situations under which the U.S. courts would give effect to the acts of de facto officers, though in this case holding that it would not give effect to the acts of persons holding a new office where the office itself was void). Recently, the U.S. Supreme Court, while not denying the existence of the doctrine, appears inclined to interpret de facto doctrine narrowly, so as to avoid creating a disincentive to the challenge of illegal appointments. See Ryder v. United States, 115 S.Ct. 2031, 2034-35 (1995). See generally NOEL HENRY, LES GOUVERNEMENTS DE FAIT DEVANT LE JUGE (1927) (offering an overview of de facto doctrine under domestic and international law from a French perspective).

65. The only case prior to 1930 in which the Supreme Court applied de facto doctrine at the level of a takeover of the national government was "Baldomero Martínez," 2 Fallos 127 (1865). In that case, the Supreme Court recognized the authority of measures taken by General Bartolomé Mitre between December 1861, when he took over the national government after the Battle of Pavón, until October 1862 when he formally assumed the presidency after elections held under the 1853 Constitution. Otero, a Spanish merchant, initially paid customs duties owed to the Confederation with a transferable letter of credit. The letter of credit was lost during the final days of the Confederation and General Mitre therefore declared the letter of credit void and required Otero to pay the amount owed to the government. Id. at 142. When Baldomero Martínez, a subsequent holder of the note, sought payment from Otero, the Argentine Court held that General Mitre was the competent authority to declare the note void because "he provisionally exercised all national authority after the Battle of Pavón, with the right of the triumphant revolution consented to by the people, and by virtue of the grave responsibilities that the victory imposed on him." Id.
IV. The Rebellions of 1866-1867

One of the remarkable features of Argentine politics until 1930 was that the penalty for rebellion was so light. The penalty for promoting or leading a rebellion was not jail or death but ten years exile, with an additional fine of 2000 to 6000 pesos in the event of combat or usurpation of public funds. Moreover, in 1875, 1877, 1880, 1895, and 1906, Congress passed general amnesties for everyone who had participated in prior revolts, and an agreement between Governor Tejedor of Buenos Aires and the federal government avoided prosecutions after the revolt of 1880. This light treatment was possible in part because the rebels were led by members of the Argentine elite who shared the basic economic and social interests of those in power. With the exception of the last gasps of provincial caudillos in the 1860s and 1870s, who wished to maximize provincial autonomy, a successful rebellion would have meant little more than a change in leadership, with somewhat greater political participation by the middle class. Given the lack of free elections, armed rebellion by disgruntled elements of the elite appears to have been an accepted element in the political system. However, even with shared economic interests a split in an elite that leads to a rebellion may lead to harsh repression and reprisals if the members of the elite do not share rules on treatment of the loser and the party out of power. Such rules existed and the Argentine Supreme Court arbitrated their application.

The Supreme Court's first important encounter with political instability involved the consequences of a series of provincial revolts in 1866 and 1867 in the Argentine Northeast. In November 1866, local police and militia toppled the provincial government of the Province of Mendoza, and in the following months the rebellion spread to

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66. Law No. 49 art. 15, Sept. 14, 1863, A.D.L.A. 385, 386. Article 16 provides that lower ranking leaders shall be subject to exile of four to six years or a 1600 to 3000 peso fine, and Article 17 provides that common soldiers shall be subject to two to four years' military service on the frontier or a 300 to 600 peso fine. Id. arts. 16 & 17.


68. BARTOLOMÉ GALINDÉZ, HISTORIA POLÍTICA ARGENTINA: LA REVOLUCIÓN DEL 80 321-22, 322 n.1 (1945). The agreement that ended the Revolution of 1859 never received Congressional approval, but was enforced in practice given that it had the approval of both President Avellaneda and President-elect Roca. Id. at 321-22, 323-25.

neighboring provinces and took on the character of a rebellion against
the national government.\textsuperscript{70} The first province to follow Mendoza was
San Juan. Then Felipe Varela, a former follower of Urquiza in his
battles with Buenos Aires, independently invaded the Province of La
Rioja from Chile and gave the uprisings the character of a revolt
against the hegemony of Buenos Aires.\textsuperscript{71} The revolt occurred in the
middle of the war against Paraguay and required President Mitre to
withdraw soldiers from the front to put it down.\textsuperscript{72} Moreover, in Feb-
ruary 1867 President Mitre himself was forced to give up command of
the combined Argentine-Brazilian army to return to Buenos Aires to
manage the political situation.\textsuperscript{73} The rebels were thoroughly defeated
by the regular army troops during March and April 1867,\textsuperscript{74} but at ob-
vious cost to prosecution of the war. Revolts later that same year in
the provinces of Córdoba, Salta, and Jujuy likewise had to be put
down by federal troops.\textsuperscript{75}

Among their acts in power, the rebel provincial governments
took over the national customs houses in their provinces and required
merchants to pay the de facto authorities the amounts normally owed
as customs duties to the federal government. Once the federal gov-
ernment reasserted control, however, it sought payment of the duties
from groups of merchants in Mendoza and San Juan. When the
merchants resisted payment, the federal district court in San Juan de-
cided against the merchants in that province, while the federal court in
Mendoza decided in favor of the merchants there, and both cases
ended up in the Supreme Court.\textsuperscript{76}

As summarized by the Supreme Court's secretary, the principal
argument of the merchants was that the Court needed to apply the
derecho de gentes,\textsuperscript{77} which may be roughly translated as "the law of

\textsuperscript{70} See 1 SOMMARIVA, supra note 10, at 251-55 (on the initial Mendoza revolt); see
generally id. at 251-79 (describing the revolts in Mendoza and neighboring provinces and
their repression. The revolt ultimately included Catamarca, La Rioja, San Juan, and San
Luis in addition to Mendoza).
\textsuperscript{71} Id. at 265-66.
\textsuperscript{72} Id. at 272-73.
\textsuperscript{73} See id.
\textsuperscript{74} Id. at 272-78.
\textsuperscript{75} Id. at 284-89.
\textsuperscript{76} "Fisco Nacional c/Varios comerciantes de Mendoza," 5 Fallos 74 (1868) [hereinafter "Mendoza"]; "Fisco Nacional c/Varios comerciantes de San Juan," 5 Fallos 155 (1868) [hereinafter "San Juan"]; see also "Procurador Fiscal c/Carrach," 5 Fallos 257, 268 (1868)
(identical to the first two cases, so the Supreme Court simply refers to its earlier
precedents).
\textsuperscript{77} "Mendoza," 5 Fallos at 76-77; "San Juan," 5 Fallos at 162.
nations,” but in the sense of natural law principles said to govern international law. Under derecho de gentes, individuals accept government for their own protection and welfare—a social contract theory that scholars in this field used to then explain the authority by which nations could speak in the name of their citizens in their interaction with each other. The applicability of derecho de gentes is debatable, since as the Federal Judge in San Juan would note in his decision, this body of law applied primarily to relations between states. The merchants argued that citizens only owe a government obedience as a sovereign when it is able to assert its authority, and the federal judge in Mendoza took this a step further, arguing that:

[W]hile it is true that the import [tariffs] form part of the national treasury, it is also true that there is a tacit fundamental pact between a society and the Government, under which the latter is obligated to protect the property of each and every one of its citizens, in return for which they contribute a portion of their wealth to pay national expenditures.

If the government was not in control of the province and was unable to blockade the border crossings, then the merchants had the right to obey the instructions of the authorities actually in power. The merchants also argued that the victorious Union forces in the recent U.S. Civil War implicitly recognized the validity of their position,

78. See Andrés Bello, Principios de Derecho Internacional 11-12 (3d ed. 1873); Emmerich de Vattel, Le droit de gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains § 6 (M.P. Pradier-Fodère ed., Guillaumin et Cie., Libraires 1863). (Bello and Vattel are the two authors cited by the plaintiffs. See “San Juan,” 5 Fallos at 162. The very title of Vattel’s work makes his point on the natural law foundations of international law). See also Antonio Sáenz, Instituciones elementales sobre el derecho natural y de gentes 55-57 (Instituto de Historia del Derecho Argentino, Facultad de Derecho y Ciencias Sociales, Univ. de Buenos Aires 1939) (originally used in a course taught at the University of Buenos Aires in 1823). During the first half of the 19th century, “derecho de gentes” was taught in Argentina as a single course together with natural law principles of public order. Augustín Pestalardo, Historia de las enseñanza de la ciencias jurídicas y sociales en la Universidad de Buenos Aires 36, 38, 39-44 (1914).

79. Vattel, supra note 78, §§ 1, 15.

80. See Bello, supra note 78, at 23-24 (nations exist for the well being and preservation of their citizens and interact with each other as polities constituting a single entity); see also Sáenz, supra note 78, at 66 (societies exist for the welfare and protection of their members and depend on the consent of their members).

81. “San Juan,” 5 Fallos at 162.

82. “Mendoza,” 5 Fallos at 76-77; see also Vattel, supra note 78, § 26 (describing the means to make others obey as one of the necessary elements of public authority).

83. “Mendoza,” 5 Fallos at 80-81.

84. Id. at 76-77.
since the Union never made a similar claim for duties from Confederate merchants who ran the Union blockade.\textsuperscript{85}

The government in the Mendoza case admitted the relevance of \textit{derecho de gentes}\textsuperscript{86} but offered a different view of its content. According to the government, \textit{derecho de gentes} recognized a right to rebel against an oppressive government that violates the nation's own laws and institutions, and that in the event of a rebellion against an oppressive government, the population must obey the new de facto authorities provided that "they respect at the very least the basic needs of humanity, recognized as such by Christian and civilized peoples."\textsuperscript{87} In such circumstances even when the uprising is put down, actions by ordinary citizens in simple obedience of the rebel authorities may not be penalized. But the government argued that apart from any question of whether the citizens of Mendoza had a right to rebel, the persons who took power were mere bandits who looted, robbed, and murdered, and therefore were not worthy of any respect.\textsuperscript{88} The example of the Confederacy during the U.S. Civil War was irrelevant, because that rebel government did respect the rights of society.\textsuperscript{89}

The government's position is not surprising, but is unsatisfactory from the point of view of individual security and lowering levels of violence. The obvious temptation of any government facing a rebellion in which rebels seize a portion of its territory is to call upon the inhabitants of that territory to defy the rebels. Paying taxes to rebels or accepting service under their military draft obviously strengthens them. By demanding resistance by citizens in occupied areas, a government can maximize its pressure on rebels, particularly when citizens expect that the government will retake their area and take action against collaborators. However, requiring defiance places ordinary citizens in a difficult situation, since they are forced to choose sides. This raises the intensity of the conflict, since if the population is forced to choose sides, a larger proportion of the population will of necessity participate. A rule that bars a government from requiring defiance of rebels by ordinary citizens will therefore serve as a rule to lower the costs of conflict, allowing citizens to continue their lives as normally as possible.

\begin{footnotes}
\item[85] Id. at 77.
\item[86] See id. at 77-78.
\item[87] Id. at 77.
\item[88] Id. at 77-78.
\item[89] Id. at 78.
\end{footnotes}
The Supreme Court decided the Mendoza and San Juan cases in almost identical opinions. As was typical of the Supreme Court in the 1860s, when it showed weaker ties to rationalism than it would in later decades, the Court affirmed at the start of each decision that since no legislative provisions bear on the case, it needed to decide the case on the basis of "justice and equity." Then, looking at the case from an equitable perspective, the Court made two principal points. First, with the government itself calling the de facto provincial rulers bandits, the government could hardly expect the merchants to have placed the security of themselves and their families in danger by resisting their instructions. The merchants acted as they did because the government was unable to protect them. Second, the rebels did not rob the merchants as mere bandits, but took the place of the legitimate government and collected the customs duties in the manner of a government. Since the government could not perform its obligation to protect the merchants, and would not have offered the merchants compensation for injuries incurred in useless resistance, it could not demand that they offer resistance. "[C]ompliance by [the government] with its obligation to guarantee life and property is the condition that legitimizes the exaction of taxes." In the San Juan case, the Court was particularly forceful about the lack of obligation of citizens to a government unable to protect them, replying to the lower court that:

It is not true that . . . citizens who inhabit a town involuntarily abandoned by its legitimate government, that have not been able to resist the usurpation, and therefore surrendered in fact to the power of the enemy, remain bound by the same ties, and subject to the same obligations as when protected by the public force of the government; [in such circumstances] the obligations become impossible, and the citizens, who are unable to either receive or fulfill orders, recover their primitive liberty and have the right to seek their security and protection through all the means within their reach.

The Court essentially applied the natural law concept of individuals accepting government so that it may provide them with protection and security, but casts it under the label of "justice and equity."

90. Id. at 85; “San Juan,” 5 Fallos at 165.
91. “Mendoza,” 5 Fallos at 85; “San Juan,” 5 Fallos at 165.
92. “Mendoza,” 5 Fallos at 85-86; “San Juan,” 5 Fallos at 165-66.
93. “Mendoza,” 5 Fallos at 85-86; “San Juan,” 5 Fallos at 165-66.
94. “Mendoza,” 5 Fallos at 85-86.
95. “San Juan,” 5 Fallos at 166.
The Mendoza and San Juan customs cases offer a striking example of the Court’s willingness to challenge the Executive on the basis of a rule that the Court itself established. The Court did not directly cite *derecho de gentes*, perhaps because it agreed with the Federal Judge in San Juan that its doctrines were designed for relations between nations, not between a citizen and the state, but let the same natural law concepts come into play to support it in its equity function. The willingness to resort to equity disappears in later decades, probably as a consequence of the adoption of the Civil Code in 1869, and with it of more restrictive approaches toward judicial reasoning. In the 1860s, however, the Court did not see itself as bound by the limits of the written constitutional order, but was willing to look at what it perceived as underlying principles of order.

The Supreme Court also handed down a series of decisions exonerating individuals charged with rebellion for collaborating with the revolutionary authorities. In one case, the Court held that the individual who administered the Mendoza customs house for the rebels did not need to compensate the federal government for the duties he collected on the rebels’ behalf because he acted under pressure from the rebels. In another case, an individual who acted as justice of the peace and police chief, and later treasurer for the San Juan rebels, was found not guilty of rebellion because he presented credible evidence that he acted out of fear for his life and tried to moderate the cruelties of the rebellion. This was likewise the case for various individuals who accepted judicial offices from the San Juan rebels, since they acted out of fear. Even an aide to one of the principal rebel leaders was found not guilty, on grounds that he attached himself to the leader to protect himself from other rebel leaders who were even more menacing. Given that the “fear” defense often depended exclusively on the defendants’ testimony, the Court was very liberal in

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96. *Id.* at 162.

97. Another example of the Supreme Court deciding a case on the basis of “justice” and “equity” is “Mendoza y Hermano,” 3 Fallos 131, 134-35 (1865) (the Supreme Court refused to award damages to a trading house that had paid a provincial export tax that it held unconstitutional, because while the provincial government had acted illegally, it was a poor province and the trading house had passed the cost of the tax back to its suppliers).

98. “Hoyos,” 7 Fallos 143, 149-50 (1869).

99. “Iturgy,” 5 Fallos 101, 109-10 (1868); *see also* “Flores,” 8 Fallos 354, 369-70 (1870) (a person who served a short period as de facto Governor was found to have done so to maintain order and avert greater atrocities by the rebels).

100. “García,” 6 Fallos 241, 249 (1868).

101. “Castillo,” 5 Fallos 149, 154 (1868); *see also* “Morales,” 5 Fallos 88, 96-97 (1868); “Cardozo,” 5 Fallos 311, 314-15 (1868); “Flores,” 7 Fallos at 455-56; “Baca,” 8 Fallos 330,
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applying it. The decisions could be described as falling under a general rule of abrogation of responsibility in situations where an individual acts under pressure and has lost his freedom of choice; however the line between such cases and de facto doctrine generally legitimating cooperation with a de facto government is very thin, if existent at all, as individuals may always be said to accept the authority of a de facto government because only the de facto government is able to provide for their security. In one case truly on the border between "pressure" and de facto doctrine, the Supreme Court reversed a verdict by the San Juan federal judge finding an individual guilty of rebellion for accepting salaried employment assisting the rebel authorities copy draft rolls. The Supreme Court held that individuals had the right to continue earning a living during a de facto government and the defendant needed the salary.

Perhaps even more striking than the Supreme Court's de facto doctrine decisions, which generally involved civilians and minor rebel officials, were the Court's decisions in favor of rebel military personnel. In one important line of cases, the Court held that a defendant accused only of rebellion had to be released on bail while his case was pending, since rebellion was not a crime that could result in a jail sentence; and in a second line of cases the Court released large numbers of defendants because the "sumario" (investigation/indictment) stage of their cases was initially handled by a provincial judge, and as a federal crime only federal courts enjoyed jurisdiction over rebellion.

The Supreme Court's decisions in the Mendoza and San Juan rebellions were not motivated by hostility toward the government. Leaders and middle ranking participants in the rebellions were sen-

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334 (1870) (all exonerating lower ranking soldiers in the rebel ranks on grounds that they joined the rebels out of fear).

102. See, e.g., "Castillo," 5 Fallos at 150, 152; "Iturgay," 5 Fallos at 106 (in both cases the lower court found that only the defendants' own testimony, unsupported by other evidence, supported their defenses that their actions were provoked by fear, and found the defendants guilty, but the Supreme Court reversed).


104. Id. at 69.


106. "Avila," 5 Fallos 167, 169 (1868); "Robledo," 5 Fallos 171, 175-76 (1868); "Riquelme," 5 Fallos 215, 219 (1868); "Calderón," 5 Fallos 268, 272 (1868); see also "Varela," 5 Fallos 211, 214-15 (1868) (reversing a death sentence for attempted murder of a Chilean diplomat because of the improper intervention of the provincial judge, but ordered new proceedings given the seriousness of the crime).
tenced to extensive periods in exile and fined,\textsuperscript{107} as provided for under federal law. Individuals guilty of looting, robbery, and murder during the rebellion were sentenced for those crimes in addition to the crime of rebellion.\textsuperscript{108} Further, minor participants who did not provide credible defenses that they acted under pressure were sentenced to pay a fine and/or serve a period of military service on the frontier.\textsuperscript{109} In fact, in the case of a rebellion that occurred in Córdoba shortly after the Mendoza and San Juan rebellions were repressed, the Court insisted that the federal judge investigating the rebellion return to his investigation when his initial findings acquitted everyone initially detained for participating in the rebellion.\textsuperscript{110} However, the Court was obviously not an arm of the government for the aggressive persecution of rebels.

The preceding cases show that the Argentine Supreme Court actively moderated the consequences of the rebellions of 1866-1867, trying rebels but often challenging the government as well. At least some members of the lower judiciary were also quite independent of the Executive. The federal judge in the Province of Catamarca insisted on detaining and trying two individuals for their conduct during the rebellion in spite of an "order" from the Ministry of the Interior that they be released so that they could participate in a provisional provincial government.\textsuperscript{111} The federal judge in Mendoza who heard the rebellion cases in that Province was seen as a rebel sympathizer.

\textsuperscript{107} "Lloveras," 5 Fallos 285, 295, 296 (1868) (affirming the maximum sentence of 10 years' exile and a 2000 peso fine on one of the leaders of the San Juan revolt); "Castro Boedo," 6 Fallos 302, 309-10 (1868) (affirming sentence finding the defendant guilty as a middle ranking officer and that sentenced him to four years exile and a 1000 peso fine); "Quiroga," 6 Fallos 444, 451 (1868) (revoking a death sentence against one defendant on grounds that there was insufficient evidence that the defendant was guilty of murder, but finding that the two defendants in the case participated in the rebellion as middle ranking officers and sentenced them to six years' exile and a 1000 peso fine); "Nieva," 8 Fallos 142, 150, 151 (1869) (affirming sentence of ten years' exile and a 2000 peso fine against one of the leaders of the rebellion in Catamarca and absolving a second defendant on grounds that he participated out of fear).

\textsuperscript{108} "Pimentel," 5 Fallos 297, 302 (1868) (sentenced for robbery and murder); "Aracena" 6 Fallos 39, 56 (1868) (sentenced for looting); "Zalazar," 7 Fallos 356, 367 (1869) (found guilty of murder in addition to helping lead the revolt in La Rioja).

\textsuperscript{109} "Gil," 5 Fallos 43 (1868); "Recabarren," 5 Fallos 116 (1868); "León," 6 Fallos 139 (1868); "Bravo," 6 Fallos 143 (1868); "López," 6 Fallos 410 (1868).

\textsuperscript{110} "Autores del movimiento sedicioso del 16 de agosto de 1867 en la ciudad de Córdo-oba," 5 Fallos 181, 192 (1868).

\textsuperscript{111} La justicia y el Gobierno, LA NACIÓN ARGENTINA, Oct. 17, 1867, at 2 (giving the text of a letter by Próspero García, the federal judge in Catamarca, to General Antonio Taboada, commander of the Army of the North, refusing to comply with his request—which General Taboada indicated originated with the Minister of the Interior—that two
and unwilling to try the rebels.\textsuperscript{112} The House of Deputies unanimously impeached the judge on grounds that he supported the rebels,\textsuperscript{113} but the government was unsuccessful at getting the Senate to suspend him,\textsuperscript{114} there was a yearlong delay until the Senate finally tried him,\textsuperscript{115} and ultimately the Senate voted for acquittal.\textsuperscript{116}

The benefits in terms of stability of the Supreme Court's approach toward provincial de facto governments are obvious, since ordinary citizens could in a sense opt out of politics. However, by

individuals be released, insisting that the Executive is constitutionally barred from interfering in judicial functions).

\textsuperscript{112} Correspondencia del Interior, \textit{La Nación Argentina}, Oct. 20, 1867, at 2 (letter from the newspaper's regular Mendoza correspondent asking about the status of the impeachment proceedings against Judge Palma and complaining that he would never put the rebels on trial).

\textsuperscript{113} Congreso Nacional, Cámara de Diputados, Diario de sesiones de 1867, Session of July 3, 1867, at 112-13 (unanimous vote impeaching Judge Juan Palma). The first count against Judge Palma was for writing to the military leader of the rebels that "[i]f the District Court Judge is needed to load a rifle, I am at your service, as a citizen who loves my country and for my good name." \textit{Id.} The second count charges him with continuing to function as a federal judge until mid-January, 1867, even after hostilities between the rebels and the federal government had begun. \textit{Id.} at 110. \textit{See also Juicio Político, La Nación Argentina, July 1, 1867, at 1-2 (giving the text of the impeachment charges and noting that this was Argentina's first impeachment).}

\textsuperscript{114} Sección Oficial, \textit{La Nación Argentina}, July 30, 1867, at 1 (giving text of a note from Vice President Marcos Paz—acting as President while President Mitre commanded the allied forces against Paraguay—and Minister of Justice Eduardo Costa, nominating a replacement for Judge Palma during the impeachment trial). Judge Palma was never suspended in his duties, however. \textit{Correspondencia del Interior, supra} note 112, at 2 (complaining that Judge Palma continued to act as Federal Judge during the proceedings against him).

\textsuperscript{115} While the House of Deputies voted for impeachment on July 3, 1867, \textit{supra} note 113, the Senate was under the impression that the articles of impeachment it received from the House of Deputies did not constitute its formal accusation. \textit{See Congreso Nacional, Cámara de Senadores, Diario de sesiones de 1867, Session of Aug. 13, 1867, at 305 (statement of Madariaga). After a six-week delay during which the House of Deputies considered evidence submitted by Judge Palma's attorney, Congreso Nacional, Cámara de Diputados, Diario de sesiones de 1867, Session of Aug. 26, 1867, at 225-32; \textit{Id.} Session of Sept. 13, 1867, at 321-22; \textit{Id.} Session of Sept. 20, 1867, at 353-55, the House of Deputies then responded to the Senate that its earlier charges constituted the formal accusation. \textit{Id.} Session of Sept. 23, 1867, at 361. Because regular sessions of Congress only ran from May 1 through September 30, Const. Arg. art. 55 (1860), the final Senate vote only took place on July 18, 1868. Congreso Nacional, Cámara de Senadores, Diario de sesiones de 1869, Session of July 18, 1868, app. at 109-11.}

\textsuperscript{116} Congreso Nacional, Cámara de Senadores, Diario de sesiones de 1868, Session of July 18, 1868, app. at 109-11. As in the United States, removal of a judge requires impeachment in the House followed by trial in the Senate. \textit{Compare} U.S. Const. art. I, §§ 2 & 3 \textit{with} Const. Arg. arts. 45 & 51 (1860). The Argentine Constitution requires a two-thirds majority in both the House and the Senate for impeachment and removal from office while the U.S. Constitution only requires a special two-thirds majority in the Senate. \textit{Id.}
allowing citizens to refrain from supporting the constitutional government the Court leaves itself open to the charge of accepting political instability. There is an element of continuity between the Supreme Court's decisions in accepting the validity of acts of de facto governments set up during rebellions, political question doctrine when applied to questions of governmental legitimacy, and the attitude it displayed in the face of a successful national coup in 1930, when it would accept the existence of a de facto national government.\textsuperscript{117} Later, when provincial rebellions sought only to dislodge provincial authorities without challenging the authority of the national government (which sometimes assisted the rebellion), the Supreme Court simply accepted the force in control of the government as the government\textsuperscript{118} and accepted the decision of Congress and the Executive as to whether a federal intervention was appropriate.\textsuperscript{119} When the credentials of much of the membership of the National Congress were questioned in 1880 because Congress was filled with ad hoc replacements for members who refused to attend sessions during that year's revolt, the Court likewise put on blinders and responded that each House was the judge of the qualifications of its members.\textsuperscript{120} By not inquiring into constitutional credentials, whether of de facto authorities or Congress, the Court resigned itself to the political instability of Argentine politics and merely limited its excesses. If the Court's vision of itself was of a tribunal charged with safeguarding the Alberdian vision of ample individual rights so that the country could achieve North American prosperity, and of moving beyond that role only when specifically required to by U.S. case law, then its conduct was certainly consistent with its perceived role.

\textsuperscript{117} The military government was recognized by the Supreme Court in \textit{Acordada sobre reconocimiento del Gobierno Provisional de la Nación}, 158 Fallos 290 (1930).

\textsuperscript{118} See "Chanfreau y Cía," 10 Fallos 59, 71-72 (1871) (refusing to enforce a contract entered into by an illegally deposed governor on behalf of his province and refusing to accept the argument that a resignation by a governor submitted under force lacks validity).

\textsuperscript{119} "Cullen," 53 Fallos 420, 431-34 (1893) (holding that the question of whether conditions in a province require federal intervention to guarantee it a "republican form of government" is a political question for Congress and the Executive to decide).

\textsuperscript{120} "Varela," 23 Fallos at 266-67 (challenging the validity of a state of siege invoked to suspend publication of the plaintiff's newspaper, since the state of siege was approved by the Congress that met in Belgrano during the Revolt of 1880, with many quick substitutions made for legislators who supported the Revolt and refused to make the move to Belgrano).
V. The Established Doctrine of the 1870s and 1880s

Issues of the authority of and service under rebel governments was not discussed by the Court after 1870, probably because of amnesties (which the Court consistently interpreted broadly), the clarity of the Court’s case law after the Mendoza and San Juan revolutions, and a change in the nature of Argentine rebellions after the early 1870s. By the mid-1870s provincial caudillos were clearly subservient to the national government and could no longer use a rebellion to try to reassume the functions of the national government in their provinces. The Court did, however, continue to develop a number of additional rules in the context of revolutions that were important for the protection of individual rights and for limiting government repression. The two most important were limits on military jurisdiction over civilians and the Court’s insistence on bail for persons arrested for rebellion.

The Argentine Supreme Court consistently opposed military jurisdiction over civilians while almost always providing for exclusive military jurisdiction over military personnel. With regard to military personnel, the Supreme Court frequently applied the rule that crimes committed by military personnel on the march, in a military installation or during an act of service were subject to exclusive military jurisdiction.

It was the truly exceptional case, such as where the crime

121. The last case to come before the Supreme Court involving assumption of national authority by a rebel government was “Saldaña,” 15 Fallos 484 (1874), regarding an individual who ran the federal customs house in Entre Ríos during the 1873 uprising led by López Jordan, but whom the Supreme Court held could enjoy the benefits of an amnesty given to the leaders of the rebellion.

122. The Supreme Court established that amnesty for leading or participating in a rebellion included amnesty of all common crimes committed in furtherance of the rebellion. “Chumbita,” 17 Fallos 22, 37-38 (1875) (though refusing to apply the amnesty to common crimes committed in earlier rebellions, prior to the rebellions that were the subject of the amnesty); “Villaruel,” 43 Fallos 204, 210 (1891). The Court did not, however, exempt the beneficiaries from liability in civil actions. “Chumbita,” 17 Fallos at 38; “Arévalo,” 17 Fallos 184, 186 (1876). In other cases, the Supreme Court blocked a federal judge from hearing cases in spite of an amnesty. “Andrade,” 11 Fallos 405, 415-16 (1872) (in which the promise of amnesty was in fact used to negotiate an end to a revolt in La Rioja). The Supreme Court also insisted that “fairness” required treating an amnesty of the leaders of the rebellion as also including lower ranking participants. “Saldaña,” 15 Fallos at 457 (adopting the Procurador General’s opinion that “since all of the primary authors of the rebellion have received an amnesty, it is unfair to proceed with a criminal case against an old man who did not commit any act of violence ... who only accepted the post of customs agent.”).

123. E.g., “Sosa,” 9 Fallos 474, 484 (1870) (stating the rule and holding that wounding two soldiers after deserting from the army did not fall within military jurisdiction); “Guatemala ó Torres,” 27 Fallos 110, 111 (1884) (stating the rule and finding military jurisdiction in
was committed prior to entry into military service, that the Supreme Court provided for civilian jurisdiction. What is striking, is how firm the Supreme Court was in barring military jurisdiction over persons not in the military, given Argentina's constant attempted rebellions. The ban included cases of bands of rebels, provincial militia, and persons acting under military orders to raise troops to put down a rebellion. Further, the federal courts frequently exer-

124. "Candia," 9 Fallos 533, 536 (1870) (ruling that a provincial court could try a military officer for crimes committed before he entered army service without seeking permission of his superiors); "Farfas," 14 Fallos 453, 464 (1874) (providing for federal jurisdiction in the case of several soldiers who participated in an uprising at a jail). "Farfas" was subsequently distinguished and effectively overruled by the Supreme Court in "Teniente Roberts," 25 Fallos at 488. This was not an area where there is a record of Argentina focusing on U.S. practice, and military jurisdiction and military justice generally was a surprisingly neglected area of Argentine law. Until Congress finally passed a Code of Military Justice in 1894, Law No. 3190, Jan. 1, 1895, [1889-1919] A.D.L.A. 302, the Argentine military continued to apply Spanish military ordinances inherited from the colonial period. See, e.g., "Coronel Espina," 54 Fallos 577, 591-97 (1893); Joaquín V. González, Manual de la Constitución Argentina (1907) in 3 OBRAS COMPLETAS DE JOAQUIN V. GONZALEZ § 644 (1897).

125. "Sosa," 9 Fallos at 484 (holding that a sergeant in the provincial militia of San Luis who deserted while the militia was on duty with the Army could not be subjected to military jurisdiction if the militia had already been detached from national service); see also "Coronel Rodríguez," 10 Fallos 55, 56 (1871) (granting a habeas corpus petition presented by a Colonel in the Santa Fé militia detained by the military, on grounds that there was no basis for the detention).

126. "Contienda de Competencia Entre el Juez del Crimen de San Juan y el Comandante en Jefe Ejército del Interior Sarmiento," 16 Fallos 61, 63 (1875) (insisting on
cised jurisdiction to require the release from military service of indi-
viduals improperly forced into the army.128 This is not to say that
rules established by the Supreme Court always governed. José Her-
ández began his 1872 gaucho epic Martín Fierro describing Martín
Fierro’s impressment into army service on the Indian frontier because
he failed to show up on election day to vote for the governing party.129
Rule of law established itself quickly, but not overnight.
Perhaps even more striking than the Supreme Court’s refusal to
allow military courts to assert authority over civilians was its insist-
tence that release on bail was available for persons charged with re-
bellion, meaning at least in theory that rebels could leave custody
almost as soon as they were disarmed. While the rule was first applied
after the Mendoza and San Juan revolutions,130 it became particularly
rooted when the Court insisted on pretrial release in numerous cases
after the revolt of 1874.131 Under the colonial procedural rules then
still in effect, bail was always available in the case of crimes that would
not result in “corporal” punishment, which the Court understood as
punishment involving a jail sentence.132 Since rebellion was a crime
only punishable by exile and/or a fine, bail was automatically avail-
able.133 The only exception was the case of Ricardo López Jordán, a
die-hard federalist whose rebellion began in April 1870 with the assassi-
nation of former President Urquiza and two of his sons as traitors to
the federalist cause.134 With Urquiza out of the way, López Jordán
seized control of Urquiza’s home Province of Entre Ríos and held out
against federal government forces until January 1871, when he was

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civilian jurisdiction when an individual named by the Army to recruit troops to stop a
rebellion shot another recruiter for failing to place himself under his command).

128. See “Godoy,” 8 Fallos 231 (1869) (federal courts can hear a habeas corpus action
alleging that the petitioner was improperly sent to serve in the federal army by the Gover-
nor of San Juan for having allegedly deserted from a municipal police force); Zavalía,

129. José Hernández, Martín Fierro ¶¶ 49-55 (1872).
131. “Abeleyra,” 16 Fallos 42 (1875); “Santander,” 16 Fallos 102 (1875); “Olivar,” 16
Fallos 118 (1875); “Gordoniz,” 16 Fallos 121 (1875); “Zapata,” 16 Fallos 146 (1875).
132. All the cases cited in the preceding footnote apply this rule, but they assume infor-
mation not obvious to a reader today. For a fuller explanation of the rule, see the decision
of the federal judge in “Lamarque,” 54 Fallos 292, 295-96 (1893) that accompanies the
decision of the Supreme Court affirming his decision.
133. “Mendoza,” 5 Fallos at 85-86; “San Juan,” 5 Fallos at 165-66.
134. 3 Diego Abad de Santillán, Historia Argentina 194-95 (1970); 2 Alberto
Floria & García Belsunce, supra note 50, at 144; María Amalia Duarte, Urquiza
y López Jordán 199-204 (1974); see generally Jorge Newton, Ricardo López Jordán:
Último caudillo en armas 100-70 (2d ed. 1974) (describing the murders and the various
López Jordán rebellions in detail).
finally defeated—though he himself escaped to Uruguay and attempted additional revolts in 1873 and 1876. The Supreme Court held that López Jordán did not qualify for bail because his alleged crimes went beyond the conduct included within the scope of a rebellion, such as raising an army and engaging the government in battle, but included executions, whippings, and lootings. A purely political rebellion without aberrant acts received protection from the Court, while rebellion combined with banditry did not. This approach would become key in the early 1890s, when the Court’s involvement in problems of revolution and civil unrest reached its peak.

VI. The Supreme Court and the Turbulent 1890s

The early 1890s were a uniquely unstable period for the Argentine elite. On the economic front, the Argentine economy and its financial markets soared and overheated in the 1880s. The financial crash came in late 1889 and the four years that followed brought serious depression. On the political front, the ever increasing presidentialism of the previous three decades finally faced a serious public reaction in 1890, leaving the governing Partido Autonomista Nacional (PAN) uniquely vulnerable until the public reaction began to fade in 1894 and 1895. The setbacks were only temporary. By the mid-1890s the economy was booming once again, and the PAN’s dominance continued until 1916.

Scholarship on Argentine politics in the 1890s ignores the courts almost completely. Substantial work has been done on the economic crisis of the 1890s, and numerous histories have been written on the revolts of 1890 and 1893 and the rise of the Radical Party. However, at least if newspaper coverage is any guide, courts played a very

135. “López Jordán,” 21 Fallos 121, 129 (1879); 3 ABAD DE SANTILLAN, supra note 134, at 196.
138. See generally BALESTRA, supra note 10 (on the Revolution of 1890); ROBERTO ETCHEPAREBORDA, TRES REVOLUCIONES 17-240 (1868) (offering a straightforward account of events in the 1890 and 1893 revolutions); HORACIO J. GUIDO, SECUELAS DEL UNICATO: 1890-1896, at 107-64, 191-225, 249-305 (1977) (offering a good overview of the entire period); JOSÉ NICOLÁS MATIENZO, LA REVOLUCIÓN DE 1890 EN LA HISTORIA CONSTITUCIONAL ARGENTINA (1926) (on the political conflicts behind the Revolution of 1890); 1 GABRIEL DEL MAZO, EL RADICALISMO 58-90 (1955) (describing the origins of the Radical Party and the Radical revolts of 1893); Ezequiel Gallo, Un quinquenio difícil: Las presidencias de Carlos Pellegrini y Luis Sáenz Peña (1890-1895), in GUSTAVO FERRARI &
Courts and the Creation of a "Spirit of Moderation"

While no single decision was the key to maintaining stability, the Supreme Court clearly acted as an independent arbiter, insisted on maintaining rules that worked against escalation of the crisis, and handed down decisions with important political consequences. In order to understand the issues faced by the Argentine Court and its responses, it is necessary to first develop some of the political history of the period.

A. Historical Background

Argentine politics in the 1880s and 1890s was a politics of personalities as much as parties, and the dominant politician of the period, even when out of power, was General Julio Argentino Roca. General Roca began his military career in the armed forces of the Confederation at the age of fourteen, and in 1859, at age sixteen, was promoted to second lieutenant for his performance at the Battle of Cepeda, in which Urquiza defeated the forces of Buenos Aires. In the years that followed he was present at countless military engagements against rebels, indians, and the Paraguayan army, becoming one of Argentina's leading military figures. President Avellaneda appointed Roca Minister of War in 1878 and as Minister he led the campaign known as the "Conquest of the Desert" that defeated the last militarily significant bands of indians, on the Argentine prairie and opened up the entire frontier to settlement. That success made him President Avellaneda's natural choice to succeed him as President. In the process of running for President, Roca defeated the forces of Buenos Aires that rebelled in the revolt of 1880. He also enjoyed the support of a League of Governors organized with the help of Miguel Juárez Celman, his wife's sister's husband and the governor of Córdoba. The PAN was created as his formal electoral vehicle, and the party united both Buenos Aires and provincial politicians. Roca's first period as President was free of any revolts or external conflicts, and in 1886 he installed Miguel Juárez Celman as his successor and probably hoped to continue to exercise power behind the scenes.

Juárez Celman did not act as Roca's puppet, however, and sought to concentrate political power in his own hands even more thoroughly.

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139. See, e.g., supra note 61; infra note 345.
140. See generally JOSÉ ARCE, Roca: SU VIDA—SU OBRA 17-96 (1960) (describing Roca's life until he assumed the presidency); FÉLIX LUNA, SOY Roca (1959) (offering a high quality, popular biography of Roca written in first person from Roca's perspective).
than Roca had.\textsuperscript{141} This accentuation of one-man rule did not run into significant problems while the economy boomed, but Juárez Celman also ran up a huge national debt, failed to control land speculation, and allowed a flood of unbacked paper money from both national and provincial banks.\textsuperscript{142} When Argentine financial markets crashed in 1889 and 1890 because of a drop in the inflow of foreign capital, Juárez Celman failed to seek new political allies and continued the personal nature of his rule. The result was a strengthened and mobilized opposition and a revolt known as the "Revolution of 1890" in July of that year.

Three main political groups joined together to produce the Revolution of 1890, forming a grouping that called itself the Unión Cívica.\textsuperscript{143} First, devout Catholics had long been at odds with the PAN for its emphasis on secular public education,\textsuperscript{144} and were disturbed by passage of a civil marriage law in 1888 that ended the authority of clergy to perform marriages with legal effect\textsuperscript{145} and that required a civil marriage before any religious marriage ceremony could legally take place.\textsuperscript{146} Second, former President Mitre, having supported the revolts of 1874 and 1880, continued to lead a party that espoused political reform but was concerned primarily with increasing the influence of the City and Province of Buenos Aires and its commercial interests. Third, and most important as a political force, was a new group of political reformers led by Leandro Alem, a Senator from the Federal Capital with substantial popular support. This group demanded clean elections and began to acquire coherence during a series of public meetings starting in September 1889. Even this third

\textsuperscript{141}See Gustavo Ferrari, Apogeo y Crisis del Liberalismo 49-87 (1988) (describing Juárez Celman's concentration of power in his own hands).

\textsuperscript{142}Id. at 183-212.

\textsuperscript{143}See Rock, supra note 69, at 42-43 (describing the principal groups making up the Unión Cívica).

\textsuperscript{144}See Law No. 1420 art. 8, July 8, 1884, [1881-1888] A.D.L.A. 126, 127 (only permitting religious instruction in the public schools outside of class hours, and only to children of the faith of the religious instructor).


\textsuperscript{146}See id. art. 118 (imposing criminal penalties on clergy who perform a marriage ceremony without a civil marriage taking place first). See generally 12 Cayetano Bruno, Historia de la Iglesia en la Argentina 87-95 (1981) (discussing Law No. 1420 on secular public education and the Catholic reaction); id. at 149-58 (discussing the Civil Marriage Law and the Catholic reaction); id. at 114-34 (on expulsion of the Papal Nuncio from Argentina in 1884 for his protests against the secularization of public education); Guillermo Furlong, El catolicismo argentino entre 1860 y 1930, in 2(1) Academia Nacional de Historia, Historia Argentina Contemporánea 251, 266-73 (1964) (on the secularization of the Argentine State in the 1880s and the reaction of the Church).
group, however, while rejecting the corrupt politics of the past, was dominated by members of the traditional elite, including members of some of Argentina's wealthiest families.

The actual revolt came on July 26, 1890, and enjoyed the support of army units commanded by General Manuel Campos and naval units in the harbor, in addition to groups of armed civilians.147 The revolutionaries seized the City's munitions depot and set up small outposts at many points around the depot, but the Government proved stronger. After three days of fighting in the City, which left approximately 1,000 dead and in which rebel naval units shelled government positions, the revolutionaries signed an agreement with the Government in which they surrendered in return for an amnesty and a promise of no reprisals. Even more important than the revolt was its aftermath. To put down the revolt, President Juárez Celman found himself dependent on his predecessor, Roca, who commanded the loyal army forces, and on his Vice President, Carlos Pellegrini, who ran the government while Juárez Celman was forced to seek refuge outside the City, and who used his own political base among the Buenos Aires elite to build support. Roca and Pellegrini became the true arbiters of the situation, while Juárez Celman was held responsible for the disorder generated by the revolt and was forced to resign a week after the revolt ended.

As President, Carlos Pellegrini, with the assistance of Roca as his Minister of the Interior, was able to maintain control, but not the absolute dominance that the PAN had enjoyed over the previous ten years.148 Civilian and military unrest required various periods of states of siege. Moreover, financial circles were uneasy as Argentina went through a difficult period of negotiating a moratorium on payment of its foreign debt, and briefly went into default shortly after the Revolution of 1890. However, Pellegrini and Roca were able to reach out to enough sectors of the elite to retain control, most notably reaching an agreement with Mitre that drew his forces into a political coalition with the PAN. This agreement also caused the Unión Cívica to split in July 1891, with Alem and his followers establishing the Unión Cívica Radical (the "Radical Party") to continue the revolutionary struggle.

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147. For a discussion of the Revolution of 1890, see generally BALESTRA, supra note 10, at 131-92; GUIDO, supra note 138, at 107-34.

148. See generally GUIDO, supra note 138, at 147-64, 191-225; JOSÉ MARÍA ROSA, HISTORIA ARGENTINA 297-335 (1973) (offering overviews of the Pellegrini presidency).
Alem and his party led a series of unsuccessful provincial revolts through September 1893, with revolts in July 1893 enjoying the greatest success and, through a strange twist of events, even received some early support from within the government. Luis Sáenz Peña, the presidential candidate for both the PAN and Mitre's forces in the April 1892 elections, was a compromise candidate who lacked strong support in any political party. He was sitting on the Supreme Court at the time he was nominated and presented himself as a non-partisan figure. Further, once he assumed office he adopted a role much more like that of a constitutional monarch than of a hands-on administrator. However, his lack of a political base forced him into a constant search for allies, and once an alliance was made he gave his allies carte blanche in the formation of a cabinet. His need for allies and lack of sufficient support from the PAN or Mitre led him to choose a prominent Radical Party sympathizer, Aristóbulo del Valle, as his Minister of War on July 5, 1893, and to allow del Valle to select the rest of the cabinet. Del Valle, with President Sáenz Peña's initial support, sought to advance the aims of the Radical Party by disarming provincial governments and thereby increasing their vulnerability to local revolts. The Radicals promptly responded with revolts in the Provinces of Buenos Aires, Santa Fé and San Luis, and del Valle in turn sought federal intervention in the three provinces in order to install Radical sympathizers as governors. The House of Deputies rejected his request, but the Radical forces were in any case successful in taking over the three provinces, with del Valle busy disarming the Buenos Aires provincial government as Radical forces advanced on La Plata, the provincial capital. The story ends, however, with Carlos Pellegrini taking advantage of del Valle's absence in La Plata to resubmit legislation seeking federal intervention in the three provinces, obtaining its approval (in spite of a constitutional ban on resubmitting rejected legislation during the same session of Congress), convincing President Sáenz Peña to appoint federal intervenors favorable to the PAN, and ultimately leaving del Valle with no choice but to resign. The Radicals lost the provinces, and a final series of uprisings in September centered in Santa Fé were even less successful.

149. See generally DEL MAZO, supra note 138, at 81-90; GUIDO, supra note 138, at 256-95; MÁRICA ROSA, supra note 148, at 352-70; Andrés R. Allende, La Presidencia de Luis Sáenz Peña, in 1(1) ACADÉMICA NACIONAL DE HISTORIA, HISTORIA ARGENTINA CONTEMPORÁNEA 1862-1930, 402-12 (1963); Gallo, supra note 138, at 226-50 (all treating del Valle's period as Minister of War and the Radical Party's revolts).

150. CONST. ARG. art. 71 (1860).
The Supreme Court played an indirect role in political events throughout the 1890-1893 period, but reached its peak in 1893.

B. 1890-1891: Active, But on the Sidelines

While 1890 and 1891 were politically turbulent years, they did not produce politically transcendent cases as would be true in the two years that followed. The agreement that the government negotiated with the rebels after the Revolution of 1890 prevented the government from arresting Leandro Alem and his allies at that time, and President Pellegrini probably lacked the political strength to actively repress Alem until after the PAN entered into a coalition with Mitre in mid-1891. There were three cases that should be noted, however, because they all involved the Supreme Court granting habeas corpus petitions in a politicized atmosphere. The Court sent a clear message to all political participants that it would insist on deciding habeas corpus cases in a manner consistent with its prior case law and the constitutional text.

First, in January 1891 the Court required the provincial authorities of the Province of Mendoza to release General Rufino Ortega, who was arrested for sedition and for shielding two political supporters found with him in his home who had allegedly made death threats against the Governor.\footnote{Ortega, 41 Fallos 405, 406-08, 413 (1891).} Ortega, an ally of Roca and Pellegrini,\footnote{CUTolo, supra note 53, at 201; see also PEDRO SANTOS MARTINEZ, HISTORIA DE MENDOZA 131 (1979) (describing Ortega as an ally of Pellegrini but not of Roca during this period; however, with Roca and Pellegrini acting together, the difference is insignificant).} was a national Senator for Mendoza,\footnote{Ortega, 41 Fallos at 408.} and sought to destabilize a Mendoza government that had entered into a coalition with the Unión Cívica.\footnote{See id. at 406; Santos Martinez, supra note 152, at 130-31.} Under Article 61 of the Constitution, no member of Congress could be arrested, from the day of his election through the end of his term, “except in the case that he is surprised in flagranti in the execution of a crime punishable by death [or some other] ignominious or shameful punishment,” with the further requirement that the relevant House of Congress be provided the facts of the case.\footnote{CONst. ARG. art. 61 (1860).} The federal district court in this case ruled in favor of Ortega’s release, holding that the crimes he was accused of were not sufficiently serious so as to overcome his immunity,\footnote{Ortega, 41 Fallos at 410-12.} but the Court took an easier path,
finding that since over a month had passed without the Mendoza au-
torities notifying the Senate of the facts of the case the detention
could not continue. This approach had the advantage of not requir-
ing an inquiry into the propriety of the original detention.

In a second case, resulting from a Unión Cívica revolt in the
Providence of Catamarca, the Supreme Court gave the Radicals a minor
victory. Radical elements of the Unión Cívica mounted a revolt in
Catamarca in June 1891, that was promptly repressed by President
Pellegrini with a federal intervention and a division of army troops.

In the aftermath of the revolt, the government officials on the scene
gave a number of the lower ranking participants a choice: either "vol-
unteer" for two years of service in the army, or face a penalty of four
years of military service—the penalty under federal law for partici-
pation in the lower ranks of a rebellion if unable to pay a 300 to 600
peso fine. The lower court decision in the case and the opinion of
the Procurador General, the chief government attorney before the
Court, show an early example of Argentina’s Civil Code beginning to
affect thinking on public law issues. The lower court and Procurador
General found that of the ten persons who filed habeas corpus peti-
tions in the case, four were minors, so any contract they signed to
enter the army was automatically null and they had to be released.
However the lower court and the Procurador General both also main-
tained that the other enlistees could not take advantage of the quick
procedures of a habeas corpus action without first bringing an ordi-
nary civil action to annul their contracts, since under the Civil Code
contracts entered into under improper pressure are not null but
merely annulable, and remain in effect until judicially annulled.
The Supreme Court, however, rejected these civil law concepts as sim-
ply irrelevant. The testimony that the enlistments were forced was
convincing and uncontradicted, and the constitutional guarantees
against illegal arrest and imprisonment protected individuals against
all restrictions and violence against their personal security. The

157. Id. at 417-18.
159. 2 SOMMARIVA, supra note 10, at 171-73.
160. “Aguirre,” 46 Fallos at 85, 87, 89-90; see also 2 SOMMARIVA, supra note 10, at 173-
74 (noting that the individuals affected were from outside the Province).
162. “Aguirre,” 46 Fallos at 85-86, 88 (citing Argentine Civil Code Articles 1045, 1046,
on annulable contracts).
163. Id. at 89-90.
164. Id. at 89.
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Neither of the above decisions attracted great public attention, and hence the political stakes were comparatively low. A third case, however, having to do with revolution not in Argentina, but in Chile, caused substantial discomfort for the Executive. The Chilean revolution occurred because of a confrontation between the Chilean President, José Manuel Balmaceda, a proponent of strong presidentialism, and the Chilean Congress. The revolution broke out in January 1891, with most of the Chilean Navy supporting the Congress, but with the Army remaining loyal to Balmaceda. With each side mustering large forces, the outcome remained unclear until late August, when Balmaceda’s army lost a series of battles, and Balmaceda himself took refuge in the Argentine Embassy where he committed suicide. The Argentine government clearly favored Balmaceda (and not surprisingly, Alem and his allies favored the rebels). Argentina was the only country that sold arms to Balmaceda—including a cruiser from its navy—that blocked arms sales to the rebels, and allowed unarmed government troops to cross Argentine territory on at least two occasions. The Argentine government also had no objection to

165. See e.g., “Godoy,” 8 Fallos at 231; ZAVALA, supra note 51, at 119-20. The Supreme Court also granted a habeas corpus petition in favor of improperly drafted soldiers several years later in “Descalzo,” 76 Fallos 209 (1898).
167. Id. at 346.
168. Id. at 347-48.
169. The split between the Pellegrini Administration and Alem and others over its support for Balmaceda is particularly clear in the Senate’s interpolation of the Minister of Foreign Relations on August 4, 1891. Many senators, and not just Alem, disapproved of the Administration’s position. See generally CONGRESO NACIONAL, CÁMARA DE DIPUTADOS, DIARIO DE SESIONES DE 1891, Session of Aug. 4, 1891, at 442-74 [hereinafter Senate Chilean Debate].
170. MARIO BARROS, HISTORIA DIPLOMÁTICA DE CHILE, 1541-1938, at 478 (1970); see also Senate Chilean Debate, supra note 169, at 457 (debate between Rocha and the Minister of Foreign Relations) (the Minister insists that arms sales to a government are entirely legal under international law because Argentina did not recognize the Chilean rebels as belligerents).
171. MINISTERIO DE RELACIONES EXTERIORES, MEMORIA DE RELACIONES EXTERIORES PRESENTADA AL HONORABLE CONGRESO NACIONAL EN 1891, at 164 (1891) [hereinafter MEMORIA] (letter by the Minister of Foreign Relations Eduardo Costa to the Chilean government indicating that Argentina would block arms for the rebels from crossing the Argentine border); BARROS, supra note 170, at 478.
172. See Senate Chilean Debate, supra note 169, at 448 (statement of Rocha), 456, 461, 462 (statements of Minister of Foreign Relations Eduardo Costa); MEMORIA, supra note 171, at 191-95 (Chilean request and Argentine grant of permission to allow unarmed Chil-
the Chileans docking the *Pilcomayo* in Buenos Aires, a slow naval ship that Balmaceda sent to Buenos Aires for safekeeping after retaking the ship in Punta Arenas, near the Strait of Magellan.\textsuperscript{173}

The crew of the *Pilcomayo* mutinied, however. The ship’s officers successfully put down the mutiny, but they found themselves unable to care for wounded prisoners and unable to securely guard the rest. They turned to the Argentine government for help, and the Argentine government agreed to treat the wounded and temporarily guard the healthy mutineers in Argentine facilities.\textsuperscript{174} The sailors responded by bringing a habeas corpus action before Judge Virgilio Tedín, one of the two federal judges for the City of Buenos Aires.

Judge Tedín held in the sailors’ favor. The Government tried to argue that the prisoners were not really in Argentine custody, but Chilean custody with Argentine assistance. Judge Tedín, however, insisted that the Chilean government lacked authority in Argentine territory, and that no detention could occur in Argentina without a court order and in accordance with due process of law.\textsuperscript{175} Further, he refused to treat the matter as an extradition proceeding, since no extradition request had been filed.\textsuperscript{176} The Supreme Court upheld Judge Tedín’s decision. Although Chile had entrusted the sailors to the Argentine government, the Chilean sailors enjoyed the full benefit of Argentine jurisdiction from the moment they left their ship and entered Argentine territory.\textsuperscript{177} No one could be detained without a written order issued by a competent authority, and the President did not enjoy a special authority to engage in detentions by virtue of his authority to conduct foreign relations.\textsuperscript{178} Moreover, even if the Chilean
government were to seek extradition of the sailors, it could not obtain them since their alleged crime was of a political nature and therefore not subject to extradition. The Executive complied with the Supreme Court's ruling the day after it issued its decision, as soon as an order was communicated by the District Court, and in spite of a letter from the Chilean Ambassador insisting that the sailors be returned to the Chilean government. While the Argentine government continued to support Balmaceda, the issue was not worth defying the Court.

C. 1892: Judge Tedín

The start of 1892 brought increasing tensions, with Congressional elections on February 7, presidential elections on April 10, and increasingly prominent judicial intervention not so much by the Supreme Court as by Judge Virgilio Tedín, the federal judge who decided The Pilcomayo mutineers case. Judge Tedín ranks among the most resolute judicial figures in Argentine history, sitting on the federal bench for eleven years until he passed away prematurely in June 1893 at age forty-two. He was clearly allied with the progressive forces in the City of Buenos Aires, and was sufficiently well considered by the Radicals to receive their nomination for the Senate for the 1892 elections, which he rejected to remain on the Bench. Judge Tedín made forceful efforts to halt electoral fraud, using the jurisdiction of the federal district courts to hear appeals from local voter re-


however, this was not invoked by the Executive as authority for the detentions when the Court asked the Executive if such was the case. MEMORIA, supra note 171, at 176-77. This is hardly surprising, as the state of siege, initiated two months before because of an alleged risk of violent demonstrations, Acuerdo declarando en estado de sitio la Capital de la República, decree of Feb. 20, 1891, 39 REGISTRO NACIONAL DE LA REPÚBLICA ARGENTINA 124 (1891), was terminated in the Federal Capital on April 17, the day before the Executive responded to the Court's inquiry. Acuerdo levantando el estado de sitio en la Capital de la República, decree of Apr. 17, 1891, 39 id. at 319.

180. Los marineros de la Pilcomayo en libertad, LA PRENSA, Apr. 25, 1891, at 5.
182. See 7 CUTOLO, supra note 53, at 286; see generally JOSÉ LUIS AMADEO, EL JUEZ TEDÍN: LA POLÍTICA Y UN JUEZ (1972) (a brief biography of Judge Tedín, mainly through quotations from his decisions and contemporary documents).
183. See 8 MARÍA ROSA, supra note 148, at 328 (noting Tedín's nomination by the Radicals); CARLOS R. MELO, LOS PARTIDOS POLÍTICOS ARGENTINOS 32-33 (1970) (describing Tedín's activity in the Unión Cívica); see also AMADEO, supra note 182, at 23-26 (describing Tedín's support for Bernardo de Yrigoyen for the presidency in 1886 and concern with electoral fraud).
registration boards provided that the appeal was first heard by the local board itself.184

In 1886 Judge Tedín made the first significant attempt by a federal judge to remove names improperly included on the voter rolls,185 and in early 1892 he went even further, deciding 3615 cases and removing 2874 names from the voter rolls of the Federal Capital.186 His conduct was unorthodox. First, in many cases the local electoral boards refused to meet to review complaints, so he heard "appeals" without a decision by the tribunal of first instance.187 Second, rather than using traditional methods of personal service by a court official or attorney, Judge Tedín used the ordinary mail system for service on individuals listed on the rolls, instructing them to appear before him. With the simple existence and residence of these persons being the true issue in most cases, he instructed the mail carriers to indicate on the letter the reason for failure in delivery if the letter could not be delivered. When the mail carrier indicated that the person sought could not be found, he then treated the failure of the named individual to appear before him on the date of their appearance as sufficient to strike the name from the voter rolls.188 Judge Tedín's 1892 decisions were not followed by the individuals who actually ran the voting tables on election day, apparently on the grounds that they never received instructions from the local registration boards to remove the names.189 The PAN argued that Judge Tedín acting in an appellate capacity lacked authority to strike a name from the rolls himself, but merely could order the local registration boards to strike a name.190 However, even though disobeyed, Judge Tedín's decisions made the fraud of the 1892 elections much more evident than usual, led to ex-

185. AMADEO, supra note 182, at 16-23.
186. CONGRESO NACIONAL, CÁMARA DE DIPUTADOS, DIARIO DE SESIONES DE 1892, Session of June 3, 1892, at 88 (statement of Beracochea); see also Los hombres y las leyes, LA PRENSA, June 8, 1892, at 4 (stating that Judge Tedín likely struck over 3000 names from the voter rolls); El fraude electoral, LA PRENSA, Mar. 31, 1892, at 4-5 (Judge Tedín was the only judge to attack the fraud in the election rolls in 1886, suffering threats of impeachment as a result, and is once again doing the same and uncovering massive fraud).
187. CONGRESO NACIONAL, CÁMARA DE DIPUTADOS, DIARIO DE SESIONES DE 1892, Session of June 6, 1892, at 94 (statement of Beracochea).
188. See Los hombres y las leyes, supra note 186, at 4.
189. Id.
190. This is the position generally taken by deputies who supported the government during the debate over whether to accept the credentials of the newly elected Deputies from the Federal Capital. E.g., CONGRESO NACIONAL, CÁMARA DE DIPUTADOS, DIARIO DE SESIONES DE 1892, Session of June 3, 1892, at 78 (statement of Meyer); id. Session of June 6, 1892, at 102 (statement of Torres).
intensive debate in the House of Deputies before the election results from the February 7 elections for National Deputies and Senators were accepted, and assisted a growing movement toward clean elections in the Federal Capital. In 1895 Congress in a sense “ratified” Judge Tedín’s conduct by providing that if the local registration boards are dissolved or refuse to give effect to the resolutions of the federal judge, the judge may name a notary public to carry out his orders and make the necessary changes to the voter rolls.

However, Judge Tedín’s most suspenseful decision came in a case involving the detention of Leandro Alem himself. On April 2, 1892, President Pellegrini declared a state of siege and arrested Leandro Alem and much of the Radical Party leadership, placing them on board the Argentine warship La Argentina, anchored ten miles from shore. In declaring the state of siege and later defending it in Congress, President Pellegrini declared that Alem and his allies were plotting an imminent, violent revolt, storing explosives to commit anarchist attacks against the homes of government figures. No proof was ever submitted to the public to back up these charges and no Radical Party leader was even indicted for rebellion in 1892, let alone for anarchist activities, but the state of siege did serve to block Radical demonstrations leading up to the Presidential elections scheduled for April 10. The very weakness of the PAN in the aftermath of the Revolution of 1890 required it to resort to repressive measures it generally had not needed in the past.

191. The debate occupied almost the entire sessions on June 3, 6, and 8, 1892, with the House finally voting to accept the Deputies on June 8. CONGRESO NACIONAL, CAMARA DE DIPUTADOS, DIARIO DE SESIONES DE 1892, Session of June 8, 1892, at 143.


194. Acuerdo declarando en estado de sitio el territorio de la República, decree issued Apr. 2, 1892, 41 REGISTRO NACIONAL DE LA REPÚBLICA ARGENTINA 481 (1892) (giving the preamble and declaration of the state of siege) (also found in Declaración del estado de sitio, LA PRENSA, Apr. 3, 1892, at 3); CONGRESO NACIONAL, CAMARA DE DIPUTADOS, DIARIO DE SESIONES DE 1892, Session of May 27, 1892, at 42-47 (text of bill submitted by President Pellegrini to Congress seeking approval of the state of siege, giving the reasons why it was declared, and including some intercepted correspondence between Radical Party leaders that allegedly demonstrated their violent plans, though in fact it shows nothing but vague scheming to plan a revolt in the future).

195. See La impresión pública, LA PRENSA, May 29, 1892, at 4; La Constitución Argentina, LA PRENSA, May 30, 1892, at 4; El estado de sitio ante el juicio del Congreso, LA PRENSA, May 31, 1892, at 4; Los presos políticos and El estado de sitio en el Congreso, LA PRENSA, June 10, 1892, at 4. See infra text accompanying note 229.
Lawyers for the detainees promptly filed habeas corpus petitions, with the petitions falling into two groups. One group of petitions were presented by Radical Party leaders who did not hold seats in Congress, and these were quickly rejected by Judge Tedín on grounds that Article 23 of the Constitution gave the Executive authority to detain individuals during a state of siege, unless they opted to leave the country. The situation was different, however, for Leandro Alem, who at that time was still a Senator for the Federal Capital (his term ending on April 30) and Victor Molina, a Deputy from the Federal Capital. Their attorneys argued that the Executive had the obligation to respect their parliamentary immunities even during a state of siege, since they had not been "surprised in flagrante in the execution of a crime punishable by death [or some other] ignominious or shameful punishment," as required under Article 61 of the Constitution, and Congress had not stripped them of their immunities, the constitutional option available to the government under Article 62. Judge Tedín acted with typical speed. Alem and Molina’s petitions were filed at 4:00 p.m. on April 2, and Judge Tedín gave the Chief of Police until 8:00 p.m. to bring Alem and Molina before the Court and to provide an explanation for the detentions. The Chief of Police responded that he acted under orders from the President and no longer had custody over the prisoners. Judge Tedín, however, took that response as evasive and ordered the Chief of Police to provide a fuller explanation by 10:00 a.m. the next morning or face arrest. When the Chief of Police then responded that it was public knowledge that the prison...

196. "Paez," 48 Fallos 17, 17-19 (1892); "Leguizamon," 48 Fallos 27, 28-33 (1892) (note that the attorneys’ names, Rodríguez and Demarfa, respectively, nct Paez et al. and Leguizamón et al., are used in the case headings provided by the Court).
197. CONST. ARG. art. 62 (1860). Habeas Corpus Petition at dossier pages 2 (back) - 5, and Leandro Alem’s Letter to the Court, 7-8 (back), Alem, Legajo 1 (1892) [hereinafter Alem Dossier]; Habeas Corpus Petition at dossier pages 1-1 (back), Molina, Legajo 1 [hereinafter Molina Dossier]. These briefs are on file with the Director of the Archivo General del Poder Judicial in the basement of Talcahuano 550, Buenos Aires, and may also be found in full in Dr. Alem ante el juzgado federal and Dr. Molina ante la justicia federal, La Prensa, Apr. 3, 1892, at 4.
198. Alem Dossier, supra note 197, at 5 (back); Molina Dossier, supra note 197, at 1 (back).
199. Alem Dossier, supra note 197, at 6, 9-9 (back); Molina Dossier, supra note 197, at 2.
200. Alem Dossier, supra note 197, at 9 (back); Molina Dossier, supra note 197, at 3 (back).
judges were aboard La Argentina. Judge Tedín ordered the Commander of La Argentina to respond to the petitions and produce the prisoners before the Court within twenty-four hours. This order was never served, however, because the Navy maintained the vessel incommunicado and not only did it not allow an order to be served directly on the Captain of the vessel, but it refused to accept service of the Court's order at the office of the Navy Chief of Staff for delivery to the vessel. Judge Tedín responded on April 5 by ordering the release of the prisoners and serving his decision on the Minister of War.

Judge Tedín reasoned that while the Executive had not responded in the case, the only possible authority for the detentions was the Executive's powers during a state of siege, and these could not be invoked against members of Congress. Article 23 of the Constitution operates to allow the President to suspend individual rights during a state of siege, but does not affect the operation of government and the privileges required by members of Congress to perform their governmental functions. With citations to Cooley and Story he argued that U.S. authors had noted the importance of Congressional immunities for the operation of representative government and of the use of habeas corpus to protect those immunities when necessary—even though the U.S. Constitution allows arrest for treason, felonies, and breaches of the peace not committed in flagranti. Further, if the President could detain members of Congress then he could also block any attempts to impeach him, and could manipulate Congress when it votes whether to confirm a Presidential declaration of state of

comply with habeas corpus proceedings and allowing the arrest to continue until the official complies with the court's orders.

202. Alem Dossier, supra note 197, at 13-14; Molina Dossier, supra note 197, at 7-8.
203. Alem Dossier, supra note 197, at 14-14 (back); Molina Dossier, supra note 197, at 8 (back).
204. Alem Dossier, supra note 197, at 15-16 (back); Molina Dossier, supra note 197, at 9-9 (back).
205. Alem Dossier, supra note 197, at 19-28 (back) (issuing a single decision with respect to both Alem and Molina).
206. Id. at 19-20. The full text of Judge Tedín's decision may also be found in Los sucesos de actualidad, supra note 61, at 4.
207. Alem Dossier, supra note 197, at 20 (back)-22 (back).
209. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (edition and page cites not provided in the opinion, first published in 1833).
A state of siege does not permit a President dictatorial powers.\textsuperscript{212}

The Executive refused to comply with Judge Tedin's decision.\textsuperscript{213} The Minister of War, Nicolás Levalle, replied that the President had instructed him to respond that the Court's order infringed on the President's constitutional powers during a state of siege.\textsuperscript{214} According to the Minister, Congressional immunities could not be invoked when members of Congress conspire against constitutional authorities. If members of Congress enjoyed immunity from detention during a state of siege, then they could work to overthrow the government.\textsuperscript{215} He also argued that British, U.S., and Chilean practice all supported the President's position, with the U.S. Constitution even allowing arrest of members of Congress in the case of a "breach of the peace."\textsuperscript{216} Habeas corpus was inappropriate because it applied only to detentions made without authority. The President, however, had constitutional authority to order a detention during a state of siege.\textsuperscript{217}

This response by the Executive effectively ended the legal proceedings. Neither Alem nor Molina appealed their cases to the Supreme Court. Having won below, there was nothing to appeal, and the Supreme Court had long held that enforcement of judicial decisions was a matter for the court of first instance.\textsuperscript{218} Alem and Molina continued in detention until June 9, by which time the Executive had relaxed most of the rigors of the state of siege.\textsuperscript{219} Alem and Molina's attorneys requested Judge Tedin to send the case dossiers to Congress to request the President's impeachment,\textsuperscript{220} but no impeachment proceedings were ever initiated. Given that President Pellegrini's term ended on October 12, 1892, the Executive's opponents in the House of Deputies saw little point in pushing for impeachment,\textsuperscript{221} and settled.
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for a resolution simply stating that detention of Molina had violated the House's parliamentary privileges.222

Judge Tedín's efforts were not entirely in vain, however. First, the day after Alem and Molina's habeas corpus petitions appeared in the Press, the government used its powers under the state of siege to prevent any comment in the Press on the state of siege or on any related habeas corpus petitions.223 Judge Tedín's decision in the case was the only statement reflecting negatively on the state of siege that the Buenos Aires Press was permitted to publish,224 and even the pro-government Press felt obliged to publish the decision or at least offer some comment on the case.225 Second, defying Judge Tedín carried a political cost. For example, *La Prensa*, the largest Buenos Aires newspaper from the 1890s through the 1940s, initially supported President Pellegrini's decision to declare a state of siege, in light of the government's claim of a violent Radical plot.226 Since *La Prensa* was not tied to any political party and had earlier been extremely critical of Pel-

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222. CONGRESO NACIONAL, CÁMARA DE DIPUTADOS, DIARIO DE SESIONES DE 1892, Session of Oct. 19, 1892, at 29 (approving the resolution regarding the detention of Molinas and also disapproving of Deputy Rafael Castillo's detention by provincial authorities in Catamarca); see also id., Session of Oct. 17, 1892, at 17-18 (giving the text of the resolution and the committee report, which found not only that the Executive lacked authority to detain a member of Congress when the arrest does not occur in flagranti, but finding that there were never even any specific allegations or proof offered by the Executive indicating that Molina participated in subversive activities).


224. See *Los sucesos de actualidad*, supra note 61, at 4 (noting that by special order of the President the Press was permitted to publish Judge Tedín's decision in the *Alem* and *Molina* cases with the Secretary of War's reply, and publishing the decisions, but complaining that it was not permitted to offer comment). The restriction on comments on the state of siege was only lifted at the end of May, and only informally. *La impresión pública*, supra note 195, at 4.

225. *La Nación*, which took a vociferous pro-government position at this time because former President Mitre, its owner, had entered into a coalition with the PAN, published the full text of Judge Tedín's decisions in *Alem* as well as the government's reply. *Habeas Corpus*, *La Nación*, Apr. 8, 1892, at 1. Even the *Buenos Aires Herald*, which strongly supported the state of siege, published an extensive summary of Judge Tedín's decision and the Minister of War's response, The *Political Prisoners, Buenos Aires Herald*, Apr. 9, 1892, at 2-3 as well as short articles supporting the government's position, *Notes, Buenos Aires Herald*, Apr. 10, 1892, at 1; *Notes, Buenos Aires Herald*, Apr. 12, 1892, at 1. *El Argentino*, a newspaper that favored the Radical Party, was closed by the government during the state of siege, but published one issue on April 10, when the state of siege was suspended for one day for the presidential elections, and used the opportunity to publish Judge Tedín's decision in *Alem*, *La sentencia del Dr. Tedín, El Argentino*, Apr. 10, 1892, at 3-4.

legrini’s presidency,\textsuperscript{227} this counted as significant support. However, during the state of siege La Prensa published not just the decisions in the Alem and Molina cases, but the attorneys’ briefs, and complained of the fact that it was not permitted to comment on the cases.\textsuperscript{228} Once the restrictions on publications were lifted, it used its voice to complain about the lack of proof offered by the government against Alem and the government’s usurpation of judicial functions.\textsuperscript{229} La Prensa’s principal complaint was not so much the government’s failure to comply with Judge Tedín’s orders, as the government’s conduct in making the unsubstantiated charges that Alem planned bombing and other violent acts and then violated his parliamentary immunities. Judge Tedín’s decision was an important reinforcement for La Prensa’s arguments.\textsuperscript{230} In October 1892, when President Pellegrini left office, he was very unpopular for what was generally perceived as authoritarian conduct, and for his handling of the state of siege was the most serious example of such conduct.\textsuperscript{231} Detention of Alem was Pellegrini’s most significant step during the state of siege, and Judge Tedín’s decision legitimized complaints on Alem’s detention.

While the Supreme Court did not get directly involved with Judge Tedín’s confrontation with the Executive, the Supreme Court also displayed some activity. The Court heard two identical cases involving groups of Radical Party leaders who were deported to Uruguay, allegedly without being asked by the Executive whether they wished to invoke their right to leave the country as an alternative to deten-

\textsuperscript{227} El balance general, La Prensa, Jan. 1, 1893, at 4 (presenting a harsh round-up of the government’s conduct over the previous year); La elección de hoy, La Prensa, Feb. 7, 1892, at 3 (condemning the government’s fraudulent electoral practices).

\textsuperscript{228} See supra notes 225-26.

\textsuperscript{229} See supra note 195.

\textsuperscript{230} See id.

\textsuperscript{231} Pellegrini’s unpopularity on leaving office is patent. He himself publicly offered to resign several weeks early, and probably would have had no choice but to go through with his offer if there had been general agreement as to who would succeed him, the President-elect or the President of the Senate. He was subject to sharp attack in Congress, in part during the debates on the state of siege, and in part because as relations with Congress worsened he refused to comply with a request by the House of Deputies that Nicolás Levalle, the Minister of War, present himself for an interpolation, an opportunity for Congress to question the President’s Ministers provided for in the Constitution of 1860, art. 63. \textsuperscript{1} Horacio Juan Cuccorese, En tiempo histórico de Carlos Pellegrini 15-25 (1985); see also 8 María Rosa, supra note 148, at 334-35 (noting that in contrast to President Pellegrini’s popularity when he assumed office, he asked Bartolomé Mitre to accompany him as he left the presidential offices for protection from angry citizens). Some of Pellegrini’s unpopularity was also due to the economic depression, and his political reputation recuperated with the passage of time.
These individuals did not enjoy parliamentary immunities and Judge Tedín had already ruled on April 4th that the Executive had the authority to detain them during a state of siege, but on April 12th, many of the prisoners were transferred to a ship that took them to Montevideo. Their appeals from Judge Tedín's decision were already pending before the Supreme Court, but with their deportation they modified their arguments to insist that they had the right to remain with their fellow political prisoners in Argentina. The Procurador General argued the government's case by taking a very limited view of the judiciary's authority during a state of siege. The Procurador General insisted not only that the Court recognize the Executive's authority to engage in a detention, but that it hold that the very action of habeas corpus is unavailable during a state of siege. Alternatively, he also suggested that even if habeas corpus were available during a state of siege, Law 48 provided for habeas corpus only when an individual is "detained or imprisoned," not in a case where the appellants were free in Uruguay.

The Supreme Court clearly was not attracted to the Procurador General's arguments. Far from holding that it lacked the authority to take any action during a state of siege, the Court took the initiative to ask the President to state the basis on which the appellants had been deported, an indication that it planned to rule against the deportations if they were involuntary. The Executive then decided to avoid a fight. The President replied to the Court that while he had been told by an individual sent to interview the appellants on board La Argentina that they preferred to leave the country, if that information was mistaken they could return to the country and surrender themselves to the custody of the Chief of Staff of the Navy. The Supreme Court then held that in light of the President's response there was no

234. Actualidad política, LA PRENSA, Apr. 12, 1892, at 4; Los presos políticos, supra note 219, at 1.
235. Los deportados políticos, LA PRENSA, Apr. 27, 1892, at 4. Significantly, this was the position of the deportees from the very moment that they arrived in Uruguay. Los presos políticos, supra note 219, at 4 (comments to reporters upon arrival in Uruguay).
239. See "Paez," 48 Fallos at 22 (noted in the Government's response).
240. Id. at 22-23; "Leguizamon," 48 Fallos at 36 (referring back to "Paez").
dispute on the issue of the deportation and if the appellants wished to return they could do so.\textsuperscript{241}

This decision does not show the Supreme Court dramatically challenging the Executive like Judge Tedín, but it does have political significance. The fact that the Supreme Court issued an order asking the Executive to indicate whether the appellants had stated that they wished to leave the country shows that the Court was unwilling to accept the Executive's position that the existence of a state of siege suspended all actions in habeas corpus. Not only had this been the position of the Procurador General, but in the lower court the Chief of Police, on orders from the President, had refused to bring one of the detainees before Judge Tedín on grounds that declaration of a state of siege suspended habeas corpus jurisdiction;\textsuperscript{242} not surprisingly, Judge Tedín took issue with this position, but he did not press the point given that the detention itself was constitutional.\textsuperscript{243} Moreover, the fact that President Pellegrini responded to the Court's request for information meant that regardless of his response to Judge Tedín, he implicitly recognized that the courts continue to exercise at least some authority when an individual is detained during a state of siege.

Even if the Supreme Court had not wished to accept the Executive's position that a state of siege suspends habeas corpus, it had other options available for avoiding a dispute with the Executive had it wished to use them. The Supreme Court could have refrained from requesting information from the Executive by adopting the Procurador General's position that habeas corpus does not apply to persons in exile and not in detention. Such an argument would have been in accord with the literal language of Law 48, which only refers to habeas corpus jurisdiction for persons "detained or imprisoned"\textsuperscript{244} and would have meant that the appellants would have had to refile their case as an ordinary civil proceeding. Similarly, since the deportation occurred after the case was heard by the court of first instance, the Supreme Court could also have taken the position that it was unprepared to decide an issue that had not been heard by the District Court, and required the case to be sent back to Judge Tedín's court for a hearing on the legality of the deportation. While the case did not produce a sharp clash between Executive and judicial authority, the Supreme Court clearly asserted its authority to rule in habeas corpus

\begin{enumerate}
\item[241.] "Paez," 48 Fallos at 24; "Leguizamon," 48 Fallos at 36 (referring back to "Paez").
\item[242.] "Leguizamon," 48 Fallos at 28.
\item[243.] \textit{Id.} at 31-33.
\end{enumerate}
matters during a state of siege, and the President seems to have been obliged to adopt a posture of compromise. The individuals deported all returned to Buenos Aires on May 26, 1892, and none were rearrested, probably because the state of siege was already beginning to wind down.

D. 1893: The Supreme Court Enters the Fray

If there was ever a year that could be said to be the peak of judicial influence in nineteenth century Argentina, it was 1893. In 1893 the PAN still lacked the grip on political power that it enjoyed prior to 1890 and that it would regain by mid-decade. The increased political competition of the moment made political disputes that would find their way into the courts inevitable. But even more importantly, the President's political credibility depended on his constitutional credentials. Luís Sáenz Peña was chosen as the presidential candidate by Roca and Pellegrini for the PAN, and by Mitre for the Unión Cívica Nacional specifically because his reputation for political neutrality made him palatable to both parties' followers, and because anyone presented to the public after the public's reaction against Juárez Celman and Pellegrini's authoritarianism needed a reputation for upholding the rule of law. (Another factor was probably a desire by Roca and Pellegrini to end the candidacy of Luís Sáenz Peña's son, Roque Sáenz Peña, who unlike his father, had an important political base among a reform-minded wing of the PAN. The son naturally refused to run against his father). Sáenz Peña actively campaigned from a rule of law platform and the reputation for upholding the law that he enjoyed from having sat on the Supreme Court. At the heart of his acceptance speech at the Unión Cívica Nacional convention he invoked this reputation, saying:

When a country convulsed by anarchic passions and party divisions turns to a civil magistrate, removing him from his seat on the national Supreme Court of Justice to raise him to the high rank of President, it is logical to believe that opinion seeks a government that will repair distributive justice, that will see to it that the law, the Constitution and individual rights are respected, that will concern itself to make honor and administrative morality the norm in all of

246. See *La solución propuesta*, La Prensa, Feb. 27, 1892, at 4 (describing Sáenz Peña's candidacy as a wise tactical solution given his reputation for neutrality and lack of party obligations); Allende, *supra* note 149, at 395-96, 396 n.2.
its branches, since this hope is the determining cause of the sympa-
thies of [public] opinion.\textsuperscript{248}

Moreover, Sáenz Peña emphasized that his conception of consti-
tutional rule included free elections and an end to arbitrary federal
interventions.\textsuperscript{249} Whether his political backers would allow him to ac-
complish his goals was another matter, but given his platform, it was
no coincidence that he also incorporated two Supreme Court judges
into his cabinet.\textsuperscript{250} If the Supreme Court was to ever seek to expand
its role and adopt more activist postures, it would seem that this was
the President to do it under.

In practice, the Supreme Court's performance during 1893 was
mixed. The Court decided several very important habeas corpus cases
in favor of Radical detainees, one of which once again involved Leand-
dro Alem.\textsuperscript{251} It also provided an important forum for the Radicals
when Aristóbulo del Valle defended a military officer accused of mu-
tiny.\textsuperscript{252} Further, the Court held 3-2 in favor of the constitutionality of
the civil marriage law,\textsuperscript{253} one of the most divisive social issues of the
period.\textsuperscript{254} However, the Court also missed an opportunity. In what
may have been the best chance the Court would ever receive to re-

\textsuperscript{248} Acta política de ayer, \textit{LA PRENSA}, Mar. 7, 1892, at 4 (giving the full text of Sáenz
Peña's acceptance speech the day before). \textit{LA PRENSA} actively supported Sáenz Peña's can-
didacy and repeatedly uses the terms "honored," "just," "impartial," and "moral" to de-
scribe him and his future government. \textit{La nueva solución}, \textit{LA PRENSA}, Feb. 22, 1892, at 3;
\textit{Momento de espectativa}, \textit{LA PRENSA}, Feb. 23, 1892, at 3; \textit{La duda como enfermedad}, \textit{LA
PRENSA}, Feb. 24, 1892, at 4. \textit{La Prensa} argued that Sáenz Peña would "rigorously apply
the Constitution," \textit{Presidencia sin partido}, \textit{LA PRENSA}, Feb. 28, 1892, at 3, 4; and would be
"strong in the severe application of the law." \textit{Las cosas y los hombres}, \textit{LA PRENSA}, Feb.
29, 1892, at 3, 4. Significantly, in its later analysis of Sáenz Peña's speech, \textit{La Prensa} quotes
exactly the portion quoted in the text above as the central theme. \textit{El programa del
candidato}, \textit{LA PRENSA}, Mar. 8, 1892, at 4.

\textsuperscript{249} Acta política de ayer, supra note 248, at 4, 5 (giving the text of Sáenz Peña's accept-
ance speech); see also Políctica militante, \textit{LA PRENSA}, Feb. 20, 1892, at 4 (giving the text of a
public letter Luis Sáenz Peña sent to his son, Roque Sáenz Peña, when his son announced
that he would support his father's candidacy, emphasizing that he would never govern on
behalf of a political party and would push electoral reform as his highest priority).

\textsuperscript{250} Benjamín Victorica served as Minister of War and Calixto de la Torre served as
Minister of Justice and Public Instruction.

\textsuperscript{251} "Alurralde," 54 Fallos 264 (1893); "Lamarque," 54 Fallos at 292; "Alem," 54 Fallos
432 (1893).

\textsuperscript{252} "Coronel Espina," 54 Fallos at 577.

\textsuperscript{253} "Correa," 53 Fallos 188 (1893).

\textsuperscript{254} The Court's decision, which is politically striking given that the President, Luis
Saénz Peña, was a strong supporter of the Church, gave the Court's blessing to Argentine
secularization. The battle over secularization had led to the expulsion of the Papal Nuncio
in 1884 for his opposition to the end of religious education in the public schools. See gener-
ally 4 \textit{ABAD DE SANTILLÁN}, supra note 134, at 343-48 (describing the battle over the elimi-
form the Argentine political system, the Court relied on U.S. case law to decline jurisdiction to consider the constitutionality of a key federal intervention, arguing that the case presented political questions that could not be heard in a court of law. When the time came to innovate along lines that varied from those already traced by the U.S. Supreme Court, the Argentine Supreme Court, either from political preference or timidity, refused to move in a new direction.

1. Cullen v. Llerena

As noted earlier, President Luis Sáenz Peña came to power through the support of Roca, Pellegrini, and Mitre, but lacked his own political base. Once in office, none of these figures gave him the full political support that he required, so in July 1893 he turned to a Radical sympathizer, Aristóbulo del Valle, to organize the Cabinet. Del Valle only lasted thirty-six days. His first step, which the PAN could not publicly oppose, was to guarantee a clean election in the Federal Capital on July 23 in an interim election to fill a vacant Senate seat. The elections were won by Leandro Alem and subsequently ratified by the Senate. The next step—Radical revolts to take over unpopular provincial governments in the provinces of Buenos Aires, Santa Fé, and San Luis—were less successful. Under Article 6 of the Argentine Constitution, federal intervention of a provincial government, which involved the temporary appointment of a presidential trustee to govern the province, was permitted to “guarantee the republican form of government or repel foreign invasion, and at the request of [the province’s] constitutional authorities to maintain them or reestablish them, if they have been deposed by sedition or invasion by another province.” Once the Buenos Aires, Santa Fé, and San Luis revolts successfully installed Radical provisional governments, President Sáenz Peña gave in to pressures from Carlos Pellegrini and asked

nation of religious education from the public schools); id. at 370 (discussing the Civil Marriage Law).


256. See generally 1 Del Mazo, supra note 138, at 81-90; Guido, supra note 138, at 256-95; 8 María Rosa, supra note 148, at 352-70; Allende, supra note 149, at 402-12; Gallo, supra note 138, at 226-30 (all treating del Valle’s period as Minister of War and the Radical Party’s revolts).

257. The Senate approved Leandro Alem’s election as Senator on August 31, 1893. Congreso Nacional, Cámara de Senadores, Diario de Sesiones de 1892, Session of Aug. 31, 1893, at 356. The timing is significant, since it is while “Cullen” was pending and before the Radical revolts in Tucumán (Sept. 17) and Santa Fé (Sept. 24).

258. Const. Arg. art. 6 (1860) (also incorporated into the present Argentine Constitution as Article 6).
Congress to declare a federal intervention of those provinces. The move was not designed to reinstall the deposed authorities, however, and occurred even though the House of Deputies had rejected a bill seeking federal interventions only two weeks earlier, when del Valle had asked for federal interventions in order to install Radical Party sympathizers as intervenors.\(^{259}\)

Once Congress declared the federal intervention of the Province of Santa Fé, with passage rushed through both the House and Senate on August 15, the revolutionary authorities in Santa Fé used the few days that remained before arrival of the federal intervenor to begin a legal challenge to the intervention. Joaquín Cullen was chosen by the revolutionary government to represent it, and it instructed him to oppose the federal intervention through all possible administrative and judicial channels.\(^{260}\) Cullen sought a quick resolution by bringing an action against Baldomero Llerena, the federal intervenor, before the Supreme Court. He invoked the Court’s original jurisdiction on grounds that he represented the Province and the case therefore involved the Province as a party.\(^{261}\) To further speed the case, his complaint, filed on August 22, 1893 and published in the Press,\(^{262}\) challenged the Court to hand down a quick decision, professing concern at (unidentified) opinions that the Court would delay deciding the case until political events had run their course and the case lost importance.\(^{263}\) On this point, he certainly got his way. The Court’s decision was handed down only sixteen days later, on September 7th.

Cullen’s case offered the Supreme Court the chance to take a big step towards free elections and limiting federal interventions, the two key areas where Argentina’s constitutional practices fell short, yet with a decision that could have been written in a narrow fashion to apply to the fairly unique facts of a federal intervention that had been first rejected by Congress before it was finally approved. While the Court dismissed the action on grounds that it involved political questions outside its authority, the situation was not one where the Court felt compelled to protect its political capital. Had the Court decided the action in favor of Cullen, the Executive would have had little

\(^{259}\) See Guido, supra note 138, at 270-71.

\(^{260}\) Case dossier titled “Gobierno Provisorio de Santa Fé Baldomero Chillevena” at 1-2 (back), stored in the Archivo de la Corte Suprema de Justicia de la Nación [hereinafter Cullen Dossier].

\(^{261}\) Id. at 49-49 (back).

\(^{262}\) Recurso de inconstitucionalidad, LA PRENSA, Aug. 24, 1893, at 4 (publishing the complaint in full).

\(^{263}\) Cullen Dossier, supra note 260, at 43.
political choice but to comply, and the Argentine elite would almost certainly have accepted the decision. In institutional terms, the Court would probably have gained political space at the expense of the Executive Branch. Legal arguments in favor of the revolutionaries were clearly satisfactory to support a decision, provided that the Supreme Court was willing to move beyond U.S. case law or, as was true of the dissent, to distort U.S. case law. However, the Court would have been required to take responsibility for establishing its own constitutional model, as opposed to the intentions of Framers who looked to the United States.

The strongest part of Cullen's case was his substantive argument. Cullen called for immediate termination of the intervention on grounds that Congress acted unconstitutionally when it passed the law intervening in the Province. Article 71 of the Argentine Constitution of 1860 provided that "[n]o proposed law totally rejected by one of the Houses can be reconsidered during the sessions of that year." Since the House of Deputies had considered and rejected federal intervention on August 1st, it could not reconsider the issue and decide in favor of intervention on August 15th. While Cullen does not discuss it, the origins of Article 71, which comes from the 1812 Constitution of the Spanish Monarchy and entered the Argentine Constitution by way of the Argentine Constitution of 1826 (a Constitution that lasted less than a year), would seem to indicate that it was designed to avoid excessive Executive pressure on Congress once a government bill had been rejected. This concern could well be present in the double submission of a law declaring the federal intervention of a province. The government might have responded that Article 71 only applied to ordinary legislation and not to inherently fluid situations like federal interventions and states of siege. The circumstances requiring a federal intervention may obviously change dramatically over the course of a session of Congress, much more so

264. Id.
265. CONST. ARG. art. 71 (1860) (presently incorporated in the Argentine Constitution as Article 81, with some modifications).
266. Cullen Dossier, supra note 260, at 43 (back)-48.
267. CONSTITUCIÓN [C.E.] art. 140 (1812) (Spain).
268. CONST. ARG. art. 62 (1826).
269. Nineteenth century Argentine constitutional doctrine usually required passage of a law providing for federal intervention if Congress was in session. See González, supra note 124, at §§ 732, 733, 735; SANTOS P. AMADEO, ARGENTINE CONSTITUTIONAL LAW 90, 91 (1943).
than will usually be true of ordinary legislation. As it was, the case never reached the point where substantive arguments were discussed.

Cullen’s most difficult hurdles involved problems of standing to bring the action and jurisdiction. First, the Procurador General responded to the complaint insisting that revolutionary authorities could not represent a province in litigation. Not only did the revolutionary authorities here lack standing to bring the action in the name of the Province, but if they did not represent the Province, they also could not invoke the original jurisdiction of the Supreme Court on grounds that the case involved a province as a party. Second, the Procurador General insisted that the case did not present an ordinary civil action for redress of an injury in which the constitutionality of a law was at issue, but an attempt to regain political power. Injury in the form of loss of political authority did not constitute an injury repa-erable in the courts. Third, the Procurador General argued that the types of issues involved in the case were inappropriate for the courts. If the Supreme Court were to consider the constitutionality of a federal intervention, then it would be starting down a path to consider the legitimacy of other branches of the federal government. In fact the very issue of whether a law was properly sanctioned, the central issue in the case, was an issue of political authority and therefore a political question inappropriate for the courts.

Cullen did a good job of anticipating and responding to these arguments, particularly the Procurador General’s first point, that the revolutionary authorities could not represent the province. In initially filing his brief, Cullen included telegrams from Aristóbulo del Valle when he was still Minister of War and Lucio V. López, del Valle’s Minister of the Interior, congratulating Mariano Candioti, the revolutionary governor, on assuming the governorship of the Province and restoring order. According to Cullen, these telegrams, which indi-

271. Id. at 425-26.
272. Id. at 426.
273. Id. The second and third points in the text were not fully distinguished from each other in the Procurador General and the Court’s opinions.
274. Telegram from Lucio V. López, Minister of the Interior, to Mariano Candioti, Governor of Santa Fé (Aug. 8, 1893), Cullen Dossier, supra note 260, at 5 (referring to Candioti as Governor and sending his best wishes); Telegram from Lucio V. López, Minister of the Interior, to Mariano Candioti, Governor of Santa Fé (Aug. 8, 1893), id. at 7 (expressing satisfaction with Governor Candioti’s success at pacifying the Province); Telegram from Aristóbulo del Valle to Mariano Candioti, Governor of Santa Fé (Aug. 5, 1893), id. at 6 (referring to Candioti as Governor and sending his best wishes); see also “Cullen,” 53 Fallos at 422-23 (the Procurador General insisted that the telegrams were not enough to
cated in their headings that they were written in an official capacity, constituted official recognition by the Executive of the revolutionary provincial government. He probably had the advantage on this point, given that many de facto regimes in the past had been treated by the Executive as the legitimate government of a province.

Further, it was Cullen and the revolutionary authorities, not the federal government or the old provincial government, that enjoyed moral authority on the issue of standing to represent the Province. The Radical takeover in Santa Fé had substantial popular support, and the previous government, as Cullen emphasized in his brief, had only been in power because of fraudulent elections. Even opponents of the Radicals admitted that the old regimes in Buenos Aires, Santa Fé, and San Luis were corrupt and lacked popular legitimacy.

Both Houses of Congress were dominated by the PAN in alliance with former President Mitre’s followers, but there was sufficient discomfort with the regimes displaced by the Radicals to cause the House of Deputies committee reporting to the floor to advise against intervention, with its reporting member stating:

If the constitutional authorities of these provinces lack the conditions that their own institutions prescribe, it seems to me that it is wise politics, prudent politics, the politics of liberty, to leave them to perish before the attacks of the revolution, because in the final anal-

275. Cullen Dossier, supra note 260, at 47 (back)-49 (also arguing that the House of Deputies implicitly recognized the revolutionary government when it first decided not to intervene). Each of the telegrams begins with the word “Official.” López Telegram, supra note 274, at 7; Cullen Dossier, supra note 260, at 5; Valle Telegram, supra note 274, at 6; see also “Cullen,” 53 Fallos at 422-23, 428, 434-35.

276. “Cullen,” 53 Fallos at 469 (dissent); see also Should Revolutionary Governments of Provinces be Recognized by the National Government?, BUENOS AIRES HERALD, Apr. 24, 1893, at 1 (noting that the federal government had often recognized provincial revolutionary governments in the past).

277. Cullen Dossier, supra note 260, at 43 (back)-45; see also Tema inagotable, LA PRENSA, Oct. 17, 1893, at 3; El Pueblo Santafecino, LA PRENSA, Nov. 24, 1893, at 3 (both articles noting that the radical rebellion in Santa Fé enjoyed popular support because of the corruption of the local oligarchy and its control over the provincial government); The Right of Revolution, BUENOS AIRES HERALD, Aug. 3, 1893, at 1 (strongly criticizing del Valle’s government for provoking provincial revolutions, but recognizing that political oppression and corruption in Buenos Aires and Santa Fé were so bad that the people of those provinces had the right to revolt).

278. See, e.g., Bearing Fruit, BUENOS AIRES HERALD, Apr. 9, 1893, at 1; The Right of Revolution, supra note 277 at 1.
ysis the revolution only signifies an appeal to the final, supreme recourse of peoples oppressed and deprived of their liberty.\textsuperscript{279}

Moreover, the law intervening the Province of Santa Fé did not include a statement that the intervention was necessary to restore the republican form of government.\textsuperscript{280} This was the first time that a law providing for a federal intervention did not include such a reference or a statement that the intervention was to assist or reinstate provincial authorities,\textsuperscript{281} and it was not an accident. Reinstating the corrupt prior government was out of the question, and the minority committee report in the House of Deputies, whose draft bill defeated the majority report on the floor, deliberately avoided referring to a threat to the republican form of government in order to win over undecided Deputies who might feel that the statement could not be made in good conscience.\textsuperscript{282} A de facto government complaining of a federal intervention might appear incongruous to a reader today, but in Argentina in 1893 it was generally recognized that it was the new de facto authorities who had the best democratic credentials.

Cullen had a tougher time with the Procurador General’s second and third points. On the second point, that the alleged injuries were political only and therefore no judicial redress was possible, Cullen argued that he had at least one precedent in his favor. Several years earlier the Supreme Court had decided the case of a boundary dispute between various provinces.\textsuperscript{283} Certainly if boundary issues were appropriate for the Supreme Court—cases involving a province’s territorial integrity—the Supreme Court could hear a case involving a province’s political integrity.\textsuperscript{284}

On the third issue, that questions such as the decision to intervene in a province were inappropriate for the courts, Cullen conceded that the question of whether a province should undergo federal intervention was a political question falling within the exclusive considera-

\textsuperscript{279} CONGRESO NACIONAL, CÁMARA DE DIPUTADOS, DIARIO DE SESIONES DE 1893, Session of Aug. 1, 1893, at 355 (statement of Olmedo).


\textsuperscript{281} JUAN VICENTE SOLA, INTERVENCIÓN FEDERAL EN LAS PROVINCIAS 149 (1982).

\textsuperscript{282} CONGRESO NACIONAL, CÁMARA DE DIPUTADOS, DIARIO DE SESIONES DE 1893, Session of Aug. 1, 1893, at 356 (statement of Lastra).

\textsuperscript{283} Cullen Dossier, supra note 260, at 65 (referring to “Las Provincias de Buenos Aires, Córdoba y Santa Fé,” 24 Fallos 62 (1882), reh’g granted, 24 Fallos 199 (1882)). This example is rather weak, however, since the Court heard this case as an arbitral tribunal by consent of the legislatures of the provinces involved. 24 Fallos at 62-63.

\textsuperscript{284} Cullen Dossier, supra note 260, at 67 (back)-68.
tion of Congress and the Executive.\textsuperscript{285} However, Santa Fe was not complaining of Congress's evaluation of whether the republican form of government in the Province required federal intervention, but of the procedure through which Congress sanctioned the intervention.\textsuperscript{286} According to Cullen, U.S. Supreme Court cases that dismissed actions because they concerned political questions involved conduct by a political branch that was within its constitutional attributions.\textsuperscript{287} The only point that Justice Taney addressed in \textit{Luther v. Borden}\textsuperscript{288} was that the existence of the republican form of government in a State was a matter for Congress.\textsuperscript{289} Cullen, with extensive quotations from Alexander Hamilton\textsuperscript{290} and Thomas Cooley,\textsuperscript{291} emphasized that the Supreme Court's power of judicial review was a broad one, with the Constitution giving the federal courts jurisdiction in "all cases dealing with points governed by the Constitution."\textsuperscript{292} Congressional acts were only valid when they followed the Constitution's mechanisms for passing a law. In sanctioning the Constitution, the Argentine people and the provinces established the rule that legislative action rejecting a bill could not be reconsidered during the same year, and their will had preference over that of Congress.\textsuperscript{293} Just as the Court presumably would not apply a law that lacked the sanction of one of the Houses of Congress, that was passed by a minority vote, or that failed to obtain a two-thirds majority in each House to overcome a Presidential veto, it should refuse to allow a federal intervention that had already been rejected once by the House of Deputies.\textsuperscript{294} Of the two acts of the House of Deputies, the first rejecting federal intervention and the second approving it, it was the first that must be given effect under Article 71 of the Constitution.\textsuperscript{295}

The Supreme Court decided against Cullen, however, in a decision that depended primarily on U.S. precedent. Unlike the approach

\begin{itemize}
\item \textsuperscript{285} \textit{Id.} at 49 (back)-50 (back), 53 (back); "Cullen," 53 Fallos at 431.
\item \textsuperscript{286} \textit{Cullen Dossier, supra} note 260, at 49 (back)-52.
\item \textsuperscript{287} \textit{Id.} at 65 (back).
\item \textsuperscript{288} \textit{Luther v. Borden,} 48 U.S. (7 How.) 1 (1849).
\item \textsuperscript{289} \textit{Cullen Dossier, supra} note 260, at 55 (back)-56.
\item \textsuperscript{290} \textit{Id.} at 66-67 (back) (quoting from \textit{The Federalist No. 78} (Alexander Hamilton)).
\item \textsuperscript{291} \textit{Cullen Dossier, supra} note 260, at 60-70 (quoting from various portions of chapter 7 of THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA (edition not indicated, but probably the original 1850 edition)).
\item \textsuperscript{292} \textit{CONST. ARG.} art. 100 (1860); \textit{Cullen Dossier, supra} note 260, at 64 (back).
\item \textsuperscript{293} \textit{Cullen Dossier, supra} note 260, at 67 (back).
\item \textsuperscript{294} \textit{Id.} at 53 (back), 66.
\item \textsuperscript{295} \textit{Id.} at 65 (back).
\end{itemize}
taken in an important case just six years before, the Court did not cite the U.S. Supreme Court’s case law as obligatory; rather, the Court first stated its position, that the case was foreclosed by political question doctrine, and only then stated that this position was supported by U.S. case law. The difference, however, is minimal. It is clear from even a cursory reading of the case that the Argentine Court needed the U.S. law it cites to be able to support its conclusions. U.S. cases were essentially all that the Court presented to support its decision.

The first U.S. case invoked by the Court was *Luther v. Borden*, for the general proposition that it was up to the political branches of government to determine which government is the established government of a State and whether that government is republican in character. *Luther v. Borden* involved an action by an individual complaining that during the Dorr Rebellion in Rhode Island in 1842, illegal State authorities forcibly entered his home during a declaration of martial law. For a short time, two competing State governments existed in Rhode Island, and the plaintiff complained that since the authorities who detained him did not constitute the State’s legal authorities, he was entitled to sue them for damages. Chief Justice Taney rejected the plaintiff’s argument, noting that the President had recognized the government that had entered the plaintiff’s home as the legitimate government of the State, and that this finding could not be reviewed by a court. The *Luther v. Borden* decision is probably a good indicator of how the U.S. Supreme Court would have reacted generally to issues like those in *Cullen c/Llerena* in the nineteenth century. However, as Cullen argued in his brief, the case is not directly on point, since the process by which the President recognized the government of Rhode Island was not questioned, while in *Cullen c/Llerena* the Argentine Congress allegedly violated the legislative procedures established in the Constitution when it passed a law providing for the intervention of Santa Fé. *Luther v. Borden* by itself did not provide enough support to decide the action against the Radicals.

297. "Cullen," 53 Fallos at 431-32. The Court does the same thing with a statement that political rights do not produce a justiciable controversy and then stating that this is also the position adopted by the United States. Id. at 433-34.
298. Id. at 432.
300. Id. at 34-38.
301. Id. at 42-45.
A second U.S. case cited by the Argentine Court was conclusive, however. The Court cited the 1867 case of Georgia v. Stanton\textsuperscript{302} for the proposition that courts cannot decide cases of a political nature that only complain of violation of political rights.\textsuperscript{303} In Georgia v. Stanton, the government of Georgia tried to block operation of the Reconstruction Acts. The Reconstruction legislation began with the finding that no legal State government existed in the various States formerly making up the Confederacy, divided those States into five military districts under military authority, and created a mechanism for writing new State Constitutions and the establishment of new state governments.\textsuperscript{304} The U.S. Supreme Court refused to rule on the merits. The U.S. Court held that the rights in danger must be rights of persons or property, not political rights, and an action seeking to block replacement of a State government primarily involves the political rights of the State and its people.\textsuperscript{305} The Argentine Court found that Cullen was seeking the protection of rights exactly the same as those which the U.S. Supreme Court refused to protect in Georgia v. Stanton, and therefore it likewise could not hear Cullen's case.\textsuperscript{306}

Blocking a federal intervention, regardless of the legal grounds, was probably too aggressive a move for a majority of the Court when there was no precedent even in the U.S. system, and given that the decision would have substantially altered the legal landscape in favor of the Radicals. However the Press's reaction to the dissent, by Judge Luís Varela, proves that had the Court wished to decide the case in favor of the Santa Fe Radicals it could have done so and probably carried the support of much of the political elite. The Press generally considered the dissent superior to the decision of the Court,\textsuperscript{307} and in

\begin{itemize}
\item \textsuperscript{302} Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867).
\item \textsuperscript{303} "Cullen," 53 Fallos at 433.
\item \textsuperscript{304} Stanton, 73 U.S. (6 Wall.) at 50-52. The law required state constitutional conventions with delegates elected by all adult male citizens, approval of the new state constitutions by Congress, legislative elections under the new State constitutions, and approval by the new state legislature of the 14th Amendment of the U.S. Constitution. Reconstruction Act of Mar. 2, 1867, ch. 152, 14 Stat. 428 (1867); Reconstruction Act of Mar. 23, 1867, ch. 6, 15 Stat. 2 (1867).
\item \textsuperscript{305} Stanton, 73 U.S. (6 Wall.) at 76-77.
\item \textsuperscript{306} "Cullen," 53 Fallos at 433-34.
\item \textsuperscript{307} La Prensa referred to Varela's dissent as "enlightening," La Ley de las intervenciones ante la Suprema Corte, LA PRENSA, Sept. 8, 1893, at 3; and published both the majority and dissent in full, id. at 3-4; La Ley de las intervenciones, LA PRENSA, Sept. 9, 1893, at 3-4. The position of the Buenos Aires Herald is particularly striking, since initially it supported the position of the Procurador General. Good Law, BUENOS AIRES HERALD, Sept. 1, 1893, at 1; Notes, BUENOS AIRES HERALD, Sept. 1, 1893, at 1. However, once the Supreme Court's decision is handed down it prefers the dissent and praises Varela as the
\end{itemize}
1893 much of the elite, particularly in the City of Buenos Aires, perceived the Radicals as legitimate contenders for power campaigning against a corrupt political system. The dissent is a unique piece of legal work. It occupies forty pages in the official collection of Argentine Supreme Court Reports, approximately five times as long as the opinion of the Court and much longer than any majority opinion or dissent until that date. Varela’s arguments rely heavily on the arguments raised by Cullen himself, but he supports his arguments with copious citations to U.S. law to show that the majority had misinterpreted U.S. practice. He is wrong, given that Georgia v. Stanton was precisely on point against Cullen, but his arguments would have been very convincing to anyone lacking a collection of U.S. Reports or the knowledge to use them.

The thrust of the Varela dissent was that political question doctrine is only used in a limited fashion in the United States, its precise outlines are blurry, and it must be understood in the context of Marbury v. Madison’s \(^{308}\) broad grant of authority to engage in judicial review. Marbury, according to Varela, established the authority of the judiciary to always apply the Constitution.\(^ {309}\) Political question doctrine does not undercut this, but only applies to cases where the government has exercised power as the holder of national sovereignty, as in the recognition of foreign governments, borders, and relations with Indian tribes.\(^ {310}\) According to Varela, Luther v. Borden and Georgia v. Stanton did not involve political questions, but holdings by the top constitutional lawyer in the country, Notes, Buenos Aires Herald, Sept. 12, 1893, at 1; National Intervention, Buenos Aires Herald, Sept. 10, 1893, at 1; Ead Law, Buenos Aires Herald, Sept. 13, 1893, at 1. The Buenos Aires Herald translated most of both the majority opinion and Varela’s dissent, a major investment of time given the length of the opinion. The majority’s decision appears in National Intervention, Buenos Aires Herald, Sept. 10, 1893, at 1. For the dissent see The Law of Intervention, Buenos Aires Herald, Sept. 12, 1893, at 1; Sept. 13, 1893, at 1; Sept. 14, 1893, at 1; Sept. 15, 1893, at 1; Sept. 16, 1893, at 1; Sept. 17, 1893, at 1. La Nación, which was owned by the Mitre family, strongly supported the positions taken by the Procurador General even before his opinion appeared. Notas de la Semana, La Nación, Aug. 20, 1893, at 1; Derecho Constitucional, La Nación, Aug. 21, 1893, at 1; Derecho Constitucional, La Nación, Aug. 29, 1893, at 1; Santa Fé, La Nación, Aug. 30, 1893, at 1 (giving the text of the Procurador General’s brief and noting that it agrees with the positions taken by the newspaper) nevertheless, La Nación treats Varela’s dissent with respect, calling the majority and dissent in combination an important work of constitutional law; Intervención nacional en Santa Fé, La Nación, Sept. 8, 1893, at 1; and, publishes both the majority and dissent in full, id.; Intervención Nacional en Santa Fé, La Nación, Sept. 9, 1893, at 1 (publishing the second half of the Varela dissent and calling it “an important juridical-constitutional study”).

\(^{308}\) Marbury, 5 U.S. (1 Cranch) at 137.

\(^{309}\) “Cullen,” 53 Fallos at 439-41.

\(^{310}\) Id. at 441-43.
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Court that accepted the findings of other branches of government as to the true government of Rhode Island and whether a government in fact existed in Georgia.311 Varela is only partly correct, however, and probably realized it, since the U.S. Court in Georgia v. Stanton specifically found that the decision of the federal government to replace the governmental authorities in Georgia during Reconstruction was a nonjusticiable political question.312

With Georgia v. Stanton directly on point, Varela's only option was to seek to undercut its authority, which he then did, by distorting statements made by Chief Justice Chase in Texas v. White,313 a case decided in 1868, the year after Georgia v. Stanton.314 Texas v. White involved an action by the State of Texas to recover U.S. bonds that had been endorsed to private individuals during the Civil War.315 The action was initially brought by successive provisional Texas governments established upon the defeat of the Confederacy. One of the issues in the case was the authority of these provisional governments to bring an action in the name of the State, and the U.S. Supreme Court held in favor of the plaintiff, since the provisional governments had been in actual operation and had been recognized by the federal government.316 These governments were replaced by the President once the Reconstruction Acts came into effect, but since the governments established under the Reconstruction Acts continued the original action, the Supreme Court, in holding that the provisional governments had the authority to bring a suit, noted that "[n]othing in the case before us requires the Court to pronounce judgment upon any particular provision of [the Reconstruction Acts]."317 Judge Varela interpreted this statement to mean that the U.S. Supreme Court would be prepared to evaluate the constitutionality of the Reconstruction Acts in the future regardless of their purely political content.318 Moreover, since Chief Justice Chase, the author of the majority opinion in Texas v. White, had declined, without explanation,

311. Id. at 443.
312. Stanton, 73 U.S. (6 Wall.) 50 at 75.
316. See id. 726-32 (the issue was the authority of the provisional Texas governments to bring an action seeking return of the bonds, and the Court holds in favor of the plaintiff, since the provisional governments had been in actual operation and were recognized by the federal government).
317. Id. at 731.
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to join the opinion of the majority in *Georgia v. Stanton*,\(^{319}\) Varela argued that he must have wished to use *Texas v. White* to turn the Court around.\(^{320}\) Varela's argument is absurd. He improperly assumes that the U.S. Supreme Court, by finding that it need not address an issue to decide a case, was holding that it had authority to rule on the issue in the future—even though it was a political question. Since the U.S. Court only stated in *Texas v. White* that the issue was not relevant, not that it planned to reconsider political question doctrine, Varela clearly misreads the case. Perhaps because he had no other option, Varela seriously distorted *Texas v. White* to reach his desired end.\(^{321}\)

Since the majority of the Supreme Court decided the case on political question grounds, it did not find it necessary to decide the delicate issue of whether the Federal government had recognized the Santa Fé provisional government and thus whether the revolutionary authorities had the authority to issue the decree authorizing Cullen to bring an action for the Province.\(^{322}\) Varela, however, does deal with this, and in the process of finding that the federal government had recognized the revolutionary authorities, also does a good job of focusing on the government's political weaknesses. In addition to using Cullen's argument that the telegrams from the former Cabinet Ministers to the provisional governor constituted recognition,\(^{323}\) and noting that de facto provincial governments had often been treated as legal

\(^{319}\) *Stanton*, 73 U.S. (6 Wall.) at 77-78.

\(^{320}\) See "Cullen," 53 Fallos at 447-50.

\(^{321}\) It is impossible to tell for certain whether Varela realized that he was distorting *Texas v. White* or whether in his enthusiasm for adopting the position that the Court could hear the case he simply grabbed at any possible authority without looking too hard. He had very little time to write his 40 page opinion. It is unlikely that he started much work on his dissent before receiving the brief of the Procurador General, which is dated August 28, 1893, since the Court would probably not have met to discuss the case and the Procurador General would have had the case dossier. As the Court's decision and Varela's dissent are dated September 7, 1893, he probably wrote his dissent in ten days or less. There are other errors in Varela's citations to U.S. cases. For example, at one point he cites the U.S. case of *Scott v. Jones*, 46 U.S. (5 How.) 343 (1847), for the proposition that the precise outlines of political question doctrine have never been marked by the U.S. Supreme Court, but his citation, to page 371 of the decision, is actually to the arguments of one of the parties, summarized in the collection of the U.S. Supreme Court's reports before the text of the Court's decision. See "Cullen," 53 Fallos at 445. In later years, after leaving the Court, Varela's writing implies that he believes he erred in "Cullen" and that the majority was right. See 1 Luis V. VARELA, PLAN DE REFORMAS A LA CONSTITUCIÓN DE BUENOS AIRES 321 & n.2 (1907).

\(^{322}\) "Cullen," 53 Fallos at 434-35.

\(^{323}\) *Id.* at 464.
governments in the past, Varela argues that Congress, by failing to state in the intervention law that intervention was necessary to restore the republican form of government, implicitly refused to disavow the provisional government as an entity that legally represented the Province. In fact, anticipating what would have been his decision on the merits, Varela winds up his dissent stating that to be constitutional a law providing for a federal intervention to restore the republican form of government must "begin by declaring that [the republican form of government] does not exist in the State intervened." Of course this was the very declaration that many Deputies felt that they could not make in good conscience. Article 6 of the Constitution only provides for federal intervention "to guarantee the republican form of government or repel foreign invasion, and at the request of [the province's] constitutional authorities to maintain them or reestablish them." Since there were no plans to restore the corrupt Santa Fé government that had provoked the Radical's revolution, the need to guarantee the republican form of government was the only possible ground for intervention—but a politically unstatable ground!

The Cullen decision can only be partially explained in terms of the political preferences of the members of the Court. One of the effects of President Sáenz Peña's election and the resignation of two more judges to join his Cabinet was a Supreme Court of relatively new members, but they generally did not owe political loyalty to the presidents who appointed them, and in any event, none owed their appointment to President Sáenz Peña. To the extent that the members of the Court owed political allegiance to any political figure or party, it was not to the PAN and its leaders Julio Roca and Carlos Pellegrini, but to former President Mitre. Three judges were appointed by Carlos Pellegrini at the end of his term, but only the President of the Court, Benjamín Paz, could be described as a former active supporter of the PAN, having served as Roca's Minister of the Interior. Another, Juan Torrent, was clearly an ally of former President Mitre, having run for vice-president on Mitre's ticket in 1874, served as President of the Unión Cívica in 1890, and followed Mitre

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324. Id. at 469, 471-72.
325. Id. at 461-62, 474.
326. Id. at 474.
327. Const. Arg. art. 6 (1860) (also incorporated in the present Argentine Constitution as Article 6).
328. S Curolo, supra note 53, at 338.
when the Unión Cívica split. The third Pellegrini appointee, Octavio Bunge, came from a prominent Buenos Aires family that traditionally had been concerned primarily with protecting the political interests of the Province of Buenos Aires, and which had generally opposed both Roca and Juárez Celman. The two remaining judges, Abel Bazan and Luis Varela, were both appointed by President Mitre who had strongly opposed Roca’s election to the Presidency in 1880, and upon Roca’s election, ended sixteen years in the Senate to start a judicial career in the civil courts of the Federal Capital. Luis Varela came from a family that like the Bunge family had long supported whatever political force most strongly represented the interests of the Province of Buenos Aires—Valentín Alsina’s son, Adolfo Alsina during the 1860s and 1870s, and Mitre during and after the Revolution of 1890. Certainly nothing in Luis Varela’s past indicates a special sympathy toward the Radicals. In fact, in 1891 he had to deny rumors circulating in the Press that he was the author of Minister of War Levalle’s response to Judge Tedín refusing to give effect to Tedín’s habeas corpus decision in favor of Alem. There is no obvious political explanation for Varela’s stand, other, perhaps, than that he wanted to see the Court play a more active political role. While the personal histories of the members of the Court offer little insight, there is no doubt of the centrality of the U.S. model to the Cullen c/Llerena decision. The dissent is if anything even more

329. 6 id. at 362; ENRIQUE UDAONDO, DICCIONARIO BIOGRÁFICO ARGENTINO 1049 (1938).
331. See ALFREDO DÍAZ DE MOLINA, LA OLIGARQUÍA ARGENTINA: SU FILIACIÓN Y RÉGIMEN (1840-1898) 159-63 (1972).
332. 1 CUTolo, supra note 53, at 363. Perhaps even more than a Mitre ally, during his years in the Senate, Abel Bazan was the Buenos Aires representative of a group of powerful La Rioja families. FELIX LUNA, DE COMICIOS Y ENTREVEROS 72 (1976). For a time in 1874, he supported Adolfo Alsina instead of Mitre. Id. at 97, 126. In addition, his political base in La Rioja split that same year due to political infighting. Id. at 199. He does not appear to have ever supported Roca, however.
333. Luis Varela began his professional career writing in his brother Mariano Varela’s newspaper, La Tribuna, 6 CUTolo, supra note 53, at 502-03, and clerking in Dalmacio Vélez Sársfield’s law office and working under Vélez Sársfield when he was President Sarmiento’s Minister of the Interior. Id. at 503; 2 CHÁNETON, supra note 23, at 375. La Tribuna, published from 1853 to 1884, was noted for its support for Adolfo Alsina and Buenos Aires interests.
334. Carta del Dr. Luis V. Varela, LA PRENSA, Apr. 11, 1892, at 4 (letter to the newspaper by Luis Varela denying rumors published in the newspaper Sud-America that he was the author of the Minister of Defense’s reply to Judge Tedín).
wedded to U.S. legal sources than the majority. Early in his opinion, Varela, unlike the majority, offers a statement that one often encounters in the 1870s, 1880s, and 1890s, that "our government is adopted from another already existent in the world at the time of our organization, and [the drafters] on constituting [the Argentine government], invoked the case law of this country whose institutions we have in large part copied." He then bases his dissent on the argument that the majority misinterpreted U.S. doctrine. While Varela may have deceived himself into thinking that he could make a reasonable argument under U.S. law, he must have realized that with Georgia v. Stanton as support the majority's position under U.S. law was much stronger. The U.S. model, however, was the basic currency of constitutional debate, so Varela did the best that he could with the U.S. precedents available. Tricky footwork like Varela's would have permitted the Court to escape the confines of the U.S. model while still invoking its talismanic authority, but the majority of the Court was unprepared to be liberated. One can dispute the sincerity of the Court when it invokes the U.S. model. None of the members of the Court were Radicals and it is likely that the majority's political preferences and U.S. case law pointed in the same direction. However, given the influence of the U.S. model in Argentine constitutional debate generally, the centrality of U.S. cases to the majority's opinion, and important earlier decisions that can only be explained by the fact that the Court wished to follow U.S. practice, the likelihood is that the U.S. case law was determinative. If there had been a U.S. Supreme Court precedent holding that the judiciary could decide who has the right to govern a State, then the Argentine Court would have had a hard time avoiding deciding Cullen c/Llerena on the merits. If the

335. "Cullen," 53 Fallos at 441. The strongest version of this statement by the Supreme Court appears in "de la Torre," 19 Fallos 213, 236 (1877). See also CONGRESO NACIONAL, CAMARA DE SENADORES, DIARIO DE SESIONES DE 1867, SESSION OF AUG. 13, 1867, AT 205 (statement of Madariaga); CONGRESO NACIONAL, CAMARA DE DIPUTADOS, DIARIO DE SESIONES DE 1867, SESSION OF AUG. 26, 1867, AT 225-32; id. SESSION OF SEPT. 13, 1867, AT 321-22; id. SESSION OF SEPT. 20, 1867, AT 353-55; id. SESSION OF SEPT. 23, 1867, AT 361; CONGRESO NACIONAL, CAMARA DE SENADORES, DIARIO DE SESIONES DE 1868, SESSION OF JULY 18, 1868, APP. AT 109-11.


337. The manner in which U.S. law guided, and sometimes irrationally bound the Argentine Supreme Court with rules that made little sense outside the U.S. is analyzed in Miller, supra note 21. The best example of this is "Sojo," 32 Fallos 120 (1837). In that case the Argentine Court follows the U.S. rule established in Marbury, 5 U.S. (1 Cranch) at 173-75, that Congress may not expand the original jurisdiction of the Supreme Court beyond the areas explicitly provided in the Constitution. "Sojo," 32 Fallos at 128-36.
U.S. Constitution would have contained an article similar to Article 71 of the Argentine Constitution and that article had been interpreted by the U.S. courts to bar reconsideration of a rejected federal intervention, that interpretation would have been very difficult to ignore on the merits.

Decided differently, *Cullen c/Llerena* could have transformed Argentine politics. An identical case from the Province of San Luis\(^3\) was decided by the Court in identical fashion a few weeks later, and had *Cullen c/Llerena* resulted in a victory for the Radicals they probably would also have brought an identical action against the intervenor in the Province of Buenos Aires. Buenos Aires was by far Argentina's politically most important province, and Santa Fé, with a vibrant and growing economy of agricultural exports, was likely the second most important. Radical control over these provinces, combined with the strength of the Radicals in the City of Buenos Aires and among some Army officers, might well have ushered in political reform nationwide. At best, it would have led to a change in Argentina's political rules to finally include free elections, and perhaps would have included limitations on federal interventions. At the least, a decision in favor of the Radicals would have meant a thorough recasting of the political dice and given a boost to President Sáenz Peña's electoral platform.

Instead, having failed in their provincial revolts, the Radicals launched a revolt to overthrow the federal government. First a small revolt began in the Province of Tucumán, on September 7, 1893, in response to a fraudulent local election;\(^3\) then, on September 24, two weeks after the *Cullen* decision, a more significant revolt began in the Province of Santa Fé, and Leandro Alem appeared in the river port of Rosario to declare himself President of the Republic.\(^4\) The revolts were poorly organized, however, with only limited army support, and by October 2 the government had regained complete control.\(^5\) Alem and his confederates were detained once again, but this time, unlike 1892, the government filed charges of rebellion and the cases rapidly made their way to the Supreme Court. The government tried to present a tough response to the rebellion. After del Valle and his

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\(^3\) See Allende, *supra* note 149, at 414; 2 Sommariva, *supra* note 10, at 228-30; see generally Etchepareborda, *supra* note 138, at 211-36 (giving a detailed account of the Tucumán and Santa Fé rebellions).

allies were forced to resign from their ministries on August 12, Carlos Pellegrini had recommended the appointment of Manuel Quintana as Minister of the Interior, with the charge of restoring order, and President Sáenz Peña had accepted the suggestion. On August 17, to aid in the federal interventions in Buenos Aires, Santa Fé, and San Luis, Quintana obtained congressional approval of a state of siege that would not end until early in 1894. Quintana was politically committed to presenting a firm response to the Radical revolts. The only significant opposition came from the judiciary.

2. The Judiciary and the September Revolts—Alem (Round 2)

During November and December 1893 the Supreme Court was the only institution in a position to question the Executive’s use of an extended state of siege to stop the Radicals. It is no coincidence that the newspaper La Prensa, increasingly critical of the government, published a long editorial on November 30 praising the doctrine of separation of powers that allows the judiciary to correct injustice and reminding its readers of the important institutional role played by the U.S. Supreme Court. This time the Supreme Court played its role well, from the point of view of institutional stability and limiting state repression, but it was comparatively easy for it to do so compared with Cullen v/Llerena, since the relevant constitutional rules were already established and it was not required to act inconsistently with its U.S. model.

Particularly during November and the first week in December, the Press appears to have been focused on the case of Coronel Espina, a case that gave the Radicals some of their most important publicity during the state of siege. Colonel Espina, a key rebel military fig-

342. Sommariva, supra note 10, at 221-22.
343. Id.
345. La Nación offered the most detailed coverage of the legal proceedings, which is particularly striking given its general hostility toward the Radicals. Causa del coronel Espina, LA NACIÓN, Nov. 1, 1893, at 1 (giving the full text of the Procurador General’s first brief, which argued that Espina waited too long to question military jurisdiction); Tribunales, LA NACION, Nov. 8, 1893, at 3 (short note indicating scheduling of oral argument); Tribunales, LA NACION, Nov. 15, 1893, at 3 (short note indicating scheduling of oral argument); Tribunales, LA NACION, Nov. 22, 1893, at 3 (short note indicating selection of José María Gutierrez to act as a substitute judge in the case in place of Luis Varela); Causa del coronel Espina, LA NACIÓN, Nov. 29, 1893, at 1; Causa del coronel Espina, LA NACIÓN, Nov. 30, 1893, at 1; Causa del coronel Espina, LA NACIÓN, Dec. 2, 1893, at 1; Causa del coronel Espina, LA NACIÓN, Dec. 3, 1893, at 2 (all four articles giving text of Aristóbulo del Valle’s oral presentation to the Supreme Court); Causa del coronel Espina, LA NA-
ure in the failed Unión Cívica revolt of 1890, had sought to sway the Argentine Navy to join the Radicals as soon as he received word of the Santa Fé revolt. He quickly won over the crews of two torpedo boats, and used these boats to approach the fleet. However the boat he was traveling in, the Murature, was sunk by the cruiser 9th of July as it approached the fleet and before he could do any talking. The Executive quickly ordered Espina court-martialed. A one day trial took place on the day after his capture, with Espina as the only witness. He was found guilty of rebellion in violation of military law and sentenced to death, and the President immediately confirmed the verdict and sentence.

Espina's sentence was commuted to twenty years' imprisonment at hard labor after appeals from much of the Argentine elite, including former presidents Roca and Mitre, but the case then received even more attention with a debate over whether the military had possessed jurisdiction to try Espina in the first place. Espina's attorney was none other than Aristóbulo del Valle, and during a recess in the one day military trial he quickly filed a complaint before the federal court in the Federal Capital insisting that the federal court was the only court with jurisdiction over rebellion. The federal judge agreed with del Valle, and when the military court continued to insist on its own jurisdiction, the federal judge sent the case to the Supreme Court for a ruling on which court system had jurisdiction to

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346. See "Coronel Espina," 54 Fallos 334, 335-36, 339 (1893) (report from the fleet and Espina's testimony to the military court).
347. Id. (Espina argued that the crews had already joined the revolution).
348. Id.
349. See id. at 338-41 (proceedings of the military court); id. at 348 (Espina's petition to the federal court).
350. Id. at 341-42 (sentence of the military court); id. at 345 (Resolution of the Executive confirming the sentence).
351. Coronel Mariano Espina—Orden general del Estado Mayor (and article that follows), LA PRENSA, Sept. 30, 1893, at 5.
353. Id. at 352-56.
hear the case. Del Valle, known as one of Argentina’s finest orators, then took advantage of the Supreme Court’s custom of permitting oral argument to present a superb defense over the course of two days, questioning the legal arguments supporting jurisdiction and emphasizing the political nature of Espina’s crime. The odds were against him, given that the Court had traditionally interpreted military jurisdiction in the case of military personnel quite broadly. In early December the Court published a unanimous decision rejecting an initial argument by the Procurador General that Espina had waived his jurisdictional defense because he had defended his case in the military court. When the Court issued its final ruling several weeks later, however, it ruled 3-2 in favor of military jurisdiction. The Supreme Court’s final decision required analysis of very confusing pre-independence Spanish ordinances on military jurisdiction and a Province of Buenos Aires law from 1823 whose validity even the three judges forming the majority could not agree upon. But in any case, by that

354. Id. at 357-59. Law No. 48 art. 17, Sept. 14, 1863, [1852-1859] A.D.L.A. 364, 365, gives the Supreme Court jurisdiction over disputes concerning the jurisdiction of the federal courts, disputes that usually required the Supreme Court to determine whether a case should be heard by federal or provincial courts, but which in this case was applied to a dispute between the federal court and a military court.

355. La Nación printed the full text of del Valle’s oral argument in four successive issues. Causa del coronel Espina, LA NACIÓN, Nov. 29, 1893, at 1; Causa del coronel Espina, LA NACIÓN, Nov. 30, 1893, at 1; Causa del coronel Espina, LA NACIÓN, Dec. 2, 1893, at 1; Causa del coronel Espina, LA NACIÓN, Dec. 3, 1893, at 2. The argument may also be found in full in Los consejos de guerra y los delitos políticos, 7 REVISTA DE DERECHO PENAL 191 (1951).

356. See supra text accompanying notes 123-24

357. “Coronel Espina,” 54 Fallos at 363-70. The Procurador General had argued that Espina had waived his jurisdictional defense by defending himself before the military court, had failed to present the jurisdictional defense in a timely fashion, and that the case was already res judicata. Id. at 360-62.

358. Id. at 584-633. The decision is dated December 30, 1893.

359. At risk of oversimplification, Judges Abel Bazan and Juan Torrent argue that rebellion is a crime enumerated in the old Spanish Military Ordinances, which remain in effect in Argentina, and that this is enough for military jurisdiction given that the crime is of a type that is of importance to military discipline. Id. at 587-97. Judge Octavio Bunge, by contrast, emphasizes the 1823 Law of the Province of Buenos Aires establishing military jurisdiction not on the basis of the offense committed but because of where it was committed, finding that military jurisdiction always exists in the case of crimes committed in the barracks, on the march, on campaign, or during an act of service, even if the law to be applied is civilian. Id. at 603-07. Benjamín Paz and José María Gutiérrez in dissent argue that rebellion was not codified in the Spanish legislation, id. at 619-26, and that the 1823 Buenos Aires law is inapplicable since while Buenos Aires represented the entire nation in foreign affairs at that time, it did not constitute a national government, id. at 615, and even if the law were in effect nationally, it must not be read to create an unconstitutional privileged jurisdiction based on belonging to a special class of persons. Id. at 617-19.
time public attention was likely focused on a much more striking decision ordering the release of Leandro Alem. TheRadicals benefited from the Espina case through the enormous publicity it generated, and the decision against them, coming immediately after the Alem decision in their favor, was less important than the publicity received from del Valle's oral argument.

Leandro Alem's case actually begins with two cases involving his followers just after the Radical revolts of September 1893, in which the Court applied already established precedents in favor of the Radicals. In November 1863, the Supreme Court held in favor of requests for release on bail by groups of Radical leaders of the Tucumán and Santa Fé rebellions, in one case, reversing a decision of the Tucumán federal court denying bail, and in a second, affirming a decision by the federal court in Santa Fé that granted bail. As noted earlier, the Supreme Court's case law dating back to the rebellions of 1866 and 1867 granted bail to the leaders of rebellions. Under the old rules from colonial practice, bail was automatic when the crime would not result in a jail sentence, and a rebellion was only punishable with a maximum penalty of ten years' exile and a fine. Further, even if exile was considered the equivalent of jail, it would make little sense to flee justice to avoid exile. Recent legislative changes only strengthened the rebels' argument. Under the 1888 Code of Criminal Procedure, persons prosecuted for a crime whose maximum penalty did not exceed two years in prison automatically received release on bail during the proceedings. Since the Code of Criminal Procedure was designed to increase the possibilities of obtaining bail, even the Procurador General, representing the government, did not argue that bail was unavailable for the crime of

360. "Alurralde," 54 Fallos at 264; "Lamarque," 54 Fallos at 292. These two decisions will be treated as though they were a single decision in the references that follow, given that they present identical issues and the decisions were handed down only 11 days apart, on November 14 and 25 respectively.
362. "Lamarque," 54 Fallos at 298, 305.
363. Supra note 105 and accompanying text; see also supra notes 130-36 and accompanying text.
366. "Lamarque," 54 Fallos at 297 (first instance).
rebellion. Rather, the Procurador General argued that bail should be denied because the defendants were also accused of seduction of troops to participate in the rebellion. Article 27 of Law 49, the first federal criminal statute, provided that “[a]nyone who tries to seduce troops to commit the crime of rebellion will suffer the penalty of [prison at] hard labor for the period of two to four years.”

The Court, however, did not accept the argument. The Court focused on the text of Law 49 and held that the statute surprisingly lowers the penalty for seduction of troops if the rebellion actually takes place. Article 28 of Law 49 provided that “[i]f the rebellion ... comes about, the seducers will be regarded as promoters [of a rebellion] and fall under the corresponding articles,” which penalize the leaders of a rebellion with exile and a fine. The Supreme Court therefore held that the maximum penalty applicable to leaders of a rebellion who successfully seduce troops to participate was ten years exile and a fine.

While the Procurador General argued that this approach was incongruous, since it penalizes the unsuccessful attempt to start a rebellion more severely than successful incitement, the Supreme Court responded that Congress had reasons of “high politics” for adopting this approach. Although the Court never identifies these reasons of “high politics,” a possible explanation is that Congress wanted the persons who actually led rebellions out of the country, and not in prison within the country where their presence might provoke further outbreaks.

In rejecting the Procurador General’s approach, the Court also argued that it owed respect to its own precedents. Aside from the many cases where the Court required the release of participants in rebellions on bail, the Court had specifically held in at least one 1860s case that the penalty for seduction of troops who participate in a rebellion was the penalty for rebellion, and had held that there is a

367. See “Alurralde,” 54 Fallos at 267-70 (opinion of Procurador General). In “Lamarque,” 54 Fallos at 298-99, the Procurador General simply conceded that bail was required under the Court’s precedent in “Alurralde.”

368. “Alurralde,” 54 Fallos at 269.
370. “Lamarque,” 54 Fallos at 302-03.
372. Id. arts. 15-17, A.D.L.A. at 386.
374. “Alurralde,” 54 Fallos at 269.
375. “Lamarque,” 54 Fallos at 302-03.
377. “Lamarque,” 54 Fallos at 301-02 (citing “Hoyos,” 7 Fallos at 149).
constitutional right to bail when the penalty will not result in a jail sentence. Moreover, the judges who decided the Court's early cases on rebellion were the persons who drafted the criminal statute. Law 49 was submitted to Congress by the members of the first Supreme Court together with Law 48, the statute on the jurisdiction of the federal courts.

These cases from Tucumán and Santa Fé were covered extensively in the Press. La Nación, whose editorials supported the government's crackdown on the Radicals, nevertheless published not only the Court's decision, but the text of one of the precedents it relied upon. Moreover, contrary to its practice of commenting vocif-

379. "Alurralde," 54 Fallos at 272-73; "Lamarque," 54 Fallos at 304. Only one member of the Court wrote in dissent. Octavio Bunge emphasized the seriousness of the offense of rebellion given its effects and the contradiction of treating the leaders of a rebellion more leniently than the mere seducer of troops. He argued that he offered a more coherent interpretation of the statute that unlike the majority's approach took its spirit into account. "Alurralde," 54 Fallos at 275-76; "Lamarque," 54 Fallos at 306. He distinguished the Supreme Court's prior rebellion cases on the very weak grounds that they were decided prior to the 1888 Code of Criminal Procedure. "Alurralde," 54 Fallos at 276; "Lamarque," 54 Fallos at 306. It may not be a coincidence that Bunge also had the least political experience of the five members of the Court, having neither served in Congress nor the Cabinet like Judges Bazan, Paz, and Torrent, nor come from a family known for its political activity like Luis Varela. He also makes no reference to what the Court calls Congressional concerns of "high politics."

380. Jurisprudencia Federal, La Prensa, Nov. 1, 1893, at 5 (text of federal judge's decision granting bail in "Alurralde"); Tribunales, La Prensa, Nov. 5, 1893, at 5 (text of the Procurador General's brief in "Alurralde"); Presos políticos de Tucumán, La Prensa, Nov. 15, 1893, at 4-5 (text of Supreme Court's decision in "Alurralde"); Jurisprudencia Federal, La Prensa, Nov. 15, 1893, at 5 (text of the Supreme Court's decision in "Lamarque"); Presos políticos, La Nación, Nov. 1, 1893, at 1 (text of the federal judge decision granting bail in "Alurralde"); Presos políticos del Rosario, La Nación, Nov. 5, 1893, at 1 (giving the text of the Chief of Police of Rosario's charges against the Radicals); Tribunales, La Nación, Nov. 10, 1893, at 3 (describing the previous day's oral argument in the case of bail for the Tucumán rebels); Junta revolucionaria de Tucumán, La Nación, Nov. 15, 1893, at 1 (publishing the full text of the Supreme Court's decision in "Alurralde"); Excarcelación bajo fianza, La Nación, Nov. 20, 1893, at 1 (noting that the case of release on bail of the Radicals has been described as a conflict between the Judiciary and the Executive, and publishing the text of the Supreme Court's precedent in "Nieva," 8 Fallos at 142).

381. See La solución del orden, La Nación, Oct. 7, 1893, at 1 (arguing that the Radicals lacked the popular support enjoyed by the Revolution of 1890 and the country needed change through proper enforcement of the law and maintenance of order); La Paz y el estado de sitio, La Nación, Oct. 18, 1893, at 1 (affirming the need to maintain order but noting that the Radicals have been thoroughly defeated and discredited, hinting that the time has come to loosen up on the restrictions of the state of siege).

382. See supra note 380 and accompanying text.
Courts and the Creation of a "Spirit of Moderation"

erously on anything related to the Radicals, *La Nación* published the Supreme Court's decision without comment, and later indicated that it did not wish to take sides in what was being described as a confrontation between the Court and the Executive. The Executive responded to the Court's decisions by informing the arrested individuals of their release on bail and then immediately detaining them once again under its special powers during a state of siege. This was irreproachable in constitutional terms, but politically less favorable to the Executive than detention of the Radicals as criminals awaiting trial. The most important effect of the decisions, however, was that they led Leandro Alem, then under arrest in the City of Rosario, to trust the courts enough to bring a similar petition for his own release on bail. Alem, unlike the Radicals granted bail earlier, could also assert arguments of parliamentary immunity as Senator-elect from the Federal Capital.

The *Alem* case consists of two parts: first, decisions on the issue of whether Alem qualified for release on bail, and second, decisions on the issue of whether once released Alem could invoke his Congressional immunities to avoid detention under the Executive's powers during a state of siege. The Sáenz Peña administration, while not accusing Alem of having planned assassinations as Pellegrini's government did the year before, still did its best to demonize him and emphasize the destruction caused by the Radical revolt. The federal prosecutor in Rosario responded to Alem's bail request by arguing that the charges against Alem included much more than simple rebellion. Alem's rebellion had led to battles in which innocent civil-

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383. *Junta revolucionaria de Tucumán, La Nación*, Nov. 15, 1893, at 1 (publishing the full text of the Supreme Court's decision in "Alurralde").
385. *Nueva prisión de los presos políticos en libertad, La Prensa*, Nov. 18, 1893, at 4; *Excarcelación de los presos de Tucumán, La Prensa*, Nov. 19, 1893, at 4; *Excarcelación bajo fianza, supra* note 384, at 1 (all three articles referring to the "release" and arrest of the Tucumán rebels). The last of the Tucumán rebels was not released until February 7, 1894. *Los presos de Tucumán, La Prensa*, Feb. 8, 1894, at 5. The last of the Santa Fe rebels were released on March 7, 1894. *Presos políticos en libertad, La Prensa*, Mar. 8, 1894, at 4.
387. See *Manifiesto de Su Excelencia el señor Presidente de la República al pueblo de la Nación*, Oct. 4, 1893, 1 B.O. 65, 66, Oct. 6, 1893 (written address by President Luis Sáenz Peña to the Nation upon suppression of the Radical revolt, emphasizing the destruction to government and private property caused by the rebellion, the civilian lives threatened, and the harm to the economy).
ians were threatened, guns were stolen from a naval ship and distributed to his followers, railroad lines and bridges were destroyed, and the telegraph and mail offices were broken into and correspondence seized. While the penalty for rebellion might well only be a fine and exile, according to the prosecutor these additional acts could result in jail sentences, making this case different from the case of the Tucumán rebels just granted bail.

The Federal Judge in Rosario rejected the government’s arguments, finding that most of the acts described were acts that one would normally expect to occur in furtherance of a rebellion. The judge held that the law, by penalizing rebellion, treated all acts normally constituting rebellion as falling within the charge of rebellion. Acts that normally occur during a rebellion cannot be charged separately. Just as rebels who fight in a battle that results in deaths have not committed homicide, the rebels cannot be charged for other acts that while normally crimes are also normal to combat. Further, the few acts that arguably did not fall within the charge of rebellion, such as interfering with the mail, were relatively minor, and in the case of the mail, all the correspondence was subsequently recovered intact.

Since all charges were either comparatively minor or amounted to rebellion, bail was appropriate.

The Executive responded to the granting of bail as it had in the case of the other Radical revolutionaries, by allowing Alem released as far as the door of the prison and then re-arresting him under its state of siege authority. Alem then brought a motion accusing the Executive of mocking the District Court’s order, and for the first time, raised the issue of his immunities as a National Senator.

Alem’s congressional immunities had not been an issue so long as his detention was based on his arrest in flagranti in the act of rebellion, since the Constitution permitted the arrest of members of Congress when caught in the act of committing a crime.

388. “Alem,” 54 Fallos at 435 (prosecutor’s response to bail petition).
389. Id.
390. See “Alem,” 54 Fallos at 438 (district court’s decision on bail).
391. See id.
392. Id.
393. Id. at 439-40.
394. Id. at 442 (Alem’s motion protesting the Executive’s failure to release him).
395. Id. at 441-42.
396. Id. at 442-43.
397. Const. Arg. art. 61 (1860) reads:
No Senator or Deputy, from the day of his election to the end of his functions, can be arrested, except in the event that he is surprised in flagrante in the execu-
However with bail granted, the general rule of constitutional immunity from arrest “from the day of his election to the end of his functions,” once again became relevant. Now that Alem was detained solely under the Executive’s authority during a state of siege, the case presented exactly the same issues litigated the previous year before Judge Tedín.

To Alem’s advantage, however, the federal judge in Rosario decided the state of siege issue against him. This decision actually helped Alem, because it allowed him to appeal the district court’s ruling to the Supreme Court rather than risk a repetition of the events of the year before when Judge Tedín decided in his favor but the President refused to enforce the judge’s order. A decision against him offered Alem something to appeal, and obviously a decision from the Supreme Court packed much more political authority than a decision by the District Court. The basis of the district court’s decision against Alem is somewhat confusing. The district court first went to great lengths to establish the President’s wide-ranging authority to detain an individual during a state of siege and offered frequent reference to U.S. practice on suspension of habeas corpus. However, on the specific issue of Alem’s senatorial immunities, the judge found that these were lifted by a note sent by the Senate to the Executive.

The District Court judge does not transcribe the Senate’s note, but the Supreme Court does, and the ambiguity of the note is a good reflection of the general confusion of Argentine politics in 1893. The note is dated September 26, 1893, during the middle of the Radical uprising, and the Senate sent it in response to a message from the Executive that began by stating that Leandro Alem had placed himself at the head of a revolt against the government, and then asked the

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398. Const. Arg. art. 61 (1850). Id. The same provision appears in the present Argentine Constitution art. 69.
399. “Alem,” 54 Fallos at 449 (district court’s decision on detention under state of siege).
400. See infra Part VI.C.
401. “Alem,” 54 Fallos at 446-48 (district court’s decision on detention under state of siege, citing Nicolás Antonio Calvo, Decisiones constitucionales de los tribunales federales de los Estados Unidos §§728-29, 2521-22 (1856), a book that is essentially a translation of Orlando Bump, Notes of Constitutional Decisions (1878)). The district court does not seem to have used U.S. cases in the original.
402. Id. at 449.
403. Id. at 462-63.
Senate to address the question: "Should the immunities that the Constitution provides to the Senators and Deputies serve, not only to protect them in the exercise of their functions, but to shield them from the powers stemming from a constitutionally declared state of siege?" 404

The Executive's message then added that it had no doubt that the Senate would provide an answer "in favor of the public peace" and "in the sense of allowing unimpeded and expeditious action by the Executive." 405 The Senate, after meeting in secret session, replied: "The Senate of the Nation, in view of the message of Your Excellency dated today, has resolved to indicate to you that in the present case you may make use of your constitutional powers with respect to the senator elect Doctor Leandro Alem." 406

It would appear that the Senate did not wish to provide a straight answer and that the District Court's finding that Alem's immunities were removed was not unavoidably dictated by the Senate's statement. The Senate response neither explicitly lifts Alem's immunities nor recognizes that the President enjoyed the discretionary authority to detain a Senator during a state of siege.

The Supreme Court handed down a unanimous decision in favor of Alem's release. Its decision is broadly similar to that of Judge Tedín the year before, but with superior craftsmanship, demonstrating both hermeneutics typical of civil code study and sophisticated invoca-

405. Id. The full note reads:
Buenos Aires, September 26, 1893
To the honorable Senate of the Nation.
The gentleman Senator elect Leandro N. Alem is the ostensive head of a political party that proclaims revolution as its method, that resorts to violence against the authorities, that seduces the front line troops of the National service and that tries to violently disturb the entire Republic.
Should the immunities that the Constitution provides to the Senators and Deputies serve, not only to protect them in the exercise of their functions, but to shield them from the powers stemming from a constitutionally declared state of siege?
To the honorable Senate belongs the reply, and the Executive Branch believes it would offend its well known preference in favor of the public peace if it showed fear that this reply might not be in the sense of allowing unimpeded and expeditious action by the Executive.
It is an honor to salute your honorable persons with the best and most distinguished regards.
Luis Sáenz Peña
Manuel Quintana
tion of the U.S. model. The Court begins with its hermeneutic argument, looking at the principles behind Articles 23, 61, and 62 respectively, and seeking to interpret them consistently with each other. First, the Court notes, state of siege is an extraordinary tool that exists for the protection of the Constitution and constitutional authorities.\footnote{407} Second, all public authorities are merely agents exercising powers delegated by the people, with even a state of siege only able to operate in accordance with the Constitution.\footnote{408} Third, the Constitution goes to exceptional lengths to establish congressional immunities.\footnote{409} Normally only Congress itself judges its own members, removing a member’s immunities with a two-thirds vote. Arrest without such authorization is only allowed when a member is surprised \textit{in flagranti} in the commission of a crime, and that exception is made to allow the judiciary, not the Executive, to try a member. Even during a state of siege the Executive is not allowed to try an individual on its own, merely detain him.\footnote{410} Fourth, the suspension of guarantees during a state of siege affects only persons and their property, not the authorities created by the Constitution.\footnote{411} Fifth, if the Executive were to have the power to arrest members of Congress during a state of siege then it could conceivably use this power to influence Congressional votes.\footnote{412} Congressional immunities therefore obviously must prevail.

Ironically, but not surprisingly, this very capable bit of civil law style reasoning is immediately followed by a lengthy quotation from an earlier case arguing that Argentine courts must follow U.S. practice, stating:

\begin{quote}

The system of government which governs us is not of our own creation. We found it in action, tested by long years of experience, and we have appropriated it. And it has been correctly stated that one of the great advantages of this adoption has been to find a vast body of doctrine, practice and case law which illustrate and complete its fundamental principles, and which we can and should use in everything which we have not decided to change with specific constitutional provisions.\footnote{413}
\end{quote}

\footnote{407. \textit{Id.} at 454-55.}
\footnote{408. \textit{Id.} at 455-56.}
\footnote{409. See \textit{id.} at 457-58.}
\footnote{410. \textit{Id.} at 457-58.}
\footnote{411. \textit{Id.} at 458.}
\footnote{412. \textit{Id.} at 458-59.}
\footnote{413. \textit{Id.} at 459 (quoting "de la Torre," 19 Fallos at 231, 236 (1877)).}
The Argentine Court then noted that the U.S. Constitution offered less protection to legislators than the Argentine Constitution, since it allows arrests for treason, felonies, and breach of the peace even when the legislator is not arrested in flagranti, and only protects members during legislative sessions and travel to and from sessions.\textsuperscript{414} However, even under the U.S. Constitution members of Congress can only be arrested as part of an ordinary judicial proceeding, not through a political decision by the Executive during a state of siege\textsuperscript{415} (which while not existing with such a name in the United States has its functional equivalent in the suspension of habeas corpus due to rebellion or invasion).\textsuperscript{416} The Argentine Court does not offer any citations to support this assertion, merely states it as a matter of fact. (In fact, the U.S. Supreme Court has never heard the issue of the detention of a member of Congress during a suspension of the writ of habeas corpus by the President and one can imagine numerous ways in which a U.S. court might decide the matter in favor of the Executive. A U.S. court might have held that suspension of habeas corpus suspends the ability of the courts to hear habeas corpus actions, or it might have held that the matter was a political question on grounds that a detention by the Executive when habeas corpus is suspended is a political, not a judicial act, and that it is up to the House of Congress to demand its member’s release.) Obviously the Argentine Supreme Court felt that in a case strongly challenging the Executive, and on an issue on which the Executive had defied Judge Tedín only the year before, it needed all the sources of authority it could muster even if a precise U.S. case was missing.

Had the Court wished an easy way out it might have focused on the Senate’s note to the President. While the note is ambiguous, the Court could have found that the Senate never protested the detention and at least tacitly accepted Alem’s detention in its response to the Executive’s query. Instead, the Court quoted Luther Cushing, \textit{American Parliamentary Law}, for the proposition that Congress has the obligation to seek its members’ release when they are illegally detained, perhaps hinting that the Senate had been remiss.\textsuperscript{417} The note had no effect on the case. The Court held that since the note only stated that

\textsuperscript{414} Id. at 459-60 (quoting U.S. Const. art. I, § 6, cl. 1 [the Court’s citation is incorrectly to art. I, § 1]).

\textsuperscript{415} Id. at 460.

\textsuperscript{416} U.S. Const. art. I, § 9, cl. 2.

\textsuperscript{417} Id. at 461 (citing Luther Stearns Cushing, \textit{American Parliamentary Law} 224-38 (edition not identified, first published in 1856)).
the President could make use of his constitutional powers to detain Alem, and the decision of the Court was that the President did not have the constitutional authority to detain a member of Congress, the President had no constitutional power to invoke.418

The Supreme Court also issued a simultaneous decision denying an appeal by the government of the lower court's initial decision granting Alem release on bail. The Supreme Court's decision here emphasized two principal points. First, the Court insisted that its case law had consistently held that acts such as blowing up bridges and occupying national offices constituted part of the act of rebellion and could not be separately charged.419 According to the Court, "in the event of a state of war, these acts constitute permissible elements of attack and defense under the law of nations."420 Second, the Court distinguished Alem's case from that of Urquiza's alleged murderer, Ricardo López Jordán, where the accused allegedly committed crimes outside the scope of a rebellion.421 López Jordán was accused of ordering ordinary homicides off the field of battle, shooting and knifing his victims, and of ordering whippings and looting.422 The prosecutor never accused Alem of such crimes.423

The Alem decision was clearly a tough decision for the Executive to accept, particularly for Minister of the Interior Manuel Quintana, given his public commitment to crack down on the Radicals' revolutionary activities. While the decision did not go out of its way to be politically provocative, it inevitably was.424 First, the decision vindicated Judge Tedín's decision the year before and therefore discredited President Pellegrini's refusal to enforce Judge Tedín's order. Since Pellegrini was responsible for Sáenz Peña's about face and his selection of Quintana as Minister of the Interior, the decision was a finding not only that the Executive had violated the Constitution with its present detention of Alem, but that Pellegrini, its primary backer, had flouted the Constitution the year before. Second, the decision recog-

418. Id.
419. Id. at 464-65.
420. Id.
421. Id. "López Jordán," 21 Fallos at 121, is analyzed supra text accompanying notes 130-36.
423. See id. at 464.
424. It is difficult to gauge the extent of the public reaction given the restrictions on the press during the state of siege. La Nación noted that the amount of public attention focused on the case was "impressive" but that it could not comment on the case because of the state of siege. La corte suprema, LA NACIÓN, Dec. 17, 1893, at 1.
nized Alem as a rebel and not a criminal. Alem was not to be compared with López Jordán, and his detention by the Executive was a purely political act. Third, as was the case with Alem’s detention the year before and Colonel Espina’s defense, briefs before the courts and court decisions were one of the few ways the opposition was able to make itself heard in the Press during a state of siege. While the country was in the middle of a state of siege in which the Executive often placed severe restrictions on the Press, apparently the Executive did not feel it could censor reports on judicial proceedings.425

The Executive did not release Alem. The Supreme Court’s decision was handed down on December 15; however, on December 18 the Supreme Court received a telegram from the federal judge in Rosario indicating that the Executive had refused to comply with his order to release Alem and asking the Supreme Court to take care of compliance.426 The next day, the Supreme Court responded as it had to such requests in the past, indicating that enforcement of court orders was the responsibility of courts of first instance, not appellate courts.427 The Supreme Court also went a step further, however. The Code of Criminal Procedure contained specific enforcement mechanisms for the judiciary when its habeas corpus orders were dis-

425. Early in the state of siege the Minister of the Interior issued an order to the Chief of Police of the Federal Capital prohibiting:

(1) Giving news of a political nature without the permission of the Ministry of the Interior.
(2) Giving news of a military nature without the permission of the Ministry of War.
(3) Discussing official acts without moderation or attributing to them motives or purposes contrary to the public service.
(4) Offering any opinion on governmental measures related to the state of siege. 

Comunicación al señor Jefe de Policía, estableciendo limitaciones a la prensa de la Capital, Aug. 26, 1893, 1 B.O. 615, 616, Aug. 29, 1893. Even La Prensa, the country’s largest newspaper, and which was initially very sympathetic to President Sáenz Peña, complained of restrictions. Perfiles de la situación, LA PRENSA, Sept. 12, 1893, at 3; Sin Estado de Sitio, LA PRENSA, Feb. 28, 1894, at 4. Incredibly, La Prensa reported almost nothing on the Radical uprising in Santa Fé until two days after it was put down, an omission that undoubtedly was due to government orders. The only information La Prensa was allowed to slip in on the Radical revolt consisted of short official announcements such as a note on September 30 that Colonel Mariano Espina had been sentenced to death by a military tribunal, Coronel Mariano Espina - Orden General del Estado Mayor, LA PRENSA, Sept. 30, 1893, at 5, and the text of the decree placing General Roca in charge of repressing the Santa Fé rebellion. El general Roca, general en jefe, LA PRENSA, Oct 1, 1893, at 4. La Prensa often criticized the government during the state of siege, but criticism related to the state of siege, such as discussion of government repression of the Radicals, was clearly off limits.

426. “Alem,” 54 Fallos at 481, 482 (telegram).
427. Id. at 482-83.
obeyed—fines and even the arrest of the responsible public officials until the order is complied with—428—and the Court criticized the judge for running to the Supreme Court rather than using these provisions.429 This placed both the Executive and the apparently reluctant judge in Rosario in a difficult position that the Executive partially resolved three days later, on December 23, when the Senate voted to expel Alem.430

The events of 1893 left President Sáenz Peña politically exhausted. Instead of ushering in free elections and rule of law, his panic at del Valle’s provincial revolutions left him hostage to the PAN as Interior Minister Quintana engaged in a reenactment of Pellegrini’s 1892 state of siege. Elections were held in February 1894 which President Sáenz Peña ensured remained relatively clean in the Federal Capital and the Province of Buenos Aires, but which his PAN allies ensured were thoroughly corrupt in the rest of the country.431 When Leandro Alem was finally placed at liberty on March 7, 1894, La Prensa made the comparison to Pellegrini explicit. According to La Prensa, Alem’s fellow prisoner Mariano Candioti (the Radical’s short-lived de facto governor of Santa Fé) had asked the government to allow him to leave the country—as was his right under Article 23 of the Constitution—and his habeas corpus petition complaining of the government’s failure to let him leave was then pending before the Supreme Court and likely to be decided that week.432 According to La Prensa, this brinkmanship by the government was just as censurable as the manner in which Pellegrini had shipped many Radicals off to Montevideo the previous year.433 La Prensa maintained that Sáenz Peña had decided to end the state of siege only because he did not want to be embarrassed by a Supreme Court decision in favor of Candioti, and rather than just releasing Candioti or sending him to Montevideo, he decided he might as well release all remaining prisoners together.434 La Prensa’s interpretation of events may or may not have been true, the point is that Sáenz Peña’s image had been indelibly tarnished by his failure to end electoral fraud and live up to the

431. GUIDO, supra note 138, at 300-03.
432. Presos políticos en libertad, LA PRENSA, Mar. 8, 1894, at 4.
433. Id.
434. Id.
Constitution. The Supreme Court never dealt with the issue of electoral fraud (which is what the Santa Fé revolt and the Cullen case were really all about even if the issue was not presented to the Court), but the Court did decide issues more firmly within Argentina’s established constitutional rules. The Court did not allow the judiciary to keep the Radicals in jail on rebellion charges without bail, and did not allow Sáenz Peña to avoid the step of seeking Alem’s expulsion from the Senate if he was to be detained. Sáenz Peña was forced to assume all the responsibility for the repression himself.

Sáenz Peña’s end is tragic. He was forced from office in January 1894, and his fall was the outcome of his failure to establish his own political base.\(^435\) Having failed in his platform of free elections and constitutionalism, a program that might have given him a political base, and having abandoned the Radicals with his turn to Quintana as Interior Minister in 1893, he became completely dependent on Roca, Pellegrini, and Mitre to stay in power, since those men did lead important political groupings. Bernardo de Yrigoyen, chosen by the Radicals for the Senate in 1894 when it was clear that Alem would not be accepted by the Senate, severely embarrassed Quintana before the Senate in September 1894 by carefully expounding on the PAN’s fraud during a three-day interpolation.\(^436\) However, once Quintana subsequently resigned, Sáenz Peña was never able to put together another cabinet. Sáenz Peña himself then resigned, and with Sáenz Peña’s resignation the PAN once again dominated the Argentine political system with a near monopoly that continued until 1916.\(^437\) While it is impossible to maintain that Sáenz Peña’s confrontations with the judiciary were what brought him down, it is clear that his failure to live up to his “rule of law” platform hastened his demise, and confrontations with the judiciary hardly conferred a rule of law image.

\(^{435}\) See *El año político*, *LA PRENSA*, Jan. 1, 1895, at 9, esp. cols. 4-5 (offering a superb political analysis of the events of the previous year and noting that by deciding to repress the Radicals, Sáenz Peña lost the ability to put his platform into effect); *Política del Purgatorio*, *LA PRENSA*, Jan. 8, 1895, at 4 (indicating that Sáenz Peña is completely dependent on Mitre, Roca and Pellegrini for political support and only gets it grudgingly); *Completamente concluida*, *LA PRENSA*, Jan. 19, 1895, at 4 (indicating that Sáenz Peña was unable to establish himself as a political force and depended on Roca, Pellegrini and Mitre for political support, which leaves Sáenz Peña with no choice but to resign).

\(^{436}\) GUIDO, supra note 138, at 302-04.

\(^{437}\) Alem’s end was even more tragic than Sáenz Peña’s, with his suicide in July 1895.
VII. The Fruits of Revolution

The Supreme Court's response to revolutions from the 1860s through 1893 demonstrates that it was able to act with great independence, arbitrating constitutional rules to deal with the instability of the times. Political question doctrine hobbled the Court, but the rules that the Court did enforce provided Argentines with dramatic improvement over the situation prior to 1853, and would seem to have helped prevent relapses toward the old savagery. The list of rules applied is short, but significant:

1) Citizens have no obligation to resist revolutionary authorities;
2) Rebels have a right to bail and to the lenient treatment specified in the governing legislation;
3) Civilian rebels have the right to trial by civilian courts;
4) Rebels may not be drafted into the armed forces unless as part of a sentence imposed by a civilian court;
5) Declaration of a state of siege does not prevent the courts from hearing habeas corpus petitions and granting them when the President has exceeded his constitutional powers, as might occur for example if he deports an individual who does not opt for deportation or refuses to permit a detainee to select deportation;
6) The President may not infringe on parliamentary immunities, even when the protected party is a revolutionary leader. Revolutionaries continue to participate in the political system.

Further, underlying these rules is a procedural principle that has utility going beyond the doors of the courthouse:

7) The Courts will keep their doors open to revolutionaries and give them the opportunity to present their case for the public record.

The above list does not constitute a definitive list of rules relevant to revolutions, merely the rules applied in cases that came before the courts. Any attempt to return to pre-1853 abuses such as confiscating the property of political opponents or cutting the throats of captured rebel leaders would undoubtedly also have produced a sharp reaction from the courts. Since courts alone are not enough to maintain political rules—for the rules to work, the society at large must have a general sense of the rules and the need to respect them—it is impossible to assert definitively that in the absence of an independent federal judiciary government repression and political violence would have escalated rather than declined. However, there is also no question that when Presidents Carlos Pellegrini and Luis Sáenz Peña increased gov-
government repression beyond that allowed under the rules, both the lower federal courts and the Supreme Court responded. Moreover, even intransigent figures like Leandro Alem, who thoroughly distrusted the government, showed sufficient trust in the courts to turn to them for protection, and Alem at least was not disappointed. The Supreme Court in Alem demonstrated that it would interpret the Constitution rationally, with reference to the structure and aims of the text as a whole, and would disregard political pressures to do otherwise.

However, the Supreme Court’s failure to consider “political questions” when these involved issues of governmental legitimacy also shows the limits of the Supreme Court’s authority. The Supreme Court in Cullen v.Llerena might have taken Luis Varela’s approach of falsifying U.S. law to create a false base of authority, freeing itself from the limitations of U.S. law. But such an approach is risky, since if there is truly an expectation in society that a particular source of authority will be invoked, the court that acts fraudulently may face discovery and suffer loss of legitimacy as an arbiter. Luis Varela, whose many publications show him to have been one of Argentina’s most capable legal scholars,438 may also simply have been an unscrupulous individual who while talented, did not take his own reasoning seriously. Varela was forced to resign from the Court in 1899 to avoid impeachment for what at best were serious financial improprieties and at worst may have been outright corruption.439 The Supreme Court in

438. Luis Varela was extremely prolific. His major works include an extensive study of the sources of the Argentine Civil Code, CONCORDANCIAS Y FUNDAMENTOS DEL CÓDIGO CIVIL ARGENTINO, 16 vols. (1873-1875); a comparative study of electoral systems, LA DEMOCRACIA PRÁCTICA: ESTUDIO SOBRE TODO LOS SISTEMAS ELECTORALES (París, 1876); two books in support of the Argentine position in border disputes with Chile, LA REPÚBLICA ARGENTINA Y CHILE: HISTORIA DE LA DEMARCACIÓN DE SUS FRONTERAS, 2 vols. (1899); LA REPÚBLICA ARGENTINA Y CHILE ANTE EL ARBITRO (1901); an administrative procedure code that was adopted by the Province of Buenos Aires in 1905, extensive proposals for the reform of the Buenos Aires provincial constitution, PLAN DE REFORMAS A LA CONSTITUCIÓN DE BUENOS AIRES, 2 vols. (1907); and an extensive political and institutional history from the late colonial period through the formation of the Argentine Constitution of 1853-60, HISTORIA CONSTITUCIONAL DE LA REPÚBLICA ARGENTINA, 4 vols. (1810). Additional works are listed in 7 CUTOLO, supra note 53, at 502.

439. The Varela corruption scandal and resignation is an interesting example of the interaction between Argentina’s traditional oligarchic politics and an increasingly aggressive Press and public opinion. The government had sought to quietly reach a gentleman’s agreement for Varela’s resignation, but a public uproar led to Varela’s public disgrace. On May 1, 1899, President Roca (in his second Presidency, 1898-1904), devoted a portion of his address inaugurating the session of Congress with a strong criticism of the Argentine judicial system and advising Congress that he would send it reform legislation shortly. CONGRESO NACIONAL, CÁMARA DE SENADORES, DIARIO DE SESIONES DE 1899, Session of May 1, 1899, at 12 (Roca address). One of the responses to President Roca’s criticisms was
Alem vaguely cited the United States as authority even though it had an investigation of judicial corruption by the House of Deputies Judiciary Committee, which focused on Varela. **Congreso Nacional, Cámara de Diputados, Diario de sesiones de 1899, Session of May 17, 1899, at 40 (statement of Gouchon); see Investigación judicial, La Prensa, May 17, 1899, at 5; El Poder Ejecutivo, La Prensa, May 18, 1899, at 3; Congreso Nacional, La Prensa, May 18, 1899, at 3; El asunto del día, La Prensa, May 18, 1899, at 5.** It is likely that Varela was singled out because he had recently approached the Executive seeking a several months advance on his salary and was involved in numerous litigations with creditors. **See Congreso Nacional, Cámara de Diputados, Diario de sesiones de 1899, Session of May 19, 1899, at 54 (statement of Lobos) (noting Varela's request for a salary advance and the existence of at least four different judicial attachments on his property); see also Congreso Nacional, La Prensa, May 20, 1899, at 3 (describing the debate in the House of Deputies the previous day). There is no reason to think that Varela had particularly poor relations with the Executive. What is clear is that as soon as it became known that Varela was being investigated, the Committee received numerous allegations of corruption and recommended impeachment. **Congreso Nacional, Cámara de Diputados, Diario de sesiones de 1899, Session of May 17, 1899, at 41 (statement of Gouchon) (stating that the Committee of Judicial Investigation had voted to recommend impeachment. Id., Session of May 19, 1899, at 56 (statement of Lobos) (noting that the Committee had received many spontaneous accusations). The Executive initially offered Varela a facesaving departure from office. On May 16, 1899 the Executive issued a decree commissioning Varela to write a book for the Paris World's Fair on Argentina's economic potential. Decreto encargando al Dr. Luis V. Varela de la redacción de un libro sobre historia, instituciones, geografía, comercio, etc. de la República Argentina, 24 B.O. 884, May 18, 1899. Varela resigned the next day, indicating that he was resigning so as to have time to write the book, as well as to avoid a public debate on his private life. El asunto del día, La Prensa, May 18, 1899, at 5 (giving the text of Varela's resignation). His resignation and the book commission created a furor, however. Law professors and their students staged public protests against letting Varela off so easily and rewarding him with further government service, and the Press agreed. El asunto del día, La Prensa, May 18, 1899, at 5 (law professors in protest refuse to give exams); El asunto del día, La Prensa, May 19, 1899, at 5 (over 1000 law students staged a demonstration); El Poder Ejecutivo, La Prensa, May 18, 1899, at 3 (lengthy editorial criticizing the Executive for rewarding Varela with a new post and not requiring him to undergo the impeachment process); La cuestión del día, La Nación, May 18, 1899, at 4 (arguing that public opinion is shocked by the Executive's decision to let Varela escape impeachment and reward him with a book commission, with the Law School particularly up in arms). Notes, Buenos Aires Herald, May 19, 1899, at 2 (criticizing the Executive). On May 19, the House of Deputies responded with an extended interpolation of the Minister of Agriculture, as the Minister responsible for Varela's book commission. **Congreso Nacional, Cámara de Diputados, Diario de sesiones de 1899, Session of May 19, 1899, at 49-61; Congreso Nacional, La Prensa, May 20, 1899, at 3. Later the same day, the Executive announced that based on the information it had received from the House of Deputies on Varela's conduct it had decided to derogate the decree commissioning him to write the book. Decreto derogando el que encargaba al Dr. Luis Varela de la redacción de un libro sobre la República Argentina, 24 B.O. 899, May 20, 1899; El asunto del día, La Prensa, May 20, 1899, at 4. The impeachment proceedings were discontinued, however, on grounds that they could not continue once Varela had left office. **Congreso Nacional, Cámara de Diputados, Diario de sesiones de 1899, Session of May 19, 1899, at 63-75, esp. 63-66 (statement of Barraquero); Congreso Nacional, La Prensa, May 23, 1899, at 4. The text of the Judiciary Committee's report recommending impeachment was never made public.**
no U.S. cases to support its position, but in the 1890s it never seriously distorted United States law like Varela.

In the decades after *Cullen c/ Llerena* the Supreme Court continued to hold that questions regarding the legitimacy of the acts of a provincial government and federal interventions were nonjusticiable political questions, and explicitly refused to review electoral results. While this is similar to what the U.S. Supreme Court would have done using the political question doctrine, it meant that the Court was willing to operate in a system where it ignored questions of constitutional legitimacy.

The most striking case is *Compañía Azucarera Tucumana c/ Provincia de Tucumán*, decided in 1924, in which the plaintiff asked the Court to invalidate a provincial law raising the tax paid for use of irrigated water, on grounds that the law had not been passed in a constitutional manner. Allegedly the Governor only had ten loyal deputies in the twenty-five member provincial House of Deputies, and in order to pass the provincial budget, which included the tax increase, the Governor called a special session of the Legislature that was attended by his ten loyal deputies and six opposition deputies who were brought into the legislative chamber by force. At the same time, the Governor used force to bar all the remaining deputies from the legislative chamber. This tactic allowed the Governor to both obtain the quorum necessary for the House to meet, and to retain the majority necessary to pass the budget. Moreover, two days later the opposition majority met in the Chamber of Deputies, with the necessary quorum, and declared that the budget law passed was null. The Governor treated the budget law as in force, however, and collected the legislated tax increases. The plaintiff argued that this conduct violated its right to a representative, republican form of government under the national Constitution.

The Supreme Court ruled against justiciability, hardly surprising given its precedent in *Cullen c/Llerena*. The Court held first, that the type of issues involved in the case—the use of force to manipulate the legislature and the existence or not of a legislative quorum—were inherently political in nature and would improperly involve the Court in

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441. *Id.* at 278-79.
442. *Id.*
443. *Id.* at 279-80.
444. *Id.* at 280.
445. *Id.* at 280-81, 286 (citing **CONS. ARQ.** arts. 1 & 5 (1860)).
partisan politics. Second, the Court argued that a decision against the Province in this case would undercut the constitutional requirement that the provinces be governed by their own institutions. Third, and most important, the Court noted that the plaintiffs were essentially alleging that the republican form of government had been violated in the Province, calling for the judiciary to assume the role ordinarily assumed by Congress and the Executive in declaring a federal intervention; however, as the Argentine Court had held in *Cullen v/Llerena* in accordance with U.S. practice, issues of federal intervention and accordingly of the existence of the republican form of government in a province were for the Congress and the Executive to decide, not the judiciary.

The reasoning of the Argentine Supreme Court in *Compañía Azucarera Tucumana* is probably little different from what the U.S. Supreme Court would have held in the same period, but that does not change its implications for judicial acceptance of what is essentially a de facto provincial government. The nature of this compromise is presented in particularly stark terms in an 1874 case in which the Supreme Court adopted the decision of the lower court as its own. In *Lozano*, the Supreme Court affirmed a decision of the federal judge in the Province of Jujuy where the plaintiff questioned not the legislative process, but the availability of an independent provincial judiciary. The case concerned property that according to the plaintiff the Governor had illegally seized as belonging to the Province. Most of the decision concerned itself with the plaintiff's argument that the seizure violated his constitutional rights and that the federal courts therefore had jurisdiction. The federal judge responded to this issue by finding that the case was an ordinary property dispute and that if every dispute involving property could be described as a constitutional question then essentially all cases could be brought in federal court. But the plaintiff also alleged that the provincial court system

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446. *Id.* at 286-87.
447. *Id.* at 288.
448. *Id.* at 289-90.
449. See *Field v. Clark*, 143 U.S. 649, 650 (1892) (refusing to allow the validity of a law to be questioned on the grounds that the law submitted to the President by Congress was substantially different from the bill voted upon by the Houses of Congress).
450. "Lozano," 15 Fallos 65, 67 (1874). The Supreme Court affirms the lower court decision "on the basis of its reasoning." *Id.* at 76.
451. *Id.* at 66, 68-69.
452. *Id.* at 71-75.
453. *Id.* at 72-73.
in Jujuy was incapable of giving him a fair hearing (which was probably true given the dominance of the governor in many small interior provinces). This is the point on which the District Court's reply is most striking. No attempt is made to defend the Jujuy court. Rather, the Court describes the matter as one involving government legitimacy and therefore by definition outside its role:

Aside from the fact that it is not the function of the Federal Courts to investigate whether justice is well or poorly constituted or administered in the states, it cannot be admitted as true that Argentines will find the doors of justice shut in Jujuy. If that was the case in this country, then the country would be outside the conditions of Article 5 of the Constitution [republican form of government], without guarantee of its institutions by the Nation, its Senators and Deputies without [proper] seats in the Congress, and without proper seat this very District Court before which the Plaintiff has recurred. . . .

The judge took the position that the courts could not consider whether the nation's institutions satisfy the constitutional requirement of a "representative, republican, federal" form of government because then judges would then have to consider their own legitimacy, since their legitimacy depended on that of the authorities who name them.

Given that in the 1870s few provinces had capable and independent judiciaries, not to mention democratically elected governments, the implications of the Lozano decision are enormous. If widespread electoral fraud vitiates a government's legitimacy then no Argentine federal government was legitimate until Hipólito Yrigoyen assumed office in 1916 in the country's first clean presidential elections. Serious institutional irregularities in small Argentine provinces are common even today. Courts, however, could not question legitimacy.

454. Id. at 67, 70, 75.
455. Id. at 75.
456. CONST. ARG. art. 1 (1860).
Courts and the Creation of a “Spirit of Moderation”

Strangely, in spite of political question doctrine, the judiciary played a central legitimizing role when electoral reform finally came, but in what the Supreme Court would insist was a nonjudicial capacity. The Radical Party slipped out of the limelight in the mid-1890s. Alem’s nephew, Hipólito Yrigoyen, assumed leadership of the party and generally refused to allow the party to compete in elections, as it would be sanctioning fraud. Yrigoyen maintained good relations with many younger military officers. However, in February 1905 he led a new revolution. This revolution, even though it was put down within a few days, served to revive the issue of electoral fraud. As required under the Supreme Court’s case law, civilian participants in the rebellion were released on bail and a general amnesty followed in June the next year. In 1907 and 1908, Yrigoyen held meetings with President Figueroa Alcorta in which the President sought to establish the Radical Party’s requirements for participation in the electoral process, and in 1910, Roque Sáenz Peña was elected President on a platform of electoral reform. Unlike his father, Luis Sáenz Peña,


458. Rock, supra note 10, at 185-86; see generally Eduardo José Cárdenas & Carlos Manuel Payá, En Camino a la Democracia Política. 1904-1910, at 69-83 (1959) (on the Revolution of 1905); 1 Del Mazo, supra note 138, at 109-31 (on the Radicals and their revolutionary activities during the 1900s).

459. López, Norberto et al., Court Dossier for 36 persons accused of rebellion in 1905, on file in Legajo 18 with the Director of the Archivo General del Poder Judicial. The dossier at 1 contains a bail request by López made on February 11, 1905, invoking the Supreme Court’s case law from 1893. López was released on a 5000 pesos bond on February 15, 1905, dossier at 2, and the other rebels were likewise released. One case where pre-trial release was initially denied made its way to the Argentine Supreme Court from the small interior province of Santiago del Estero. In “Abregú,” 102 Fallos 219 (1905), the Supreme Court required the release of one of the rebels in spite of an article in the Constitution of Santiago del Estero read by the Province’s Supreme Court as barring pre-trial release of individuals accused of rebellion. Id. at 226. The Supreme Court declared that release on bail was a constitutional right when the possible sentence did not include the possibility of jail, merely exile. Id. at 227-30.


461. Informe elevado a la Convención Nacional de la Unión Cívica Radical (Dec. 1909) in 3(2) Hipólito Yrigoyen, Pueblo y Gobierno 270, 274-75 (2d ed. 1956) (report by Yrigoyen of his two meetings with President Alcorta in 1907 and 1908); Cárdenas & Payá, supra note 458, at 131-35.

462. 3 Abad de Santillán, supra note 134, at 684-85; 1 Del Mazo, supra note 135, at 131-32. Remarkably, President Roque Sáenz Peña began his inaugural address by questioning the legitimacy of his own mandate given the lack of free suffrage, and naturally indicating that free suffrage would be the first aim of his presidency. Congreso Nacional, Cámara de Senadores, Diario de sesiones de 1910, Session of Oct. 12, 1910, at 3, 3-4 (President’s inaugural address).
Roque Sáenz Peña had the political base to put his platform into effect.

The federal judiciary played the central role in supervising the new electoral process that Roque Sáenz Peña established, and which produced a Radical victory in the 1916 presidential election. Federal judges had often had a role in supervising elections prior to the Sáenz Peña reforms, and likely were often guilty of at least looking the other way when fraud occurred. However, the role given them in the reforms would indicate that they still enjoyed credibility, and their new role was so large that they could no longer escape direct implication in the event of widespread fraud.

Federal judges intervened in three different ways. First, the federal judge in the capital of each province and the senior federal judge in the Federal Capital were placed in complete charge of the voter rolls within their jurisdictions, naming all subordinate employees and using military conscription lists as the starting point for their work. Second, the new law on elections procedures also established elections commissions dominated by the federal judiciary. A three-person elections commission was established in each province, with two of the three places taken by members of the federal judiciary, and with the third occupied by the president of the provincial supreme court or, in the case of the Federal Capital, the president of the Court of Civil

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463. For example, under the electoral laws in effect prior to the Sáenz Peña reforms the senior federal judge in each province sat on the elections commission in charge of counting votes. E.g., Law No. 893 art. 3, Oct. 16, 1877, [1852-1880] A.D.L.A. 1154, 1154; Law No. 4161 art. 25, Jan. 7, 1903, [1889-1919] A.D.L.A. 580, 582. However the federal judge was only one out of the three persons on the elections commission, id., and most of the fraud and voter intimidation took place at the polling place. Further, the elections commission did not have authority to reject votes that satisfied the formalities of the law, merely to notify Congress of irregularities. Law No. 893 art. 40; Law No. 4161 art. 25; see also supra note 184 and accompanying text (on the federal judiciary's role in hearing appeals from voter registration boards). The very fact that so much attention was focused on Judge Tedín when he aggressively combatted electoral fraud implies that most of the federal judiciary had been willing to treat its role in supervising elections mainly as a formality. Id.


465. Law No. 8871, Feb. 13, 1912, [1889-1919] A.D.L.A. 844. The law established obligatory, universal male suffrage by secret ballot. Id. art. 1, at 844, art. 6 at 845, art. 41-42 at 848-49. The law also specially legislated against the worst abuses of the past such as round-ups of voters to force them to vote in a group, id. art. 5 at 845 (prohibiting voting in groups); and election day arrests of opposition voters, id. art. 3 at 845 (prohibiting all arrests on election day unless by judicial order or the individual detained has been caught during the commission of a crime).
These commissions were responsible for counting votes, ruling on all voting irregularities, and most important, naming the individuals responsible for manning each polling place.

Third, as had always been the case, the federal courts heard all criminal prosecutions for violation of the federal elections law. Strangely, however, the Supreme Court continued to treat most electoral issues as political questions, ruling that elections commissions were not judicial organs from which appeals could be made to the Supreme Court. While the Supreme Court never questioned the constitutionality of having judges supervise the electoral process, it insisted that in doing so the judges functioned in a nonjudicial capacity. Until the 1960s the only electoral issues heard by the Supreme Court were appeals from criminal prosecutions for electoral misconduct.

The lesson that emerges is a complex one. First, the federal judiciary was clearly respected enough by all major political participants to play the central role in supervising elections once enough members of the Argentine elite finally wanted them. This respect was earned by the judiciary because of its political neutrality and its successes prior to the Sáenz Peña elections law during crises like those of 1890s. Second, while according to the Supreme Court federal judges supervising elections did so in an extrajudicial capacity, it is clear that the reason that federal judges were able to act was because a new political/constitutional rule had emerged that required fair elections based

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@footnote{466} Id. art. 51, at 850 (in provinces with a federal court of appeals and in the Federal Capital the elections commission is made up of the president of the federal court of appeals, the federal judge responsible for the voter rolls, and the president of the provincial supreme court, with the president of the federal court of appeals replaced by the federal prosecutor in provinces lacking a federal court of appeals).

@footnote{467} Id. arts. 59-65, at 851-52.

@footnote{468} Id. arts. 60-62, at 851.

@footnote{469} Id. art. 30, at 847.

@footnote{470} Id. arts. 68-84 (establishing various criminal violations that as federal law must be heard in the federal courts. Law No. 48 art. 2, § 1, Sept. 14, 1863, [1852-1859] A.D.L.A. 364, 366).

@footnote{471} “Bavastro,” 128 Fallos 314, 314-15 (1918); see also Alberto B. Bianchi, Control de Constitucionalidad: El Proceso y la Jurisdicción Constitucionales § 42, at 321-26 (1992); Héctor A. Mairal, Control Judicial de la Administración Pública § 317 at 534-542 (1984) (both books describing the Supreme Court’s extensive case law, most of it developed after 1930, first finding that electoral issues and issues concerning political parties constituted political questions, and gradually abandoning that approach).

@footnote{472} See “Bavastro,” 128 Fallos at 314-15; Bianchi, supra note 471, at 534-42 (but not including examples of criminal appeals). On appeals in criminal prosecutions, see “Ríos,” 99 Fallos 383 (1904); “Alejántara,” 99 Fallos 99 (1904) (both involving federal officials who violated the law by making voting recommendations to their employees); see also supra note 57.
on a secret ballot and universal adult male suffrage. This rule had not existed prior to the Sáenz Peña reforms and explains why the Sáenz Peña reforms heightened the judiciary’s role. Third, the Supreme Court’s application of political question doctrine to elections indicates a failure to incorporate a change in the political/constitutional rules that it was responsible for protecting. The Supreme Court had a fossilized view of the Constitution on the most important issue in Argentine politics.

**VIII. Two Different Views of Legitimacy**

While the Supreme Court’s response to Argentine political unrest through 1929 is interesting in its own right, showing the Court’s ability to act independently to restrain the level of political repression, it is especially important for what comes afterwards, given the Court’s decision in 1930 to continue functioning and continue applying much of the Constitution when a military coup overthrew the constitutional government and established a de facto executive. The Supreme Court in 1930 announced that it would treat the government established in that year’s coup as a de facto government whose credentials could not be judicially questioned. Two different approaches toward explaining the Supreme Court’s attitude toward government legitimacy emerge from this Article, and both will help explain the Court’s conduct in 1930. First, the Supreme Court may be seen as a timid body unwilling to consider issues of legitimacy because it recognized that during most of Argentine history the entire political system lacked legitimacy in democratic terms. Second, the Court may be viewed as an independent organ invoking the talismanic authority of the U.S. Constitution and rational authority, but with only an incomplete set of political/constitutional rules to arbitrate.

Taking the first approach, one can argue that there is little difference between political question doctrine applied to questions of government legitimacy and the de facto doctrine that the Supreme Court was to adopt under which it simply refused to entertain actions questioning the constitutional legitimacy of the military authorities. A Supreme Court already accustomed to living with continuing illegitimate government on the provincial level is in a sense already trained to accept it on the federal level. Moreover, if the Supreme Court had

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474. Id.
already determined that issues of provincial government legitimacy were beyond its role because—according to Lozano—the Court's own legitimacy might be called into question, then the Court had held that questions concerning the legitimacy of the federal government were outside its authority long before the 1930 coup. In fact, there are pre-1930 examples of blatant illegality that could be said to affect government legitimacy on the federal level. For example, when in January 1908, after having properly called an extraordinary session of Congress, President José Figueroa Alcorta found Congress so hostile that it refused to pass a budget, he merely signed a decree declaring the previous year's budget in effect and declared the session of Congress concluded.\(^5\) One can even argue that a Court that lived with widespread electoral fraud in almost every presidential election until 1916 had long decided to put aside all issues of government legitimacy, even if involving a de facto government.

The above approach is, however, overly simplistic. There may be an element of truth in likening political question doctrine used to avoid decisions on governmental legitimacy to acceptance of de facto situations and the affirmation that the Court was therefore willing to act under illegitimate military governments, but the approach fails to explain exactly what is meant by “illegitimate” government. The equation “political question doctrine” = “de facto doctrine” = “acceptance of illegitimate government” sees government legitimacy as equal to constitutional compliance. However, such a definition is probably erroneous in most societies and certainly so in the Argentine context. A second, and more precise, analysis of the Supreme Court's approach toward governmental legitimacy is possible with a better understanding of the term legitimacy.

Legitimacy cannot be described in absolute terms. Individual members of society may be violently opposed to the government to the point that they embark upon revolutionary activities, may consider the government to have some legitimacy but not much—leading them to neither support it nor oppose it in the event of a revolution—or they may actively support a government because they consider it legitimate. Different members of society will have differing views of a government's legitimacy. Rule of law based on rational interpretation of a text or its legislative history is one of the ways government may increase its degree of legitimacy, others being the invocation of any traditional or religious authority that might exist within the culture or

\(^{475}\) Decree dated Jan. 25, 1908, B.O. Jan. 27, 1908, at 279.
simply the enjoyment of popular charisma conferred by elections or rallies of support in the street.476

Argentine government prior to 1916 clearly did not enjoy the level of legitimacy enjoyed by government in countries like Great Britain or the United States, where the political rules provided generally accepted mechanisms for the transfer of political power between competing parties. The Radicals engaged in constant revolts precisely because Argentina's political rules did not provide for the peaceful transfer of power through a clean electoral process. Without free elections or some other widely accepted method for transferring political power, the scope of Argentina's system of political/constitutional rules was incomplete and it lacked sufficient alternative sources of authority to fill the gap.

If: (a) legitimacy is viewed as degree of acceptance of government rather than degree of compliance by government with the constitutional text, and (b) it is recognized that given the nineteenth century elite's lack of interest in free elections, the scope of Argentina's political/constitutional rules remained too incomplete for its government to enjoy high levels of legitimacy among all political sectors, then (c) it follows that the initial refusal of the Argentine Supreme Court to rule on elections and the "republican form of government" in the provinces simply recognized the incomplete nature of Argentina's political/constitutional rules and governmental legitimacy. Argentina's elite in the mid-nineteenth century never planned on universal suffrage or truly independent provincial governments.477 Aside from what U.S. doctrine might have required, if Argentina's political/constitutional rules are viewed in terms of what the Argentine elite truly agreed upon in 1853 and 1860, then the Supreme Court lacked even rational authority to explore issues of electoral fraud and the republican form of government in the provinces. (Assuming of course that rational authority is not understood as all textual authority, but as those legal rules adopted with the understanding that they will carry authority.) Questions of transfer of power on the national level and in the provinces were not part of the early political rules, so the courts could properly ignore those issues and the problem of governmental legitimacy. No one had an expectation that the Court was defrauding.

477. 3 ALBERDI, supra note 29, at 523; Miller, supra note 21.
If the above seems too abstract, the reader might consider asking what the Argentine Supreme Court would have done had the Radicals successfully taken power with a revolution in 1893. The Radicals in the 1890s never questioned the distribution of property or the protection of civil liberties and had no qualms with the court system. Likewise, the Supreme Court had no particular qualms with the Radicals. Alem only sought a revolution in order to truly realize the Constitution. In this context, there is no reason to think that in the event of a successful Radical revolt the Court would have resigned, or that anyone in 1893 would have expected it to resign. The Radicals never indicated that they considered the Court corrupted by the other branches of government either because it received its authority from them or because it approved of their practices.

Now one can ask whether there is any real difference between what the Court probably would have done in 1893 to usher in a revolutionary government dedicated to clean elections and what it did do in 1930 in continuing to act under a military government. Assuming that no political rule exists requiring the democratic transfer of governmental authority, a court dependent on rational authority should be able to continue to operate in the event of a revolutionary change of government. If the court's own authority does not stem from the democratic origins of the authorities appointing it—and until the Sáenz Peña reforms this certainly was not the case—and if the revolutionary government accepts the rules that the Supreme Court has applied in the past, then the change in authorities may be regarded as an irregularity little different from common past events such as a federal intervention to be sure of a province's votes on election day.

There is one important difference between what might have happened in 1893 and what did happen in 1930, however. In 1893 free elections were only an aspiration, whereas by 1930 eighteen years had gone by since the Sáenz Peña reforms. The Radical Party had become the ruling party by virtue of the reforms, electing Hipólito Yrigoyen President in 1916, Marcelo T. de Alvear in 1922, and Hipólito Yrigoyen once again in 1930, in clean elections supervised by elections commissions made up mainly of the federal judiciary, and with power transferring peacefully each time. While President Yrigoyen engaged in various politically motivated federal interventions, and one can argue that portions of the Argentine oligarchy still had not incorpo-

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rated free elections as a political rule,\textsuperscript{479} much of Argentine society undoubtedly had. Although the Radicals had spent years in armed conspiracies, they came to power through free elections and traced their origins to Alem and his original platform of free suffrage. Further, the development of free suffrage in Argentina was not the result of a single moment of inspiration, but the result of a long campaign that ended with the ruling conservatives themselves finally electing Roque Sáenz Peña as President, the political figure from their ranks most identified with free suffrage. The Supreme Court's acceptance of revolutionary authorities in 1930, unlike what might have occurred in 1893, also implied acceptance of what many Argentines would have considered a breach of a rule requiring that political power only be transferred as a result of free elections.

\textbf{IX. Final Observations}

The nineteenth century Argentine Supreme Court developed as a superb instrument for moderating political struggles among members of the economic and political elite, but never moved beyond that to become a vehicle for incorporating new classes into the political process. The Argentine Court's failure to begin hearing appeals in electoral cases and other situations characterized as political questions was in some ways an error that it shared with those members of the political elite who delayed, or in many cases never accepted, the need for democratic political institutions. Because the Court only exercised authority to enforce a restricted set of rules, it was never able to become a progressive force for political reform and provide the stability needed for political competition that went beyond the confines of a small elite.

However, the Argentine Supreme Court and the federal judiciary did function as a force of moderation in Argentine politics. The Court helped enforce a set of rules protecting political dissidents in a system where until the 1860s political enemies—even when from within the economic elite—ended up with their throats cut and their property confiscated. Given the constant revolutions because of the lack of democratic mechanisms for transferring power, the instability of the past could have easily returned. With the Court protecting individual liberties, the old spirals of violence gradually ended and revolutionary uprisings could be classed as mere minor distractions in Argentina's rapid growth. Clearly the Alberdian vision of Argentina as a land of

\textsuperscript{479} \textit{Waismann, supra} note 12, at 83, 114.
economic opportunity required receptive world markets for Argentine products and foreign investors and immigrants able to put Argentina’s natural agricultural endowments to work. But the Supreme Court’s role in ending the repressions of the past offers the other side of the coin for scholars seeking to explain Argentina’s nineteenth century success. The Argentine elite wanted stability and the Supreme Court became a tool to help provide it. Without the Supreme Court available to engage in judicial review, it is questionable whether political opponents would have treated each other so graciously.