

# SOUTHWESTERN JOURNAL OF INTERNATIONAL LAW



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# THE INTERNATIONAL TACTICS OF THE AMIA CASE: THE RELEVANCE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS IN THE PURSUIT OF JUSTICE

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Gastón Chillier\*

## ABSTRACT

*The AMIA bombing of 1994 is the most scarring terrorist attack in the history of Argentina. As of today, the attack remains a divisive and highly sensitive topic in Argentinian politics. However, the current political relevance of the case does not derive as much from the attack itself than from the initial manipulation of the criminal investigations. The case today exists as a symbol of impunity fabricated by deliberate collusion between intelligence authorities, the judiciary and a part of the political system. The manipulation in the AMIA investigations was so pervasive that the Argentinian government recognized it before the Inter-American Commission on Human Rights in 2005. However, the case remains unresolved and the victims still await justice.*

*This article traces how the struggle of the victims evolved to pursue different claims of justice. For this purpose, the article uses the concept of “boomerang” mechanisms, a well-known conceptualization of human rights politics, to offer a more complex perspective of the fluid interaction between domestic and international activity. The victims relied on the Inter-American Commission on Human Rights (IACHR) to boost the investigations and the implementation of a decree meant to provide reparations. Memoria Activa and their allies activated these interactions at contingent moments of the struggle to overcome impasses and*

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\* Gastón Chillier is the Executive Director of Centro de Estudios Legales y Sociales [CELS]. This paper is a collective effort of CELS’s team in which Erika Schmidhuber, Edurne Cárdenas and Michelle Cañas have taken part. I also want to thank the collaboration of Angel Cabrera Silva.

*transform their claims for justice. By the iterative action of these fields, the case has developed a set of normative meanings that slowly incorporated forms of reparatory, restorative and transformative justice.*

*A central aspect of this argument is that these dynamics would not have been possible without the tactical opportunities provided by the IACHR and the tenacious efforts of the victims to create and sustain the existence of a public space to voice their claims for justice. After making a review of this twenty-year-long struggle, the article concludes with a brief description of the prospective role that the IACHR will play in the subsequent stages of this case.*

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#### I. A TRAGIC MORNING: THE TERRORIST ATTACK AND ITS IMMEDIATE AFTERMATH

On July 18, 1994, Buenos Aires experienced the most traumatic terrorist attack in Argentine history. One-hundred and fifty-one citizens were injured and eighty-five more were killed when an explosion consumed the Asociación Mutual Israelita Argentina (AMIA) and Delegación de Asociaciones Israelíes Argentinas (DAIA) buildings at 9:53 that Monday morning. At the time, we could not imagine that the flames of the explosion would spread beyond the AMIA and DAIA buildings, nor the extent to which the event would engulf our country. The fire ignited by the

*AMIA Case* burned in the hearts of the Argentine society until extinguished by the manipulation of several political groups that buried its social significance in a series of scandals. However, for the victims, their injuries remain open—unable to heal because the failure to obtain justice burns still. Even today, twenty-five years later, Argentinians do not know precisely what happened on July 18th. Several civil society groups struggle to attain closure to one of the most stirring and long-lasting injustices in Argentina’s democratic history. This article seeks to uncover the multiplicity of this struggle.

We write this article as members of the *Centro de Estudios Legales y Sociales* (CELS), the human rights organization that represents the victims. As such, we do not intend to advocate for a particular version of the facts here. Rather, we are interested in describing the claims that the victims have made in order to demand accountability of the authorities in charge of discovering the truth. This does not mean that we pretend to have some standard of neutrality; this would be impossible. However, we believe this article presents a more complex account of the case, its evolution and, most importantly, an accurate description of the struggle for justice from the perspective of the survivors and the victims’ families.

In this sense, we envision this essay as a contribution to the debate of the *AMIA Case* and as the foundation of a future research agenda that would aim to analyze, systematize and conceptualize the significance and implications of this process in its vast complexity. This future exploration would be a relevant contribution to the democratic life of our nation and to the advocacy work that CELS has undertaken since its creation. Nevertheless, this research would require that CELS devote adequate time and resources to work through our files and undertake a collective reflection with the relatives of the victims, other organizations and the officials involved in this struggle. Meanwhile, this paper is an effort to establish a first basis that could launch these reflections.

First, let us take a look at that tragic morning. Soon after the attack, an emergency team of the Israeli Army that was assisting in the search for survivors found the engine of what they claimed was the car-bomb used by the attackers.<sup>1</sup> Inadvertently, this would be a prelude to what would become one of the most divisive aspects of the case. The clue pointing towards a car-bomb, inaugurated what would be later known as the *Local Connection Theory* (or “*conexión local*” in Spanish).

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1. InfojusNoticias, *Zeev Livne: General del Ejército Israelí en el atentado a la AMIA* (Statement by General Zeev Livine from the Israeli Army), YOUTUBE (Oct. 6, 2015), <https://www.youtube.com/watch?v=kgOPiS6qaJA>.

Pursuant to Argentinian criminal procedures, the case fell under the jurisdiction of the Federal Court No. 9. In this way, the Investigating Judge, Juan José Galeano, was appointed to conduct the pretrial stages of the criminal investigation. At the time, it seemed obvious that the investigation would be guided by the findings of the car engine. It was only after several years, that crucial flaw came to light and large parts of the investigations were annulled.<sup>2</sup> Since then, what actually happened during the first years of the investigation has been surrounded by a mist of immense controversy.

*A. Judge Galeano: The Flaws in the Original Investigation.*

Strictly speaking, the flaws of the investigation were already voiced during the very time in which Galeano was still investigating. *Memoria Activa*, the organization founded by victims of the attack, questioned several aspects of the investigation as Judge Galeano advanced it. The proceedings were later annulled in large part because of this early intervention by *Memoria Activa*. In brief, the criticism against the investigation conducted by Judge Galeano denounced tactics used to forge evidence that strengthened the *Local Connection Theory* and to conceal evidence that pointed towards alternative theories.

According to Judge Galeano's investigation of the Local Connection, Carlos Telleldín, a trafficker of stolen cars, had sold a Renault Traffic Van to a suicide bomber, a member of the terrorist group Hezbollah, using funds from the Iranian government. This implied that, in order to be able to perform the car-bomb attack, this suicide bomber would have had to operate with the support of a local Buenos Aires law enforcement agency.<sup>3</sup> Therefore, Judge Galeano focused solely on prosecuting members of the Buenos Aires Police Department. The main problem of pursuing this *Local Connection Theory* was that the investigation ignored evidence that suggested other possible causes – like the *Syrian Clue Theory* – which could have pointed towards the possible responsibility of a Syrian merchant named Kanoore Edul.

As Judge Galeano pursued the *Local Connection Theory*, he captured and interrogated Carlos Telleldín to extract information about the person that had purchased the van used in the attack. Eventually, Judge Galeano

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2. Tribunal Oral Criminal No. 3, Files No. 487/00, 496/00, 501/01 and 502/03, Oct. 29, 2004 (Arg.), <https://www2.jus.gov.ar/amia/sentencia.htm>.

3. Centro de Estudios Legales y Sociales, *El Sistema de Inteligencia en Democracia: Una Agenda de Derechos Humanos*, in INFORME ANUAL 2016: LA SITUACIÓN DE DERECHOS HUMANOS EN LA ARGENTINA 127, 132 (2016), <https://www.cels.org.ar/web/wp-content/uploads/2016/12/IA2016-04-sistema-inteligencia-en-democracia.pdf>.

established that the “local connection” of the terrorist had been the Vehicle Subtraction Division of the Buenos Aires Police Department, then commanded by Commissioner Juan José Ribelli. On July 5, 1996 Judge Galeano finally issued an indictment against Commissioner Ribelli and other members of the Buenos Aires Police.<sup>4</sup> The case was solved—or so we thought.

One year after the indictment was issued, in 1997, Commissioner Ribelli made a public video in which Judge Galeano was seen negotiating with Telleldín to fabricate the testimony that inculpated him.<sup>5</sup> After that, it came to light that Telleldín’s wife received a payment of \$400,000 U.S. dollars (divided into two separate payments) from the Counter-Intelligence Direction within the Secretary of State Intelligence (SIDE). This payment served as compensation for Telleldín to change his testimony. This revelation splintered the main evidence holding the investigation together. Following this fracture, the proceedings revealed other flaws.

One of the most notorious discoveries were the practices that Judge Galeano utilized throughout his investigation to conceal other evidence that would contradict the forged testimony. For a time, Galeano had opened secret “legajos” (independent files) to archive evidence pointing towards different case theories. The decision to open or close these files was made arbitrarily by Judge Galeano himself. Using this method, Galeano was able to strategically isolate evidence from the main file and prevent the victims’ access to it.

The leak of two videos and the subsequent finding of other irregularities would initiate the path towards annulling the first investigation. However, this did not happen immediately. The Trial Oral Court had to wait until 2004 to finally resolve this issue,<sup>6</sup> attesting the existence of several irregularities. These same irregularities were also analyzed in great detail in a report issued by Dean Claudio Grossman, who, as we will describe shortly, was appointed by the Inter-American Commission on Human Rights (IACHR) as an international observer. Naturally, this chain of events was neither what Judge Galeano nor the interests that were pulling the strings behind him (whatever they may be) had envisioned. To a large extent, the discovery of the flaws in the investigation and the subsequent annulment of the proceedings were the result of the active participation of *Memoria Activa*.

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4. *Id.* at 134.

5. Ailín Bullentini, *Los videos, el pago y la pista falsa*, PÁGINA12 (Sept. 23, 2015), <https://www.pagina12.com.ar/diario/elpais/1-282453-2015-09-25.html>.

6. Tribunal Oral Criminal No. 3, *supra* note 3.

Under Argentinian Law, *Memoria Activa* was allowed to act as a private prosecutor in the case, which enabled them to identify and question the flaws in the investigations by the multiple judges and prosecutors in charge. If it was not for the vitality of this intervention, the clamor for justice could have been quashed by those with political interests at stake.

### 1. The Rise of a Social Movement: Active Memory and Collective Memory

*Memoria Activa* is the organization created by the survivors and families of the victims of the terrorist attack. Its origins, however, can be traced to 1992, when the Israeli Embassy at Buenos Aires suffered a similar attack. What seemed to be a trend of anti-Semitic violence, developing in an atmosphere of impunity, invigorated the victims of the 1994 assault to organize and to take part in finding justice.

To a large extent, the rise of *Memoria Activa* was grounded in the foundations established by the broader human rights movement in Argentina. Through the 1970s and 1980s, an important array of organizations struggled against the last dictatorial regime. These include the now-well-known activities of Madres de Plaza De Mayo, Abuelas de Plaza de Mayo, and CELS itself.<sup>7</sup> The processes that created democracy in Argentina had also built a series of committed networks and inserted the human rights discourse deep into civil society. The movement launched by *Memoria Activa* profited from these pre-existent networks and mobilized the resources supporting human rights activism.

Obviously, the rise of this mobilization happened much more organically. After the attack, the families would gather at the site of the explosion to remember their deceased loved ones and simultaneously ratified their commitment to find justice together. They would also demonstrate in front of the courts and appeal to the public's sense of injustice.<sup>8</sup> Eventually, from this incipient mobilization crystallized an organized body that still spearheads the struggle to find justice today despite the drawbacks and negative effects that the political manipulation of the *AMIA Case* would provoke in the broader social imaginary.

The relevance of *Memoria Activa*, family members, survivors and other activists in the pursuit of justice cannot be overemphasized: If it was not for their perseverance, the case would have likely been concluded under

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7. MADRES DE PLAZA DE MAYO, <http://madres.org>; ABUELAS DE PLAZA DE MAYO, <https://www.abuelas.org.ar>; CENTRO DE ESTUDIOS LEGALES Y SOCIALES, <https://www.cels.org.ar/web/>.

8. See MEMORIA ACTIVA, [memoriaactiva.com](http://memoriaactiva.com) (last visited Feb. 14, 2019).

false evidence. These groups have become, in a very literal sense, guardians of the collective memory. They keep alive the affects and emotions that engulfed Argentinians on the day of the attack—their intervention has made sure that the collective memory does not forget the feelings of social indignation, mourning and hope for justice. An iconic symbol of how *Memoria Activa* works to ensure the continuity of this struggle, is the annual gathering that takes place on the date of the attack. Year after year, the members of *Memoria Activa* gather at the site of the explosion and read aloud the names of victims as the public responds “*Presente*” (He/She is here).

In terms of social movement theory, *Memoria Activa* can be thought as a Social Movement Organization (SMO) that was very successful in mobilizing structures to ground and grow their struggle.<sup>9</sup> However, it has also been a savvy handler of the political opportunities that appeared throughout their struggle. As we will describe, the change of government in the early 2000s was a crucial moment for the movement. Additionally, *Memoria Activa* has skillfully managed the framing processes of the mobilization, particularly after the case became more complex and political ideologies swamped the judicial proceedings. In this sense, *Memoria Activa* would make for an excellent case study about the origins, transformation and impact of social movements. However, this theoretical question remains beyond the scope of this article. I mention this here hoping that a social movement scholar reading this article might become interested in making such academic contribution. What is of relevance here, however, is the fact that *Memoria Activa* exists at the center of the struggle. Therefore, to a large extent, the evolution of the claims for justice can be appreciated as a result of their intervention.

## 2. The Claims for Restorative Justice

Why do we talk about the evolution of the claim for justice? We believe an important part of understanding the history of the *AMIA Case* has to do with understanding how the ideal of justice is conceived. In other words, the evolution of the claim for justice refers to the way in which the victims and the society have transformed their own understandings of the struggle as the events developed. Let us explain this a bit further by exemplifying this process with the first of such transformations.

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9. M. Zald, D. McAdam & J. McCarthy, *Introduction: Opportunities, Mobilizing Structures, and Framing Processes Toward a Synthetic, Comparative Perspective on Social Movements*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS* 1, 1-23 (1996).

The day after the terrorist attack, the whole public demanded to know the truth. The people were outraged, and the families gathered and demanded “justice.” In that moment, their claims were rather concise: They wanted those responsible to be punished. Back then, the original idealization of proper justice consisted in discovering who the terrorists were, who their accomplices were and to have all each jailed or, at the least, held accountable. For some, this would also have included some type of reparation damages to the families and the injured.

This is precisely why the indictment of Ribelli and other police officers meant so much to the general public. For a brief moment, justice was served. However, after it became known that Judge Galeano had forged the evidence, the things were never the same. The claim for justice transformed. The procedural irregularities had fractured the original notion of justice. The trust between citizens and their institutions was broken. For human rights lawyers, this process is well-known: The forging of evidence and obstruction of justice in itself constitutes another form of rights violations. Under the standards developed by the Inter-American Human Rights system, forging evidence and investigative irregularities are analyzed as an independent violation of the right to judicial protection,<sup>10</sup> and, in notorious cases, as a violation of the right to truth.<sup>11</sup>

In this sense, the leak of the videos was a breaking point. Justice could no longer be idealized as simply finding the person responsible for the attack and delivering some reparation. Reparatory justice was not going to be enough. Naturally, *Memoria Activa* and other social actors now demanded to discover and prosecute all the public officials responsible for forging and concealing evidence. They also wanted to understand how this had been possible, and, rightfully, they expected a degree reassurance that this would not happen again as the investigation reopened.

Then, the claim for justice became more complex. Beside reparation, it now demanded the restoration of the bond of trust between society and the State. This is how, we conceive, the birth of the claim for restorative justice, which remained latent throughout several years before the flaws of the original proceedings, were prosecuted. This delay in opening an

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10. The Inter-American Court on Human rights has established that “remedies that because of the country’s general conditions or even because of specific conditions related to the case in question are illusory cannot be considered effective. This can be the case, for example, when their uselessness has been demonstrated in practice, due to a lack of means for executing rulings, or due to any other situation giving rise to a context of denial of justice.” See *Abrill Alosilla et al., v. Peru, Mertis, Reparations, & Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 223 ¶ 75 (Mar. 4, 2011).

11. *The Right to Truth in the Americas*, INTER-AM. COMM’N H.R., OEA/Ser.L./V/II.152, doc. 2 rev. ¶ 73 (Aug. 13, 2014), <http://www.oas.org/en/iachr/reports/pdfs/Right-to-Truth-en.pdf>.

investigation demonstrated the shortcoming of the judiciary to have its own officials held accountable. Ultimately, this new claim of justice from the victims prospered in opening another criminal prosecution: The investigations of the concealment of evidence, commonly referred to in Spanish as the “causa de encubrimiento” or *AMIA 2*. This new case investigated the criminal responsibility of Judge Galeano and other officials that participated in the tactics employed to hide and conceal evidence. Due to space constraints, it is not possible to describe all the irregularities discovered in this essay. However, it is important to highlight those that the trial against the concealment of evidence (causa de encubrimiento) is currently investigating, namely: the existence of secret films that Judge Galeano recorded and later destroyed; the arbitrary use of the legal figure of “witnesses with reserved identity;” the deficiencies in the process to collect evidence and clues; and, of course the payment to Telleldin in exchange for his testimony that blamed Buenos Aires police officers.

As these procedures progressed, the investigation included other officials working alongside Galeano. Currently, the defendants of the case reunite two other prosecutors, Eamon Mullen and Jose Barbaccia; the President of DAIA, Ruben Beraja; the Secretary of Intelligence, Hugo Anzorreguy; and even the former President of the Nation, Carlos Menem, among many others.

The case would only get more complex thereon; that bond of trust will be further reaped apart by the subsequent manipulations of the *AMIA Case*. As we will describe later in this piece, this claim for justice remains largely unanswered even today.

## II. THE “BOOMERANG” THROW: REACHING OUT TO THE IACHR

After the disappointment of the initial investigation, *Memoria Activa* had valid reasons to mistrust any further investigation by the Argentinian authorities. The evolution of the claim for justice also carried a shift in the strategic thinking of *Memoria Activa*. These events made evident that the security agencies had been involved in concealing the truth behind the attack. This would finally confirm the longstanding suspicion of the victims that the State held an important degree of responsibility in the lack of results. Moved by this new realization, on July 16, 1999 – almost five years after the attack – *Memoria Activa*, CELS, CEJIL and Alberto Zuppi, an attorney that acted as a private legal representative of the victims, filed a

petition before the IACHR.<sup>12</sup> The Commission became the new platform through which the movement would voice their demands.

The petition filed before the Commission condensed the new claim for restorative justice. There were two core allegations: First, that the Argentinian State was responsible of violating Articles 4 and 5 of the American Convention of Human Rights<sup>13</sup> because of their responsibility in failing to protect the victims of the attack. Second, it claimed that the State had violated Articles 8 and 25 of the American Convention because it had deliberately failed to provide access to justice by covering evidence and forging false testimonies that led to a false resolution.<sup>14</sup>

Another important feature of the petition is that it included a detailed list of all the flaws of the investigation conducted by Galeano. In this sense, the petition to the IACHR would also initiate a debate that would gradually grow into a very politicized discussion. Back then, the claim was still rather simple. After it was revealed that Galeano kept secret “legajos” of evidence, *Memoria Activa* discovered a particular set of clues that pointed to theories that diverged from the official version that involved Telleldín and the police officers.

But let us not get too far ahead. For the moment, it is just relevant to recognize how the petition to the IACHR was an important prelude to the complex developments that were to come. By providing a scenario to voice both claims of reparatory and restorative justice, it would also trigger political turmoil, exacerbated as well by the deposition of SIDE officers confirming that they had paid Telleldín’s wife with secret funds from SIDE.<sup>15</sup>

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12. Writ of Complaint, Case 12.204, Inter-Am. Comm’n H.R., <https://www.cidh.oas.org/Comunicados/English/2001/Press19-01.htm>.

13. American Convention on Human Rights, 1144 U.N.T.S. 123, arts. 4, 5. Article 4, in relevant part, states: “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.” Article 5 states:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

*Id.*

14. *Id.* arts. 8, 25.

15. See *La SIDE le pagó a Telleldín y lo filmó*, LA NACION (Sept. 24, 2003), <https://www.lanacion.com.ar/530023-la-side-le-pago-a-telleldin-y-lo-filmo>; Centro de Estudios Legales y Sociales, *El Sistema de Inteligencia en Democracia*, *supra* note 4, at 160.

A. The “Boomerang Pattern”: The Claudio Grossman Report

The “boomerang pattern” is a widely known model to understand the political dynamics triggered by the submission of human rights claims to international bodies.<sup>16</sup> It briefly describes a pattern provoked by transnational exchanges of information that combine pressure from above and pressure from below to overcome political blockages at the domestic level. In this sense, the boomerang pattern has been conceptualized as a tool to affect the domestic political scene by empowering human rights actors.<sup>17</sup>

Naturally, these conceptualizations have met limitations and challenges. Not every actor can use a “boomerang” and not every “boomerang throw” is successful. The impact rate varies largely depending on factors such as the openness of a domestic system, its prior commitment to human rights, vulnerability to international sanctions, the vitality of domestic mobilization, etc.<sup>18</sup> We do not intend here to reevaluate the details of this model. We refer to it because we believe it holds a good degree of explanatory power to describe the events that would follow the petition to the IACHR, particularly with regard to the interaction between local and international publics.

One of the first important recursive tactics that followed the “boomerang” throw to the IACHR was the appointment of Dean Claudio Grossman as special observer of the Commission in the AMIA investigations. This mandate was created in 2000; its objective was to observe and evaluate the subsequent development of the trial against Telleldín, the police officers and others that constituted the so-called local connection. Institutionally, it had the double function of informing the IACHR about the status of the investigation and allowing the State to demonstrate their compliance with human rights standards. Socially, it also stabilized a legal structure to bring visibility to crucial aspects of the case. This stabilized legal opportunity immensely facilitated the back-and-forth processes of subsequent “boomerangs.”

In more practical terms, the intervention of Dean Grossman shifted the terrain over which *Memoria Activa* and its allies engaged. First of all, it opened a channel for communication with the responsible authorities that was unavailable domestically. However, it also created a *sui generis*

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16. MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: NETWORKS IN INTERNATIONAL POLITICS* (1998).

17. THOMAS RISSE, S. ROPP & KATHRYN SIKKINK, *THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE* 85 (2013).

18. *Id.* at 65.

mechanism that deviated from the traditional form in which the “boomerang” revolved. Normally, the IACHR performs intermittently: It receives information and then reacts through one of its mechanisms. This time, however, the IACHR had propped the door open—it fixed a constant flow of intervention to allow a more fluid interaction between *Memoria Activa*, the State and the International scene.<sup>19</sup>

It is important to note that the creation of Dean Grossman’s mandate was both a consequence of prior activity of *Memoria Activa* and its allies, and a trigger of subsequent mobilization. After the report was published, the IACHR initiated a friendly settlement procedure between the parties (meaning the victims and the State). This friendly settlement was launched during the brief government of President De la Rúa, who would later resign in the context of the severe economic, social and political crisis. The gravity of this crisis cannot be underscored in just one week: the Republic would have five different Presidents. It was not until 2003 that the country finally found a renovated stable ground, and, from this critical context, Néstor Kirchner would emerge as the new President. This new government had a strong agenda of justice system reform,<sup>20</sup> and it was precisely within this context that the President Kirchner’s administration would approach the *AMIA Case* and the friendly procedure mechanism.

### *B. The Friendly Settlement: Decree 812/2005 and Recognition of Responsibility*

Dean Grossman, who was then the president of the IACHR, issued his final report on 2005.<sup>21</sup> The contents of his evaluation summarized the multiple irregularities, flaws and complications of the initial investigation. These discoveries came to reaffirm and further elaborate on the findings of a domestic Oral Trial Court that had annulled the first stage of investigations in 2004.<sup>22</sup> Having an independent and external assessment of these defects prepared a legitimate ground from which to seek restoration

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19. This type of intervention had since been replicated in only two other cases: *Digna Ochoa v. Mexico* and the *Ayotzinapa Case*. See Centro de Estudios Legales y Sociales, *Ayotzinapa. La experiencia del Grupo Interdisciplinario de Expertos Independientes*, in INFORME ANUAL 2017: LA SITUACIÓN DE DERECHOS HUMANOS EN LA ARGENTINA 223 (Siglo XII).

20. *La renovación de la Corte, la primera gran reforma encarada por Néstor Kirchner*, TÉLAM POLÍTICA (May 20, 2013), <http://www.telam.com.ar/notas/201305/18285-la-renovacion-de-la-corte-la-primera-gran-reforma-encarada-por-nestor-kirchner.html>.

21. INFORME DEL DECANO CLAUDIO GROSSMAN OBSERVADOR INTERNACIONAL DE LA COMISION INTERAMERICANA DE DERECHOS HUMANOS EN EL JUICIO DE LA AMIA: 22 DE FEBRERO DE 2005 (Feb. 22, 2005), <https://www2.jus.gov.ar/Amia/grossman.htm>.

22. Tribunal Oral Criminal Federal No 3, City of Buenos Aires, Oct. 29, 2004, [www2.jus.gov.ar/amia/sentencia/TI%20CVIII%20E5.pdf](http://www2.jus.gov.ar/amia/sentencia/TI%20CVIII%20E5.pdf).

and reparations for victims. The strategy had moved beyond acknowledging the flaws and towards the construction of a solution.

Based on these conclusions, *Memoria Activa* and its allies recurred again to the scenario provided by the IACHR to pursue a proactive strategy. Profiting from the political opportunity that was offered by the moderate sympathy of the new government, we decided to try a friendly settlement mechanism. Within the procedures of the IACHR, the friendly settlements offer several perks: They hold a relatively high compliance rate, imply less costs for the victims and their representatives, and also keep open the opportunity to restart an adversarial procedure as long as the IACHR does not publish a Friendly Settlement Report.<sup>23</sup> There was a reasonable expectation that a friendly settlement could work to amend the investigation, restore the trust in the state and repair the victims.

In this sense, the victims and the State representatives signed a friendly settlement agreement before the IACHR on March 4, 2005. This agreement included the State recognition of international responsibility. The settlement agreement meant that the new government of Argentina acknowledged that their predecessor had failed to prevent the attack and had concealed evidence. In legal terms, this implied recognition of a violation to the right to life, personal integrity, judicial protection and due process of the victims.

On July 12, 2005, presidential Decree 812/05, through which the Nation-State formally accepted its terms, sanctioned this agreement.<sup>24</sup> This meant that the agreement with the victims had risen to the hierarchy of national law, which is a position of legitimacy rarely attained by a human rights strategy. The expectation to find justice were understandably reinvigorated for a brief period of time, even if we still held a healthy degree of cautiousness.

The agreed terms included several commitments. First, the state had to publicize the Final Report of Dean Grossman. Also, it had to adopt measures to support and reinforce the investigation of the *AMIA Case*, which meant that they should strengthen the specific Prosecutorial Unit in charge of the AMIA investigation. Additionally, the State had to take actions to investigate and prosecute the concealment of evidence, which required invigorating a process to access and inspect the field in possession of the SIDE. It was in this process to fulfill these latter aspects of the

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23. *Impact of the Friendly Settlement: Updated Edition*, INTER-AM. COMM'N HUMAN RIGHTS OEA/Ser.L/V/II.167, Doc. 31 (Mar. 1, 2018), <http://www.oas.org/en/iachr/reports/pdfs/ImpactFriendlySettlement-2018.pdf>

24. Decree No. 812/05, art. 99, B.O. July 12, 2005 (Arg.), [https://www2.jus.gov.ar/Amia/pdf/decreto\\_812.pdf](https://www2.jus.gov.ar/Amia/pdf/decreto_812.pdf).

agreement, which things started to get trickier. The intervention of intelligence agencies in the workings of the judiciary had always been a problem in Argentina. However, we could hardly imagine how deep this intervention went and how vastly it touched the sensitive nerves of the political system.<sup>25</sup>

The process to comply with the terms of the Friendly Settlement Agreement, now Decree 812/05, stagnated soon after its ratification. In 2009, *Memoria Activa*, CELS and CEJIL decided to break the friendly settlement procedure and restart the adversarial proceedings before the IACHR. However, before we move to what happened after this decision, it is important to briefly sketch a few significant changes that took place during those years in which the agreement was still in place.

First, Judge Galeano was removed from the investigation of the terrorist attack. In 2004, Judge Galeano was subjected to a political trial that culminated in its destitution as a judge in 2010. The investigation was then taken on by Alberto Nisman, who would be the new head of the Prosecutorial Unit created to investigate the *AMIA Case* (also known as UFI-AMIA for its Spanish Acronyms). Nisman remained the prosecutor in charge of the investigation until his death in 2015.

During his time as chief prosecutor of the *AMIA Case*, Nisman would not make any significant contribution to the investigations; his work did not move beyond the case theories elaborated previously, which included the *Local Connection Theory*. *Memoria Activa* would proactively request Nisman's removal from the investigation on two occasions. Nisman's subpar performance has been explained as a by-product of his lack of independence.<sup>26</sup> That is, even while acting within the constraints of his institutional positions, it was known that Nisman had been advised to work closely with Stiuso – then factual operative head of the SIDE).<sup>27</sup> Additionally, it was later revealed that Nisman also discussed matters

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25. For a more detailed description of this enmeshment between intelligence agencies and judiciary bodies, see *La SIDE le pagó a Telldin y lo filmó*, *supra* note 14.

26. Sonia Budassi & Andrés Fianza, *Cuando lo policial y lo político se mezclan, en la batalla mediática por el verosímil, quizás triunfe la operación mejor orquestada. El caso Nisman genera enormes consecuencias sobre la política y la campaña electoral. La muerte del fiscal saca del clóset a un actor cada vez más influyente desde la vuelta de la democracia: los servicios de inteligencia. Su estrecha relación con sectores de la justicia federal queda al desnudo. De esa trama oscura y de un hombre solo habla esta investigación de Revista Anfibia*, ANFIBIA (Sept. 24, 2003), [www.revistaanfibia.com/cronica/el-rompecabezas-nisman](http://www.revistaanfibia.com/cronica/el-rompecabezas-nisman).

27. Centro de Estudios Legales y Sociales, *El Sistema de Inteligencia en Democracia*, *supra* note 4, at 137

related to the investigation with members of the United States Embassy in Argentina.<sup>28</sup>

Second, the criminal investigation against the concealing of evidence (*AMIA 2*) also underwent important changes. Despite the fact that the leaked video evidenced that Galeano had forged evidence, the first Judge in charge of the case, Judge Cavallo, acquitted the defendant after just a few months of investigations. This decision would be challenged and overruled by a Court of Appeals in 2013, and, finally, the Supreme Court would confirm the reversal in 2015.<sup>29</sup> However, while this process was ongoing, another Judge, Bonadío, assumed responsibility over the case in 2000. Under Judge Bonadío, the investigations would experience a deliberate lag that would work in benefit Judge Galeano, the main defendant. It was not until 2005, within the context provided by the Friendly Settlement, that Judge Bonadío was replaced by Judge Ariel Lijo. Judge Lijo would manage to keep the investigation open after an attempt by the defense to close the proceedings. However, it would take more than a decade to move forward in actually addressing the merits of the case and annulling the first acquittal decision.

At large, Decree 812/2005 established several urgent measures of reparations that were of utmost importance for the victims in the friendly settlement agreement. Particularly, the State had committed to take seriously its duty to investigate the facts of the attack as well as the concealment of evidence. *Memoria Activa* pushed this demand for four years and persistently demanded the fulfilment of these commitments. After it became evident that the State had no real intention to comply with this aspect of his internationally agreed responsibilities, we decided to break the friendly settlement process and pursue the adversarial mechanism of the IACHR instead.

After the friendly settlement disappointed our expectations to find a new path to justice, the strategy had to find another way forward. By 2011, the IACHR had confirmed the conclusion of the friendly settlement

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28. SANTIAGO O'DONNELL, ARGENLEAKS: LOS CABLES DE WIKILEAKS SOBRE LA ARGENTINA DE LA A A LA Z (2011).

29. Decree No. 812/2005, art. 1, B.O. July 12, 2005 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=107751>. For a Press Release summarizing the 2013 decision of the Court of Appeals that overruled the decision acquitting Galeano, see, *Causa AMIA: Casación rechazó un planteo del exjuez Galeano contra la anulación de su sobreseimiento*, CENTRO DE INFORMACIÓN JUDICIAL [CIJ] (Aug. 14, 2003), [www.cij.gov.ar/nota-12001-Causa-AMIA-Casacion-rechazo-un-planteo-del-exjuez-Galeano-contra-la-anulacion-de-su-sobreseimiento.html](http://www.cij.gov.ar/nota-12001-Causa-AMIA-Casacion-rechazo-un-planteo-del-exjuez-Galeano-contra-la-anulacion-de-su-sobreseimiento.html). See *Another judge withdrawn from AMIA bombing investigation*, WORLD JEWISH CONG. (Nov. 21, 2005), <http://www.worldjewishcongress.org/en/news/another-judge-withdrawn-from-amia-bombing-investigation>.

procedure and decided to resume its adversarial processes. Up to this date, the IACHR had yet to issue its report on admissibility and merits. What would follow after this attempt to construct a solution, was an increased awareness of the deep structural problems hampering the pursuits of justice. This would gradually reflect in a new claim for transformative justice.

### III. TRANSFORMATIVE JUSTICE: THE STRUCTURAL PROBLEMS IN THE INVESTIGATIVE SYSTEM

Ever since the friendly settlement process broke, the evolution of the *AMIA Case* has had several significant developments. Overall, this stage can be summarized by the gradual revelation of the structural problems underlying the incapacity of the judiciary to conduct proper investigations. While many of these flaws were already included in ruling of the TOF 3 and Dean Grossman's report, these years would intensify their scrutiny. More recently, the case has also been obscured by new scandals and complexities, noticeably following the death of Alberto Nisman.

A recurrent problematic evidence by the case was the role of the SIDE in the investigation and the concealment of evidence. From day one, it was evident that SIDE was an important factor in the capacity of the judiciary to investigate; however, it was also evident that SIDE had a wide array of unchecked powers that enabled them to act opaquely and undemocratically. The SIDE, being an intelligence agency, was legally authorized to classify information and could gather various type of evidence without the proper involvement of judicial authorities. In turn, it was common to see judicial investigations having trouble accessing, evaluating and incorporating the evidence obtained by the SIDE. The *AMIA Case* not only faced these general limitations to appropriate judicial functioning, it would also reveal a darker side of this structural problem: The capacity of officials within the SIDE to deliberately manipulate and influence the progress of judicial investigations.

The social and political pressure emanating from the activities of *Memoria Activa* would inadvertently shuffle a hidden balance of interests. On the one hand, there existed a large and unchecked power of Intelligence Agencies that had persisted as an inherited feature of dictatorship; on the other hand, the political elites were also able to exploit this enclave of undemocratic power to manipulate it and conceal quasi-authoritarian practices; finally, some members of the judiciary were willing to assume a comfortable position, by accepting the convenience of being technically unable to access information that would complicate their work. It was a win for all, except for the victims and the pursuit of justice.

This balance of interest has proved to be very resilient. However, it eventually showed some fracture – the most significant of which was revealed by the signing of the Iranian Memorandum.

*A. The Memorandum of Understanding between Argentina and Iran*

In 2013, President Cristina Fernandez announced that her government had reached an Memorandum of Understanding (MOU) with the Iranian State in order to further the investigations of the *AMIA Case* and to follow the tracks of those responsible for the terrorist attack. This MOU came about as a result of several developments that followed from the investigations that were initiated after 2000. During the years in which Judge Galeano pursued the *Local Connection Clue*, some evidence suggested that several Iranian officials had participated in the planning of the AMIA bombing. When this hypothesis emerged, Argentinian authorities decided to request red notices to INTERPOL against six Iranian citizens. These requests were granted in 2007 by an official decision of the INTERPOL.<sup>30</sup> However, the orders of detention could not be executed.

Thus, the MOU was officially advertised as an attempt of the Argentinian government to side-step the execution problem, by collaborating with Iranian authorities. Its specific purpose was to allow Argentinian investigative authorities to interrogate Iranian officials in Iran, and to create a Truth Commission with a bi-national composition. However, the MOU was received with skeptic and negative reactions. For some the problem was that the MOU demonstrated a willingness to negotiate with the enemy; for others, the MOU was problematic because it did not establish the appropriate rules to ensure that whatever evidence was obtained would further the investigation. For others, the MOU signaled a problem because it had been negotiated without the adequate participation of all stakeholders. For the skeptics, the MOU was only the result of an attempt to foster economic negotiations over oil and gas, by using the possibility to lift the INTERPOL notices as an exchange token that would cover-up any responsibility of Iran in the attack.

However, even if the MOU was questioned from all these fronts, the National Congress ratified it on February 27, 2013 as Law No. 26.843. After its ratification, *Memoria Activa* and its allies abstained from either

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30. See *INTERPOL Executive Committee Takes Decision on AMIA Case*, INTERPOL (Jan. 1, 2007), <https://www.interpol.int/ar/1/1/2007/INTERPOL-Executive-Committee-takes-decision-on-AMIA-Red-Notice-dispute>; Helen Popper, *Argentina's Congress Approves Pact with Iran to Probe Bombing*, REUTERS (Feb. 28, 2013, 2:57 AM), <https://www.reuters.com/article/us-iran-argentina-bombing/argentinas-congress-approves-pact-with-iran-to-probe-bombing-idUSBRE91R0DR20130228>.

supporting or criticizing the MOU, even if they had doubts regarding its efficiency, they thought that it would not damage the investigations.<sup>31</sup> After the Israeli government denounced the MOU, DAIA and AMIA filed a judicial action challenging the constitutionality of the memorandum. *Memoria Activa* decided not to join this litigation.

Subsequently, this judicial action would lead to the annulment of the MOU in 2015 through a decision of the Federal Chamber of Criminal Appeals. By this time, it had also become evident that the Iranian Legislative Power would not ratify the MOU, which meant that the agreement was not able to be executed.

Despite the eventual failure of the MOU, it had important impact in the case and the structural problems underlying its investigation. The fact that President Cristina Kirchner was willing to pursue an investigation that might involve other high-level officials of the Argentinian government was felt directly within the intelligence agencies. The balance of interests shook, and one of its biggest reactions came from Antonio Stiuso, an influential SIDE official, who interpreted the MOU as a betrayal of the President. Allow me to further elaborate on this betrayal.

Stiuso had been involved in the AMIA investigations since day one. From his position in the intelligence agency, he could influence the way in which the judiciary investigated the case.<sup>32</sup> In practical terms, Stiuso had much more control of the progress of the investigation than Nisman. In fact, Stiuso used his privileged position in the SIDE to orient Nisman towards the *International Connection Theory*, involving the Iranian intervention.<sup>33</sup>

In this sense, the fact that President Cristina Fernandez had arrived at an agreement with a foreign government that might endanger his power over the investigation was problematic. This meant, that Stiuso might lose grip of the control of the investigation.

### *B. The Death of Alberto Nisman*

The dispute within the SIDE, and between Stiuso's fraction of the SIDE and external political actors, would get worse. In 2014, President Cristina Fernandez removed Antonio Stiuso from his position as head of the SIDE, along with other high-level officials that were close to Stiuso.<sup>34</sup>

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31. Centro de Estudios Legales y Sociales, *El Sistema de Inteligencia en Democracia*, *supra* note 4, at 138

32. *Id.* 136.

33. *Id.* at 137-38.

34. *Id.* at 139.

Prior to this removal, Alberto Nisman had initiated an investigation against President Cristina Fernandez for her alleged responsibility in abetting the impunity of the Iranian citizens involved in the AMIA attack. According to the accusation, President Cristina had deliberately attempted to ensure the impunity of the Iranian citizens by signing the MOU.<sup>35</sup> Before Alberto Nisman could formalize his accusation, however, he was found dead in his apartment on January 18, 2015. The cause of his death is still uncertain. One version explains that he committed suicide. Another version believes that Nisman was murdered. Both explanations reflect the cleavage in the larger political scenario: On the one hand, there are those who believe that Stiuso was utilizing Nisman to exact revenge against President Fernandez. On the other hand, there are those that believe that President Fernandez ordered the killing to stop any prosecution against her.

The fact that the judicial system has been unable to resolve this issue, has also been a symptom of the underlying structural problem. The judges that were put in charge of investigating Nisman's death also had political leanings. Furthermore, the criminal investigation authorities that would theoretically be in charge of establishing the truth, were also compromised. The undemocratic balances of interests behind political, judicial and intelligence authorities reappeared as a barrier to solve this case.

Most importantly, all this cacophony of political scandals and interests had rendered the victims' claims for justice inaudible. An increasingly polarized society had made it harder for *Memoria Activa* to keep the collective memory and the hopes of justice alive. Once again, their struggle for justice had been utilized as a token in the large political game of encroached power elites and left them expecting resolution.

### C. A Claim for Transformative Justice

At this point, the reader might have noticed that *Memoria Activa* and its coalition stopped being the protagonist within these last few pages. Going through the effect of the MOU, the death of Nisman and all the internal divisions within investigative institutions moved our attention away from the victims. This is precisely the same effect that prevailed over the Argentinian society and the public discussions around the *AMIA Case*. More than two decades after the attack, all the institutional attention was diverted to subsequent scandals, while the investigations of the attack itself remained vastly unattended. So, how did *Memoria Activa* face this

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35. Francisco Peregil, *Muere el Fiscal que acusó a Cristina Fernández de encubrir a Irán*, EL PAIS (Jan. 19, 2015), [https://elpais.com/internacional/2015/01/19/actualidad/1421650071\\_491119.html](https://elpais.com/internacional/2015/01/19/actualidad/1421650071_491119.html).

situation? How have they kept pushing for justice in the midst of such a dense haze of political interests, geopolitical calculations, and personal betrayals? The answer, we believe, lies in the transformation of its claim for justice.

After Nisman's death, a first team of three prosecutors was put in charge of the investigation. *Memoria Activa's* work also helped reveal the deficiencies found in Nisman's investigations. For instance, in just a few months after *Memoria Activa* began their activities, they were able to establish the identity of one of the bodies in the attack.<sup>36</sup> However, despite these results, they soon thereafter resigned or were removed.<sup>37</sup> A few years later, the case was put in charge of yet another prosecutor, Sebastián Basso.<sup>38</sup>

It became evident for everyone in Argentina that the rupture of balance between elites had imperiled the stability of the justice system and its governability. A change was needed; the balance needed to be restored. This conjuncture would offer *Memoria Activa* another scenario to renovate its struggle for justice. This time, *Memoria Activa* was not only demanding reparation or restoration. It was no longer possible to idealize justice simply by restoring the trust between citizens and institutions and repairing the victims of the attack. After living through the scandals and realizing the evident corruption that poisoned the investigative system, the expectations of achieving justice would fade even more. The victims faced the conundrum of either resigning their struggle or pushing towards a goal that was looking more utopian than possible. In this way, the ideal conception of justice had to adapt and include the need to radically transform the very institutions that had again violated their democratic duty.

The first political opportunity to continue pursuing the claim for transformative justice appeared in 2015. Facing multiple criticisms regarding the *AMIA Case* and surrounded by the conflict with the intelligence system after the MOU, President Fernandez felt compelled to take strong action to reform the intelligence system. She introduced a bill to the Congress to replace the SIDE and create a new agency, called

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36. *Identifican a la víctima 85 del atentado a la AMIA*, LA NACIÓN (Aug. 11, 2016), <https://www.lanacion.com.ar/1926916-identifican-a-la-victima-85-del-atentado-a-la-amia>.

37. For a brief account of the changes in the prosecutors, see Aurelio Tomás, *Siete Fiscales, novedades y varias polémicas en la Unidad AMIA*, PERFIL (Jan. 17, 2019), <https://www.perfil.com/noticias/politica/nisman-siete-fiscales-novedades-y-varias-polemicas-en-la-unidad-amia.phtml>.

38. It is important to note that Sebastian Basso is nephew of Riva Amayo, one of the appellate judges that was involved in the tactics that Judge Galeano used to conceal evidence and in the payment to Telleldín. If it was not for the fact that she passed away, she might also be indicted in the trial for concealment of evidence.

Agencia Federal de Inteligencia (AFI).<sup>39</sup> This bill also included other elements seeking to establish some democratic checks on the activity of intelligence bodies. However, the specific amendments that were proposed did nothing to change the underlying structure that had enabled the SIDE to create an authoritarian enclave for it. Profiting from this political opportunity, *Memoria Activa* and its allies took the initiative to contribute to some aspects of this deeper structural reform. *Memoria Activa* and CELS seized this scenario to demand for structural reforms of the intelligence system, which had already been included as part of the friendly settlement agreement signed ten years earlier.<sup>40</sup>

This new bill was an attempt to improve the democratic-ness of the judicial and intelligence bodies. However, it is not easy to transform an institution that has developed decades of undemocratic practices. Changing the name and the legal rules are only the first step of that process. During the following years, the coalition that had advocated for a more democratic intelligence system would begin seeing evidence of the un-democratic resilience.<sup>41</sup> Just like the Decree 812/05, the implementation of this new law would prove to be completely disappointing.

After President Mauricio Macri took office, he appointed one of his acquaintances, Gustavo Arribas, to lead the AFI. Gustavo Arribas was a former manager of soccer players that met Macri during the time Macri served as the President of the Football club “Boca Juniors.” From that moment on, the reform of the Intelligence System would suffer important retrocessions. In 2016, President Macri issued Decree 656/16,<sup>42</sup> which changed several aspects of the original reform. For instance, this decree established that all the staff of the AFI (including administrative and janitorial personnel) had to be considered “intelligence staff.” It also re-established the “discipline of secrets” in several aspects of the intelligence work; it abrogated important improvements regarding transparency in the budget expenditures; and it overall deteriorated the opacity of the system.<sup>43</sup>

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39. The definitive text of the Bill is recorded as Law No. 25.520. See Decree No. 25.520/2015, art. 27126, B.O., Mar. 3, 2015 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/240000-244999/243821/norma.htm>.

40. Centro de Estudios Legales y Sociales, *El Sistema de Inteligencia en Democracia*, *supra* note 4, at 130.

41. Larry Siems et al., *Surveillance and Democracy: Chilling Tales from Around the World*, INT’L NETWORK CIVIL LIBERTIES ORG. 56, 57 (2013).

42. Decree No. 656/2016, art. 1, B.O. Jun. 5, 2016 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/260000-264999/261157/norma.htm>.

43. For further details about the retrocessions of the reform of the intelligence system, see *Agencia Federal de Inteligencia: Vuelta al Oscurantismo?*, ICCSI (June 1, 2016), <http://www.iccsi.com.ar/agencia-federal-de-inteligencia-vuelta-al-oscurantismo/>.

Ever since, it has been difficult for *Memoria Activa* and CELS to access information regarding the mechanisms that AFI uses to exercise its surveillance power. Additionally, the AFI has been much more opaque regarding the way it spends public budgets. Confronted with this specific question before the U.N. Human Rights Committee, the government of Argentina was pushed into acknowledging that it had experienced “a setback regarding transparency.”<sup>44</sup>

After all these processes, the *AMIA Case* is entering yet another stage. Recently, on August 6, 2015, a court in Buenos Aires heard the opening arguments in the trial that investigates the original concealment of evidence.

#### IV. CONCLUSION

For *Memoria Activa*, the case investigating the concealment of evidence become their only hope to get a tiny fraction of justice. It was the only opportunity to know who was involved in hiding the truth, and their motives. These investigations advanced slowly, and mostly due to the pressure that *Memoria Activa* and the IACHR placed over the case. Generally, the context had forced us to keep moderate expectations about the possible outcomes of said trial. A few days before I submitted the final draft of this article, on February 28, 2019, the tribunal finally delivered his decision.

After more than three years of trial the Oral Criminal Court 2 confirmed that there was a maneuver intended to conceal the responsibilities of the AMIA attack. Furthermore, the tribunal framed these facts as a “grave human rights violation” in line with the petition filed by *Memoria Activa* before the IACHR in 1999. The court found that Juan José Galeano, Hugo Anzorreguy, Carlos Telleldín, Ana María Boragni, Juan Carlos Anchezar and Carlos Castañeda were guilty of the concealment of evidence. Additionally, the two former prosecutors Eamon Mullen and José Barbaccia were also found guilty – despite the fact that Minister of Justice, German Garavano, had attempted to excuse them from responsibility.<sup>45</sup> However, former president Menem, along with Ruben

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44. INFORME CASO AMIA, INTER-AM. COMM’N HUMAN RIGHTS (2016), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fAIS%2fARG%2f24441&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fAIS%2fARG%2f24441&Lang=en)

45. *Amia: quedó probado que el poder político, el juez y los fiscales encubrieron el atentado*, CELS (Feb. 28, 2019), <https://www.cels.org.ar/web/2019/02/amia-queda-probado-que-el-poder-politico-el-juez-y-los-fiscales-encubrieron-el-atentado/>.

Beraja, Alfredo Palacios and Patricio Finnen were all acquitted. *Memoria Activa* will appeal this part of the ruling.<sup>46</sup>

In spite of the progress that this decision might bring, the long process that leading to this moment has taken an important toll in the trustworthiness of institutions, the cohesion of civil society, and, overall, on the victim's expectations to find justice. After decades of struggle, *Memoria Activa*, the families and survivors have experienced firsthand a variety of injustices and repeated human rights violations. While these last proceedings are allowing a thin layer of hope to exist, every day that passes is eroding the expectations to find the truth about the attack. At the end of the day, the claims of justice of *Memoria Activa* might not receive the answers they so much deserve. However, so long as there exists an opportunity, we cannot but hope that at least they would get to see a tiny fraction of justice been delivered.

Regrettably, even after the recent ruling, the case has lost its traction with the broader Argentinian society. Now, the AMIA investigations are better known for the scandals and political manipulation that surrounded the case, and not by the memory of a tragedy. At this point, however, we realize that those opposed to find the truth are highly resilient and influential. Unfortunately, current government officials deployed several tactics aiming to preclude any possibility of revealing the truth. They exerted pressure on the lawyers that represented the claimants within the Ministry of Justice; they changed their position regarding the accusation of two prior investigators of the case (Mullen and Barbaccia); they removed several members of the Prosecutorial Unit of the *AMIA Case*; they publicly supported officials of the Ministry of Justice that were involved for concealing evidence; they appointed a new prosecutor (Sebastian Basso) who is related to one of the judges that were involved in the concealment of evidence; and they altered the policies regarding file declassification, among many others.

At this point, the victims are forced to maintain only moderate expectations. In fact, even in the best of scenarios, it would be impossible that that investigation, by itself, would be able to provide an answer to the complex claims of *reparatory*, *restorative* and *transformative justice*. The proceedings that would follow the recent judgment, refers only to the responsibility in the concealment of evidence; the victims still deserve much more than what a court can deliver from such a narrowly defined litigation.

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46. *Audiencia N°174-la sentencia*, MEMORIA ACTIVA (Feb. 28, 2019), <http://memoriaactiva.com/?p=3059>.

We should not forget that the case still has an ongoing petition before the IACHR. The international claim that initiated twenty years ago has created a long track-record of the way in which the case has been handled in Argentina. We have denounced all of the abovementioned maneuvers to hide the truth to the IACHR, which now has vast information about persistent denials of justice and human rights violations. This petition is disputing various forms of international responsibility in which the State has incurred through the various stages of the case. It disputes the original violation to the right to life for the failure to prevent the attack. It also controverts the violation of the right to judicial protection and lack access to an effective remedy, for the multiple failures to investigate and prosecute those responsible; it also claims that the State has violated the rights of the survivors and their families by submitting them to subsequent psychological violence. In this sense, the petition before the IACHR introduces all the complex claims for justice to be adjudicated by an international human rights litigation mechanism.

As the *AMIA Case* approaches a new stage of its investigations, the role of the IACHR – and most likely the Inter-American Court – will be decisive. These international bodies will have a great deal of responsibility as they are called again to respond to the trust that the victims have put on them. Unfortunately, the long and exhausting process that followed that first attempt to find justice through the influence of the IACHR, has circled back to the point in which our expectations are focused again in the impact of a “boomerang.” Just as the intervention of Dean Grossman, managed to unravel the impasse in the domestic political system fourteen years ago, the decision on the merits of the case could again, be the catalyzer. Deciding the *AMIA Case* is likely to be one of the most iconic tasks in the near future of the Inter-American System.

After all these years of frustrations, disappointments and betrayals, the victim’s clamor for justice has evolved to encompass much more than their original intent. Their struggle has put a huge burden on their shoulder. It has become part of a crusade against corruption, authoritarianism and opacity. The claims for justice demand that the State undertake a serious and trustworthy investigation on all the possible theories behind the attack. It also requires a thorough investigation of the concealment of evidence and the mechanisms that allowed it. Finally, it demands a complete transformation of the investigative agencies, in order to completely

eradicate the practices of judicial complicity, opacity and manipulation.<sup>47</sup> Lacking any of these, justice would not be served.

This for sure sounds like an impossible objective. Perhaps we would require another decade of struggles before reaching a somewhat acceptable outcome. However, the victims are rightfully frustrated and the little hope that stills ground their struggle could evaporate at any second. After all these years, we would have expected that the victims would have at least experienced at least a little taste of justice. Instead, they have been pushed and pulled across the alley and into sketchy investigations that opaquely investigate the flaws of the actual investigations. The little confidence that might remain is kept by the trust that they put on the IAHCR twenty years ago. Whatever future brings, we can be sure that *Memoria Activa* has struggled for justice as tenaciously as humanly possible. Whatever injustice remains afterwards would bear on all those that have actively participated in hiding the truth.

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47. Centro de Estudios Legales y Sociales, *El Sistema de Inteligencia en Democracia*, *supra* note 4.

# A DOCTRINE OF PRECEDENT IN THE MAKING: THE CASE OF THE ARGENTINE SUPREME COURT'S CASE LAW

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Alberto F. Garay\*

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## INTRODUCTION

In Argentina, federal courts, and the Supreme Court in particular, ground their decisions on past precedent. It is my view that once today's courts begin to use prior decisions as support for their own decisions, they must decide many problems peculiar to this way of grounding a decision: in precedent. The problem encountered is that the Civil Law tradition, to which Argentina belongs, cannot solve problems using tools created to deal with codes and legislative acts. The courts need specific weaponry for that purpose. I submit that one should prudently and intelligently look to the Common Law tradition in order to see how this approach copes with similar questions. In this essay, I will attempt to describe some characteristics of the Argentine legal process, specifically how the Supreme Court deals with cases. To aid in that description, I will highlight situations that show the need for a common theoretical framework and procedure to face that task.

In Part I, I present a brief historic account of Argentina to provide a minimum context for readers who have a scarce knowledge of the country. Those who already have a basic knowledge of the Country's history can comfortably skip this section. Part II identifies Argentina's legal culture as one belonging to the Civil Law tradition. But, at the same time, Argentina received a strong influence from the U.S. Constitutional Law and from 18th and 19th century American thinkers that acted on a fertile but very different soil. Argentina wanted to detach from its Spanish heritage, but all extant law and institutions were Spanish. Those features are indispensable to understand why Argentina is, in fact, a *tertium genus*, something in between both traditions. Part III is devoted to exploring how Argentine courts functioned at that time, the changes the legal community wanted to introduce, and the countries the courts were looking to for inspiration. Part IV examines how the court system, mainly at the Supreme Court level, implemented demands to treat judicial cases alike and to publicize judicial decisions (historically, the Court of Appeals' President kept judicial decisions secret). At the same time, through two paradigmatic examples, I attempt to show how the predominant civil law education of lawyers interferes with this peculiar way of grounding decisions, particularly with regard to notions such as holding, *obiter dictum* and *stare decisis*, and their bearing on the fact of the case.

## I. A BRIEF HISTORIC ACCOUNT OF ARGENTINA

### 1. *The Colonial Times*

In 1536, Pedro de Mendoza discovered and founded Argentina's first Spanish settlement in what we today call Buenos Aires. This settlement was short-lived and was soon destroyed by natives. In 1580, a fort was again erected, this time by Juan de Garay who then re-founded the city. For the next several hundred years, the Spanish crown ruled the land. Two centuries later, in 1776, Spain established the Viceroyalty of Río de la Plata, which covered Argentina, Uruguay, the southern part of Brazil, Paraguay, Bolivia and the northern part of Chile. In 1806 and 1807, Buenos Aires repelled two British invasions. A few years later, in 1810 and in the light of the fall of King Fernando VII of Spain at the hands of Napoleon Bonaparte, the local forces refused to be ruled by the Viceroy (which governed the Viceroyalty in the name of the deposed King) and voted for a new government occupied by local residents. The Spanish authorities resisted this action and war spread throughout and beyond the Viceroyalty. Finally, in 1816, local forces definitively defeated the royal troops and declared independence from Spanish reign. This creole army, led by General José de San Martín, also

supported and significantly contributed to the independence of Chile, Perú, Ecuador and Venezuela.

Several ideological trends emerged during this period. On the one hand, the inherited Spanish legal and political institutions remained the dominant ideology. On the other hand, the ideas of Montesquieu and the French Revolution, Rousseau, the Social Compact and liberal European principles began to influence some Argentine minds more inclined to a centralized government, as had been the rule since colonial times. At the same time, the powerful local Caudillos that in fact ruled the provinces were more inclined to populist, autonomous rule. These trends, opposite in many respects, soon paved the way to a clash that lasted approximately thirty-six years. This clash is characterized by the development of two frustrated national Constitutions (1819 and 1826), national anarchy, civil revolts and dictatorship (from 1829 to 1852) that restricted the press, neglected education, confiscated property and persecuted political opponents into execution or exile. In the midst of such conflict and despite the dictatorship rule, a young group of intellectuals gathered around poet, writer and public figure of the time, Mr. Esteban Echeverría, to discuss legal and political ideas and philosophy. These intellectuals comprised the so-called Generation of 1837, which was committed to liberal principles, private property and representative government, and laid the roots from which a unified and democratic nation could grow.

## *2. The Argentine Constitutional Framework*

In 1852, after Justo José de Urquiza defeated dictator Juan Manuel de Rosas (in power since 1829), young jurist, Juan Bautista Alberdi, prepared a draft national constitution. The document, “Bases and Starting Points for National Organization,”<sup>1</sup> is a profound study of Argentine history, and in its final pages offered a draft National Constitution that was modeled mainly upon the United States Constitution and European ideas. Alberdi’s draft strongly influenced the framers of the Constitution, which was finally approved in 1853. The Constitution, despite its novelty, maintained certain colonial political structures, following the path of previous Argentine constitutions. Thus, even though the Constitution established a federal system, it conferred large powers to the President, National Congress and

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1. JUAN BAUTISTA ALBERDI, BASES Y PUNTOS DE PARTIDA PARA LA ORGANIZACIÓN NACIONAL 15, IN X OBRAS SELECTAS (Librería de la Facultad de Juan Roldán ed. 1920). For a quick historical background that preceded the Constitution enacted in 1853, see JOAQUÍN V. GONZÁLEZ, MANUAL DE LA CONSTITUCIÓN ARGENTINA 24 (Ángel Estrada y ca., 1897); and JULIO B. LAFONT, 2 HISTORIA DE LA CONSTITUCIÓN ARGENTINA (El Ateneo ed. 1935).

Federal Courts, and facilitated a centralized government. Buenos Aires, the largest and wealthiest Province, did not agree with the Constitution's terms because of competing economic and political interests – a disagreement that brought about serious confrontations between Buenos Aires and other Provinces. As a result of that tension, Buenos Aires ultimately seceded from the confederation, giving birth to several years of political disputes and a civil war. Finally, once Urquiza's forces were defeated in the battle of Pavón in 1859, the Province of Buenos Aires agreed to join the Argentine Confederation.

As a predicate to membership, Buenos Aires required a Constitutional Convention to reexamine the National Constitution of 1853. In 1860, the National Convention adopted many of the Buenos Aires Constitutional Convention's proposed amendments, this time remarkably inspired by the United States Constitution. In this adoption, the amendments curtailed some national powers that favored provincial governments and narrowed the federal courts' jurisdiction.

### *3. The United States Influence on the Argentine Constitution of 1853-1860*

The U.S. Constitution, and the federal jurisdiction established therein, exerted a powerful influence on the Argentine Constitution.<sup>2</sup> Both the U.S. Constitution and Argentine Constitution of 1853-1860 establish a republican form of government based on the principle of separation of powers. The federal system adopted by the Argentine Constitution is an attenuated version of the American system: The National (or Federal) Government has certain powers and the Provinces retain all those powers not delegated to the former or expressly reserved by the Provinces for themselves.

The organization of the federal judicial power under the Argentine Constitution is strikingly similar to that of the United States Constitution. As in the United States, Argentina has both federal and provincial court systems with a National Supreme Court as the high court of the federal system. Specifically, Article 108 of the Argentine Constitution vests the judicial

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2. For a comprehensive study on the sources of the Argentine Constitution, see MANUEL JOSÉ GARCÍA-MANSILLA & RICARDO RAMÍREZ CALVO, *LAS FUENTES DE LA CONSTITUCIÓN NACIONAL Y LOS PRINCIPIOS FUNDAMENTALES DEL DERECHO PÚBLICO ARGENTINO* (2006). The fundamental documents of the United States (the Declaration of Independence, the Articles of Confederation, the U.S. Constitution and the constitutions of several states) have been known in the Río de la Plata since approximately 1811 due to the distribution of Thomas Paine's *COMMON SENSE AND OTHER WRITINGS*. See *LA INDEPENDENCIA DE LA COSTA FIRME JUSTIFICADA FOR THOMAS PAINE TREINTE ANOS HA 151-253* (Manuel García de Sena trans., 1811); Ricardo Zorraquín Becú, *La Recepción de los Derechos Extranjeros en la Argentina Durante el Siglo XIX*, *REVISTA DE HISTORIA DEL DERECHO*, INSTITUTO DE INVESTIGACIONES DE HISTORIA DEL DERECHO 325, 329 (1976).

power in one Supreme Court and inferior tribunals. According to Article 110, the justices of the Supreme Court and of the lower courts shall hold office as long as they maintain their good behavior and shall receive for their services a compensation that shall be determined by law and which, according to the Argentine Charter, cannot be diminished “in any way” during their tenure. Articles 116 and 117 further establish the jurisdiction of the federal courts. Article 116 is cast in terms nearly identical to Article III, Section 2 of the United States Constitution.

These similarities were not accidental. One reason the National Convention amended the 1853 Constitution in 1860 was to follow the track the United States Constitution, which at that time was generally acknowledged as the best ideological framework carried to fruition. Without the U.S. background, the Argentine Constitution would have contained many meaningless sections.

This same modeling similarly appears with respect to the Supremacy Clause, contained in Article 31 of the Argentine Constitution and Article VI of the U.S. Constitution. In both Constitutions, the Federal Constitution is specifically designated to be the supreme law of the Nation. But neither document expressly established who or what body is empowered to decide, with final authority, whether a piece of legislation, federal or provincial, speaking broadly, is contrary to the former. This notwithstanding, both Supreme Courts, based on similar reasoning, have considered that the power of judicial review was embodied in the Constitution. More specifically, the Argentine Supreme Court has heavily relied on the famous U.S. case *Marbury v. Madison*<sup>3</sup> and its progeny to affirm the power of courts to determine the constitutionality of legislation.

When interpreting Article 116 of the Argentine Constitution, the Argentine Supreme Court has referenced U.S. constitutional case law and discussions relating to Article III of the United States Constitution. In fact, in one of its earliest decisions rendered in 1865, the Supreme Court of Argentina stated that there was no basis to believe that the drafters of the Argentine Constitution had Spanish legislation in mind when drafting the Argentine Constitution. The Court stated that it was evident that the Argentine framers sought to imitate the Constitution of the United States. Therefore, the Court looked to United States constitutional principles and case law in order to properly determine the scope of Argentine federal courts' jurisdiction.<sup>4</sup>

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3. 1 Cranch 137 (1803).

4. *Gómez c. La Nación*, Corte Suprema de Justicia de la Nación [CJSN] [National Supreme Court of Justice], Apr. 24, 1865, Fallos 2:36 (1865) (Arg.).

Due to the foregoing reliance on United States Supreme Court precedent and bearing in mind that the first statute regulating Argentine Supreme Court appellate jurisdiction also drafted took into account the first United States Judiciary Act, Section XXV, of 1789,<sup>5</sup> several North American judicially created doctrines have also fructified in Argentine soil. Specifically, it is worth mentioning certain jurisdictional requirements that regularly serve the purpose of limiting the access to the federal judicial power. Among those requirements are the doctrines of standing (plaintiff must demonstrate that he or she has suffered or imminently will suffer an injury),<sup>6</sup> mootness (the dispute between the parties must be an actual one even though such controversy might have existed at one time),<sup>7</sup> ripeness (the dispute must not be premature for review or has not yet occurred),<sup>8</sup> advisory opinions (there must be an actual dispute between adverse litigants)<sup>9</sup> and political questions (conflicts that the court considers to be out of its constitutional reach and that

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5. In 1860, the government committed a young lawyer, Manuel Rafael García, to Washington D.C., in order to learn how the federal judiciary had been organized in the United States. As a result of that study travel García wrote a series of articles where he analyzed the Judiciary Act of 1789 and the sections that could be adapted to our system. President Mitre handed down some of those studies to *La Revista de Buenos Aires* for publication. See, for instance, *Estudios sobre Derecho Federal Jurisdicción de las Cortes de Distrito*, 260, 1 *La Revista de Buenos Aires* and *Estudios sobre la Justicia Federal Americana. En su Aplicación a la Organización Constitucional Argentina* 94, X *La Revista de Buenos Aires*. García also wrote a book on that very subject. See ESTUDIOS SOBRE LA APLICACIÓN DE LA JUSTICIA FEDERAL NORTE AMERICANA A LA ORGANIZACIÓN CONSTITUCIONAL NACIONAL (Imprenta de Andrés Bettini, Florencia ed., 1863).

6. *Compañía Sancinea de Carnes Congeladas c. La Municipalidad de la Capital*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 6, 1920, Fallos 132:101 (1920). (Arg.)

7. Law No. 27, art. 2, promulgated Oct. 13, 1862 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=116333>; de Oca, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 27, 1865, Fallos 1:455 (1864) (Arg.); Silverio Bejarano, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 31, 1872, Fallos 12:372 (1872) (Arg.); Vitón c. Ugarte, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 12, 1905, Fallos 103:53 (1905) (Arg.).

8. *Bermay y otro c. H.J. Navas y Cía. S.A.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 20, 2005, Fallos 328:3373 (2005) (Arg.); de Majo c. ANSeS, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 28, 2008, Fallos 331:2353 (2008) (Arg.).

9. See Senator Zapata statements as to the jurisdiction of the federal courts, Argentine Senate Chamber 222, year 1857. Dr. D. José Roque Pérez, en representación de la Provincia de Mendoza, reclama de una sanción del Senado de la República, que anuló la elección de un legislador hecha por la Legislatura de aquella, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], October 26, 1865, Fallos: 2: 253 (1865) (Arg.); Guillermo H. Moores y otros representantes de empresas de Tramways, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], August 5, 1886, Fallos: 30: 281 (1886) (Arg.); Procurador Fiscal del Juzgado Federal de Salta, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], February 10, 1930, Fallos: 156: 318 (1930) (Arg.).

must be decided exclusively and with finality by the political branches).<sup>10</sup> Apart from the foregoing cases, which may be raised by the court *sua sponte* or *ex officio*, the general rule is that constitutional issues must have been timely raised by the parties to the lawsuit, though this principle may have been narrowed in recent times.<sup>11</sup>

Furthermore, it must be highlighted that during the first twenty-five years of Argentine constitutional jurisprudence, express legislative commands required Spanish translations of many books on United States constitutional law authored by George T. Curtis, Luther S. Cushing, Frederick Grimke, James Kent, Francis Lieber, George W. Paschal, John N. Pomeroy, Joseph Story and the famous *The Federalist Papers*.<sup>12</sup> The Argentine Supreme Court frequently cited these works, as did inferior courts, newspapers, and the Argentine Congress.

However, there is a remarkable difference between the United States and the Argentine constitutional systems resulting from Article 67, Section 11 of the Argentine Constitution of 1853-1860 (today Article 75, Section 12). This provision expressly authorizes the Argentine Congress to enact national civil, commercial, penal, mining and labor codes and social security laws. Once the Argentine Congress enacts a code, the provinces are barred from regulating matters covered by the law. This provision is peculiar to the Argentine Constitution and recognizes its pedigree in European ideas. On one hand, Spanish law governed colonial Argentina, with some laws specially enacted for the colonies (*Leyes de Indias*, *Novísima Recopilación de Leyes de España*, *Ley de Partidas*, etc.). Thus, the argument goes as follows: In matters of civil, commercial, penal and mining concern, among others, Argentine culture dictated general rules for the whole country, despite its vast territory, and the federal system adopted. On the other hand, the code methodology was considered the best way to commit this enterprise due to French influences, particularly the Napoleon Code.

Argentina consequently enacted the Civil Code (in effect since 1871) that was considered, as in many other Civil Law jurisdictions, the spine of

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10. Cullen c. Llerena, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 7, 1893, Fallos 53:420 (1893) (Arg.).

11. See *infra*, Part IV.3.3.

12. See Law No. 55, promulgated Sept. 27, 1855 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=280931>; Law No. 109, promulgated Sept. 28, 1864 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=281084>; Law No. 375, promulgated June 17, 1870 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=281340>; Law No. 380, promulgated July 8, 1870 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=281345>; Law No. 501, promulgated May 28, 1872 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=281450>; Law No. 616, promulgated Sept. 3, 1873 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=281558>.

the law.<sup>13</sup> However, in order to attenuate its centralist force, this section contains a clause by which judicial cases grounded on those codes will be litigated in provincial courts if the case falls within their jurisdiction. So, provincial courts are sovereign in interpreting these codes and, according to Article 100 (Article 116 today) of the Constitution, cases arising under them will not be reviewed by the Argentine Supreme Court despite being enacted by Congress.<sup>14</sup>

As is apparent from this quick survey, and apart from those provisions that were taken from or inspired by Argentine colonial past and European ideas, the United States Constitution and U.S. constitutional law influence has been deep and remarkable since the start of Argentina's founding as a constitutional and independent state. This influence is notorious in Argentina's constitutional text and Supreme Court precedents, and on which I will retake further below.<sup>15</sup>

#### *4. European and Latin American Influences on the Argentine Constitutional Text*

The Executive Power, exercised by a President, is an idea taken from the United States Constitution. But Argentine presidency holds much more power than in the United States. This difference is due to the Framers' reliance on Argentina's centralist past and culture.<sup>16</sup> On the other hand, the

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13. The Civil Code and the Commercial Code were recently restated and fused in the National Civil and Commercial Code, in effect since August 1st, 2015.

14. See CONSTITUCIÓN NACIONAL [CONST. NAC.] ART. 116 (Arg.), <http://servicios.infoleg.gov.b.ar/infolegInternet/anexos/0-4999/804/norma.htm>. Article 116, translated into English, states as follows:

The Supreme Court and the inferior federal tribunals of the nation have jurisdiction over and decide all cases dealing with matters governed by the Constitution and the laws of the Nation, with the exception provided by article 75 (12); and by treaties with foreign nations; all suits affecting ambassador, public ministers and foreign consuls; with cases in admiralty and maritime jurisdiction; with cases to which the Nation is a party; with cases between two or more provinces; between one province and citizens of another province; between citizens of different provinces; and between one province or its citizens against a foreign State or citizens.

*Id.* ("Corresponde a la Corte Suprema y a los tribunales inferiores de la Nación, el conocimiento y decisión de todas las causas que versen sobre puntos regidos por la Constitución, y por las leyes de la Nación; , con la reserva hecha en el inciso 12 del artículo 75; y por los tratados con las naciones extranjeras; de las causas concernientes a embajadores, ministros públicos y cónsules extranjeros; de las causas de almirantazgo y jurisdicción marítima; de los asuntos en que la Nación sea parte; de las causas que se susciten entre dos o más provincias; entre una provincia y los vecinos de otra; entre los vecinos de diferentes provincias; y entre una provincia o sus vecinos , contra un Estado o ciudadano extranjero.").

15. See Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith*, 46 AM. U. L. REV. 1483 (1997) (providing an exhaustive survey of Argentina's reliance on U.S. texts); GARCÍA-MANSILLA & CALVO, *supra* note 2.

16. ALBERDI, *supra* note 1, at 166.

Argentine Constitution of 1853-1860 contains a vast and generous declaration of individual rights and guarantees including the following: freedom of association, freedom of expression and freedom of the press without prior censorship (Article 14); the right to private property (Article 17, ¶ 1); the right to just compensation in cases of expropriation for causes of public use (Article 17, ¶ 2); freedom of the press (Article 23); and the right of defense and the right to be trialed by permanent courts and not by special “ad hoc” commissions (Article 18). The domicile, written communications and private papers shall not be violated, and an act shall establish in what cases and under what circumstances their search and occupation shall be authorized (Article 18). Further, no person shall be obligated to testify against himself (Article 18); and no person shall be arrested except upon a written order issued by competent authority nor shall be punished without a previous trial according to the law in effect at the time of the charged facts (Article 18).

The Constitution also guaranteed the abolition of slavery, humane treatment of prisoners and suppression of the death penalty for political crimes (Articles 15 and 18). The Constitution further establishes equal protection of the law for “all” of Argentina’s “inhabitants” (Article 16). These rights and guarantees are explicitly granted to foreigners, including the freedom of religion (Article 20). Article 19, inspired by French ideas, establishes that no person is obligated to perform what the law does not require, nor can any person be prohibited from doing what the law does not forbid. This Article also provides that private actions that neither offend public morality nor harm third persons are exempt from the magistrate’s judgment and reserved only to God. Moreover, Article 33, directly inspired in the Ninth Amendment of the U.S. Constitution and the natural rights doctrine, provides that the enumeration of all the above referred rights could not be construed as a denial of other unenumerated rights. It further guarantees the republican form of government, born from the sovereignty of the people’s principle.

As the foregoing discussion demonstrates, the Argentine Constitution contains a comprehensive Bill of Rights intended to wipe out old, specific and indigenous practices (e.g., the death penalty for political reasons, torture, inhumane treatment of prisoners, confiscation of property, trial by *ad hoc* commissions, etc.). Some of these rights were not expressly included in the United States Constitution at that time (1860) and others were mainly inspired by The French Declaration of the Rights of Man and of the Citizen of 1789.

Argentine legal culture is and has also been strongly influenced by Civil Law countries. French law is the root of Argentine civil law. Administrative

law is an area that received different influences from France, Spain and, in minor degree, Germany and Italy. Commercial law (commercial papers, corporations and bankruptcy) and Procedural law have historically incorporated multiple European influences, mainly from Spain and Italy. Moreover, Argentine scholars frequently rely on novel European developments in these areas.

### *5. Further Constitutional and Political Developments*

The so-called 1853-1860 Constitution remained in force with very small amendments until 1949 when Perón's government proposed and obtained several crucial reforms. After Perón was overthrown by a *coup d'état* in 1955, the revolutionary government nullified the reforms and reinstated the 1853-1860 Constitution. In 1957, a National Convention decided to maintain the 1853-1860 Constitution and introduced a new amendment that incorporated the so called "social" rights (for example, participation of employees in the companies' profits; same work-same salary right; right to associate to free and democratic workers unions; right to minimum wages; right to paid vacations; and right to pension.). It is noteworthy that the Supreme Court considers Article 14, the clause incorporating these rights, as non-self-operative. Thus, intervening laws are necessary for the rights to become effective. The Constitution was amended once again in 1994. This time, the basic structure of individual rights and institutions were left untouched, but the amendments incorporated new rights, institutions and the supremacy of some international treaties.<sup>17</sup>

## II. ARGENTINE CIVIL LAW TRADITION

It is commonly said that Latin American countries, Argentina among them, belong to the Continental, Civil or Roman Law tradition, as opposed to the Common Law tradition. Inherent in this comparison is the often repeated idea that in our legal systems a judgment is not a source of law. Instead, as the argument goes, a judgment decides a conflict between parties by applying pre-existing law – statutes, executive orders, administrative general regulations, municipal ordinances and many other general regulations enacted by the political branches of government, whether federal, provincial or municipal. So, the "law" applied by courts, generally speaking, emanates from the political branches, not from the judicial branches.

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17. Alejandro M. Garro, *Judicial Review of Constitutionality in Argentina: Background Notes and Constitutional Provisions*, 45 DUQ. L. REV. 409, 410-11 (2007); Néstor Pedro Sagüés, *An Introduction and Commentary to the Reform of the Argentine National Constitution*, 28 U. MIAMI INTER-AM. L. REV. 41, 56 (Keith S. Rosenn trans., 1996).

Lawyers today know that this notion is an exaggeration, for it does not accurately describe what judges actually do today. In fact, judges have a considerable margin of creation from principle, in cases not specifically regulated by statutory law. These principles evolve from controversies in a which solution depends on the application of standards or a reinterpretation of ambiguous or vague rules. Nevertheless, the preconception that judges only apply pre-existing law remains in force and continually operates in the background of legal understanding.

Related to the idea that judges only apply the law, is the concept that judges are, in Montesquieu's terms, "the mouth of the law;" a notion entrenched in this tradition and consolidated by the process of codification that followed the Napoleon Code of 1804.<sup>18</sup> According to the Napoleon Code, the judge's only function is to decide legal controversies by applying rules enacted by the legislator. The general opinion was that the legislative body was the authentic interpreter of the law.<sup>19</sup> This idea fructified not only because Argentine jurists of the time knew Montesquieu's Spirit of the Law, but also because after the independence, as in France after the 1789 Revolution,<sup>20</sup> the Bar greatly distrusted the Administration of Justice.

Finally, though a judgment is not a source of law, judges and continental lawyers share another legal concept, namely, *jurisprudencia*. Nevertheless, problems arise in attempting to grasp a precise meaning of *jurisprudencia*. Historically, the word was used as a synonym of science of the law,<sup>21</sup> but in today's common parlance, a very general use of this expression is connected to a collection of judicial decisions. Still, on certain occasions, it is employed to refer to the decision adopted in a previous case ("It exists *jurisprudencia* in the sense that . . ."). Other times, one will find the expression related to a previous decision rendered by a court of appeals *en banc*, deciding the meaning or scope of a statute or code's article (*jurisprudencia* or *sentencia*

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18. CHARLES-LUIS DE SECONDAT, BARON DE LA BREDE ET DE MONTESQUIEU, EL ESPÍRITU DE LAS LEYES 194 (Nicolás Estevanés trans., Heliasta 6th ed. 1984) ("Pero los jueces de la nación, como es sabido, no son más ni menos que la boca que pronuncia las palabras de la ley, seres inanimados que no pueden mitigar la fuerza y el vigor de la ley misma.").

19. Abelardo Levaggi, *La Interpretación del Derecho en la Argentina del Siglo XIX*, 7 REVISTA DE HISTORIA DEL DERECHO 23 (1980).

20. See generally JOHN P. DAWSON, THE ORACLES OF THE LAW 263 (William S. Hein & Co. ed. 1968) ("My thesis will be that modern French Theories as to the role of judges are not a reflection of Roman law but a reaction against the excessive power and pretensions of the French judiciary under the old regime.").

21. See Víctor Tau Anzoátegui, *Los Orígenes de la Jurisprudencia de los Tribunales en la Argentina* 319, in 6 REVISTA DE HISTORIA DEL DERECHO, INSTITUTO DE INVESTIGACIONES DE HISTORIA DEL DERECHO (1978), <http://inhide.com.ar/portfolio/revista-de-historia-del-derecho-no-6-ano-1978/>.

*plenaria*). Typically, authors do not spend time in clarifying in what sense they use the word.

In Argentina, prestigious scholars have given their own meaning to the word *jurisprudencia*. Carlos Nino, a legal philosopher, said that:

As to precedents, it is obvious that in our system (of European continental kind) they don't have a decisive relevance. In our country judges look for guidance in the *jurisprudencia* but generally speaking they don't consider that precedents have imperative force over future decisions. On the other hand, in our country the 'jurisprudencia' . . . is not established with only one decision, but it is necessary a set of consonant decisions.<sup>22</sup>

Palacio, a procedural law scholar, considered that "in its more accepted meaning, '*jurisprudencia*' refers to the consonant way in which judicial organs express when deciding similar cases . . . '*jurisprudencia*' lacks the degree of bindingness that a statute has."<sup>23</sup>

These ways of understanding *jurisprudencia* is very similar in other civil law jurisdictions.<sup>24</sup> In all of those jurisdictions, one finds two common ideas, namely, the necessity of repetition of similar cases decided alike and the merely persuasive character of those decisions. As Ruiz Miguel y Laporta has stated, "[A] judgment ignoring or not respecting jurisprudence [rectius, case law] is not considered unlawful, but simply subject to discussion and only to a possible reversal by the Supreme Court."<sup>25</sup> Generally speaking, the same can be predicated in Argentina. These are, in general terms, entrenched ideas that civil law countries commonly share. Of course, the reception and evolution of those ideas may have had a different impact in each jurisdiction. However, it is undeniable that those ideas are part of this legal tradition and operates consciously or unconsciously in its legal background.

As a byproduct of those beliefs, generally speaking and bearing in mind the exception that will be considered further, in the judicial field, continental jurists have systematically neglected the critical analysis and the rationale in

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22. CARLOS S. NINO, INTRODUCCIÓN AL ANÁLISIS DEL DERECHO 152 (Editorial Astrea 2d ed. 1980).

23. LINO E. PALACIO, DERECHO PROCESAL CIVIL 139-140 (Abeledo Perrot 3rd ed. 2011).

24. For a French approach to the multifaceted word *jurisprudence* see MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 37 (2009) ("The issue then becomes how the French define the term '*jurisprudence*'. In French legal terminology *jurisprudence* may mean a court's (1) past decisions, (2) precedents, or (3) judicial doctrine on a particular legal issue.").

25. Alfonso Ruiz Miguel & Francisco J. Laporta, *Precedent in Spain* 274, in INTERPRETING PRECEDENTS (D. Neal MacCormick & Robert S. Summers eds., 1997). In this text, the authors mistakenly use the English word "jurisprudence" to mean case law. Here, I have preferred to use the Spanish word *jurisprudencia* to mean case law, because of the different meaning that the word "jurisprudence" has in common law countries.

support of judicial decisions.<sup>26</sup> Their interests and intellectual efforts have been directed to statutes and codes, its method of interpretation and jurisprudential developments derived from them.

The same has happened in Argentina. Even though courts frequently quote previous decisions, the way they tend to do so is manifestly irrelevant. One common way of doing it is as follows: after arriving to a legal conclusion, the Court may, between parentheses, add “see” or “same,” followed by the citation of one or several previous decisions rendered by the same or different court and the date of the decision, either published or not.<sup>27</sup> It does not take a huge effort to come to the conclusion that this kind of quotation lacks any analysis of the referred decisions and, on many occasions, they are difficult to find (courts do not always mention where the judgment is published, if it is at all). It’s safe to conclude, that in those cases, judgments play a mere ornamental function.

On other occasions, Courts use, cite, quote or rely on case-law in order to establish what is the *jurisprudencia* in any area of the law. But those uses frequently lack emphasis on the facts and on their relevancy or irrelevancy or on the different weight one can recognize to some reasons over others also mentioned in those cases. Even though there have been isolated Civil Law scholars that started analyzing the technical, logical or philosophical underpinnings of *jurisprudencia*, their analyses don’t seem to have permeated other areas of the law, the practice of courts or the Law Schools whatsoever. Otherwise, if I were wrong, we should have frequent *Civil Law* examples of judicial decisions in which judges deal skillfully with problems

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26. The neglect of precedent analysis can be easily observed in the judgments of European countries. As the Italian professor Michele Taruffo said:

Only occasionally and in important cases are precedents thoroughly discussed. Instead, the prevailing practice in Italy, Spain, Norway, Sweden, Germany, Poland and in EC courts seems to be one of merely quoting a precedent or a list of precedents as supporting materials . . . without developing any real argument based upon them. The decision is presented as implicitly supported by the bare quotation of precedents . . . almost without due attention to their specific content.

Michele Taruffo, *Institutional Factors Influencing Precedents*, in INTERPRETING PRECEDENTS 455 (D. Neal MacCormick & Robert S. Summers eds., 1997).

27. See *El Rincón de la Retama S.A. c. Izquierdo, Ricardo Mario*, CNCiv, Section A, Dec. 15, 2017, 2018-B LL, 309. (“Por último señalo que, incluso en los aspectos que continúan siendo regidos por la legislación derogada, las disposiciones del Cód. Civ. y Com. de la Nación constituyen una valiosísima pauta interpretativa, en tanto condensan las actuales tendencias doctrinales y jurisprudenciales y expresan además la intención del legislador de nuestros días (esta Sala, 25/6/2015, “C., Jéscica María c. B., Carlos Ricardo y otros s/daños y perjuicios”, *idem*, 30/3/2016, “E., Celeste Ester c. De.P., Virginia Gabriela y otro s/daños y perjuicios”, Expte. N° 11.725/2013; 11/10/2016, “R., Jorge Oscar c. A., Adrián Bartolomé y otro s/nulidad de acto jurídico” y “A., Adrián Bartolomé y otro c. R., Jorge Oscar s/restitución de bienes”, Exptes. N° 47.289/2001 y 38.328/2003; *idem*, CAC y C. Azul, sala II, 15/11/16, “Ferreira Rodríguez, Amelia c. Ferreira, Marcos y otra s/desalojo”, LA LEY, 2017-B, 109 y RCCyC 2017 (abril), 180; Galdós, Jorge Mario, “La responsabilidad civil y el derecho transitorio”, LA LEY, 16/11/2015, 3.”).

inherent to the analyses of cases, such as defining the holding or *ratio decidendi*, *obiter dicta*, and questions of similarity or dissimilarity of facts. And, needless to say, such a habit of careful analysis is generally still absent in our jurisdictions.

As Genaro R. Carrió, former Supreme Court's Chief Justice, clearly stated years ago:

[A] good technique to correctly support one case on a previous one has not developed among us. We have not been trained in handling the case law as a source of decisions. Contrarily, we are trained in handling statutes.<sup>28</sup>

The lack of expertise in handling cases denounced by Carrió is usually replaced mechanically with hermeneutics that are not strictly apposite to this practice. Carrió continued:

In spite of analyzing the facts of previous cases in order to verify what was really decided in them, we prefer to derive the solution of the present case from precedent's isolated paragraphs, many times taking them out of their context. Almost always the solution of the case is extracted from the statute and the so called 'doctrine'<sup>29</sup> (sic) of cases supposedly consistent with it is only mention to reinforce that independent inference's cogency.

Indeed, that is a defect not attributable to our judges and jurists. It is attributable to the beliefs lying at the base of our legal system, the Continental European system.

Those beliefs assign an excessive importance of the legislator's role and, at the same time, obscure the judges' role . . . They don't conceive another way of participating in the legal dynamics than enunciating general rules and no other way of supporting a decision than its syllogistic deduction from a general rule previously put.

From there it is frequent . . . that judicial decisions rest on exceedingly general grounds. There is a kind of attraction to the abstract, a wish to go farther than the facts of the case, using them as a springboard to jump towards constructions of a larger scope.<sup>30</sup>

Finally, legal education in Argentina has been, and still is despite some modern developments, characteristically continental. The principal operating legal concepts are mainly drawn from or developed by analogy to the civil law. And this way of reasoning permeates every area of the Law. Therefore, the general mode of reasoning of an Argentine average lawyers,

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28. GENARO R. CARRIÓ, RECURSO DE AMPARO Y TÉCNICA JUDICIAL 174 (Abeledo-Perrot 2d augmented ed. 1987).

29. In that context, the word "doctrine" (*doctrina*, in Spanish) may be understood as "holding." But the word *doctrina* is very ambiguous in Spanish and Carrió writes it between quotation marks to stress that character.

30. CARRIÓ, *supra* note 28, at 175-77.

professors and judges are not geared by precedents but by laws and scholarly works found in treatises, hornbooks or articles. A serious and systematic analysis of precedents is, generally speaking, ignored even though in the last years some courses on Constitutional Law have stressed the importance of the Supreme Court case law. This kind of incomplete, lame training has also been criticized by another distinguished scholar, Julio C. Cueto Rúa, who stated many years ago:

Actually, the law teaching in Argentine law schools only partially covers its duty because it stops in the middle of the road. The teaching of abstract structures must be completed with a thorough study of the techniques of interpretation and application and with a detailed study of the judicial experience. In these two latter respects, we are in debt with the students of our law schools.<sup>31</sup>

### III. THE FEDERAL JUDICIARY AND THE FOUNDATION OF A DIFFERENT TRADITION

#### 1. Introduction

This extended introduction is necessary to grasp some basic features of Argentine political history and of common beliefs shared today with countries belonging to the Civil Law tradition. Those shared beliefs are particularly strong in private law generally and in some areas of public law (*i.e.*, criminal and administrative law). Those beliefs also function as a filter through which other legal ideas and facts are understood.

However, the Argentine constitutional and federal landscape offers features that markedly differ from that tradition. One of those differences has already been mentioned and it recognizes the strong influence the American Constitution and some of its commentators had over the Argentine Constitution's framers and contemporary political actors, which is reflected in several Constitution Articles and structure.<sup>32</sup> In effect, the whole idea of judicial review, the Supreme Court as a final interpreter of fundamental law with power to declare unconstitutional legislation that opposes the Constitution, the operative character of constitutional guarantees and the structure of a federal government was ostensibly American.

That influence was also abundantly reflected in Supreme Court case law and in lawyers and politicians opinions to the extent that the U.S. constitutional practice, as Miller has shown, was considered a source of

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31. JULIO C. CUETO RÚA, THE 'COMMON LAW': SU ESTRUCTURA NORMATIVA - SU ENSEÑANZA 225, n.33 (1957).

32. See GARCÍA-MANSILLA & CALVO, *supra* note 2.

authority to interpret analogous Argentine constitutional or judiciary act clauses.<sup>33</sup> The other differential trait with the Civil Law tradition is going to be found in the Supreme Court's treatment of prior cases since its early beginnings. Its mode of reasoning clearly moved it away from the Civil Law tradition. The best way to grasp those differences is to focus on the Supreme Court, its recording of decisions and the way the Court adjudicated cases from its establishment until today.

## 2. *The Supreme Court Recording and Reporting of Cases*

Since its establishment in October 1863, the Argentine Supreme Court officially published its judgments and collected those reports in a set of volumes generally referred as *Fallos*.<sup>34</sup> This fact, today trivial, was very unusual in the XIX Century among Latin American countries. During its colonial past, judgments, which usually do not express any grounds but a short indication about the claim and the court's final decision, were secretly kept by the Court's President—their publication was forbidden.<sup>35</sup>

Contrarily, since 1863 Supreme Court's judgments were officially published by it, along with the appealed rulings rendered by inferior federal courts or by highest courts of the provinces. Sometimes, the Supreme Court decision was preceded by a Clerk's note summarizing the case. Besides, all the decisions of the year were later gathered in bound volumes with a subject-matter index in the back that referred to the cases in the volume.<sup>36</sup> In the

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33. Miller, *supra* note 15, at 1544.

34. The original full title of the Argentine Supreme Court records are *Fallos de la Corte Suprema de Justicia de la Nación y su relación de las respectivas causas*.

35. I will refer to this practice *infra* section III.4. Now, suffice it to say that this prohibition originated in a *Real Cédula* of Spanish King Carlos III of 1778, reiterated in the Spanish restatement of laws called *Novísima Recopilación* (1805) that was applicable in colonial and post-colonial times. LUIS MÉNDEZ CALZADA, *LA FUNCIÓN JUDICIAL EN LAS PRIMERAS ÉPOCAS DE LA INDEPENDENCIA* 472 (1944) ("During the last colonial days a rigorous secret as to the decisions' text was kept. Remember that item 13 of Audiencia de Buenos Aires Ordinances established '... that our President kept a Conference Book [Libro de Acuerdos] which briefly contained his opinions and his brethren's [Oidores]. The conference should be secret (Book forth, title fifth, Law 6, Nov. Recop.'). The *Audiencia de Buenos Aires* was the name given to the court of appeals. The only exception to this prohibition was the case of the Tribunal of Extraordinary Writs (*Tribunal de Recursos Extraordinarios*) that acted as a court of last resort in certain cases between 1838 and 1852. As will be shown later, this Court was legally obliged to publish its decisions, which had to be reasoned. *See id.* at 433 ("It is curious to note that it was during the very time of Rosas dictatorship that for the first time a legislative act established the obligation of grounding a judgment . . . Art[icle] 14 of that statute [a law promulgated on December 6, 1838] ordered: 'there shall not be any further appeal from the Tribunal's judgment, which shall be founded, and which will be notified to the Governor for its publication together with the antecedent judgments.'").

36. Nowadays, the Court does not publish the previous decisions of the courts which judgment is appealed. Neither massively publishes hard copies of volumes, except for just a few. All the

beginning those volumes were freely distributed among federal courts and public libraries, later they were distributed among the provincial courts and sold to the public. The Supreme Court's decision to proceed this way was expressly adopted following the U.S. Supreme Court practice.<sup>37</sup>

### 3. *Origins of a New Style of Adjudicating Cases*

In 1864, six months after its establishment, the Supreme Court of Argentina decided the *Tomkinson & Co.*<sup>38</sup> case, a customs dispute in which the Customs Office claimed that the plaintiff, an imports company, had made a false declaration as to the goods imported as required by the applicable statutory law. After expressly discarding plaintiffs argument that the customs declaration contained involuntary mistakes, the federal judge said: “[B]esides, apart from the reasons stated above, the instant case is already decided by the Supreme Court case law, because it is entirely identical to the Thomson Co. warehouse case where the Supreme Court upheld the Custom’s decision that ordered the payment[.]” Notwithstanding that this statement may be considered an *obiter dictum*, the language employed was compelling: “the instant case is already decided by the Supreme Court case law.”<sup>39</sup>

The plaintiff appealed to the Supreme Court and, among other assertions, contested the similarity of cases alleged by the inferior court. After reciting the relevant facts of the case, the parties’ arguments and the previous decision by the district court, the Supreme Court treated the question of similarity in the first place and endorsing the prior court ruling decided: “it is not inferable that the present case is of different nature than the *Tomkinson & Co.* case so as to decide it based on different principles.”<sup>40</sup>

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decisions can be obtained via the internet, from the Court’s web page ([www.csjn.gov.ar](http://www.csjn.gov.ar)). There is a specific office within the Supreme Court, namely, *Oficina de Jurisprudencia*, which prepares the case syllabus and the judgment for web publishing.

37. In the Preface of the first volume, the Court’s Clerk, José M. Guastavino, introduces the publication and says, among other things, that “[a]s it happened in the U.S., this publication will be in Argentina the great book, the great school which will attend everybody and particularly judges, legislators, lawyers and students to study decisional law, the Constitution and the perfection or imperfection of statutes.” José M. Gustavino, Preface, in *FALLOS DE LA SUPREMA CORTE DE JUSTICIA NACIONAL I*: iv (1863).

38. Tomás Tomkinson y Compañía y el Fiscal, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 26, 1864, Fallos 1:148 (1864) (Arg.).

39. *Id.* at 153 (“Que, además de las consideraciones espuestas [sic], el presente caso se halla ya decidido por la Suprema Corte de Justicia, pues es enteramente idéntico al de la casa de Tompson y compañía en el cual se confirmó la resolución de la Junta de Comisos, que condenaba al pago de la diferencia.”).

40. *Id.* at 156 (“Primero: que de la circunstancia espresada [sic] en la primera observación, no se deduce que el presente caso sea de distinta naturaleza y deba resolverse por otros principios[.]”).

Neither the Supreme Court nor the district court explicitly supported in custom, laws, or the Constitution their decision to follow the prior decision rendered in a similar case just because such a precedent existed, a weird path for justices that did not belong to the Common Law tradition. But it is apparent that for both courts the similarity of cases was reason enough, actually the first reason laid down by the Supreme Court, to decide both cases alike.

Besides, the Supreme Court did not explain why it stated in detail the facts of the case and previous procedural contingencies. As I have already stated, this was also a temperament that had not been regularly observed in the past. In any case, where was that practice rooted?

#### 4. *The Previous Legal Background and its Critics*

The first answer to that question, as I have inferred some years ago, is the strong bearing the U.S. Constitutional text and practice exercised over the framers of the Argentine Constitution. We should also bear in mind that the first Argentine judiciary statute of 1863, Law No. 48, that designed the federal courts jurisdiction, including the rules to apply to the Supreme Court from the district and provincial courts, was modeled after the U.S. Judiciary Act of 1789. The familiarity of the Justices and district judges with those texts and case-law may have decided them to borrow that practice for themselves.<sup>41</sup> However, a deeper historical research reveals other part of this story.

As stated above, many Spanish laws, substantive and procedural, remained in force well after the independence.<sup>42</sup> One of those rules, enacted by Carlos III, King of Spain in 1778, prohibited to state the reasons which supported the judgment in order to prevent, among other motives, the “*litigants’ ruminations.*”<sup>43</sup> As a consequence of the latter the most important court in Buenos Aires in colonial times, the *Audiencia de Buenos Aires* enacted a rule that stated “that our President shall hold a book of Audiencia’s conferences (under oath of having it secret) in which he briefly shall state his

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41. ALBERTO F. GARAY, *LA DOCTRINA DEL PRECEDENTE EN LA CORTE SUPREMA* 26 (2013).

42. *See supra* section. I.1.

43. Real Cédula de Carlos III de 23 de junio de 1778, Chapter V (“I order to cease the practice of motivating judgments limiting themselves to state the decision arrived . . . to prevent the harms experienced by the Mallorca Court [*Audiencia de Mallorca*] derived from grounding its decisions, giving room to the ruminations of the parties, time consuming because the judgment restates the proceedings and costs to the parties[.]”); *see* A. MURILLO VILLAR, *ANTECEDENTES HISTÓRICOS DE LA OBLIGACIÓN DE MOTIVAR LAS DECISIONES JUDICIALES EN EL DERECHO ESPAÑOL*, *TEORIA E STORIA DEL DIRITTO PRIVATTO* V, 45 (2012); CALZADA, *supra* note 35, at 442.

opinions and the Oidores [*i.e.*, his peers].”<sup>44</sup> Usually, the extension of courts’ judgments was extremely brief. They occupied one short paragraph in which the judge stated in just a few words the plaintiffs’ claim and the decision of the Court.<sup>45</sup> The decisions did not refer to prior cases either. Furthermore, the secrecy and writing style hardly gave room to the practice of supporting today’s decision in the one rendered yesterday in a similar case as did the Supreme Court and the federal court in *Tomkinson & Co.* case.

The legislation that had given room to this style was bitterly criticized by lawyers and journalists of the time who repudiated the Spanish legislation and its aftermath. In 1832, Valentín Alsina strongly argued against that practice. Some of his reflections were as follows:

If for the enactment of a statute it is necessary for the legislator to state its motives, much stronger is the necessity of that statement when it deals with the application of that very statute. This is the only way to prevent mistakes or arbitrariness, and to give effect to the judge responsibility, that in our system in force I believe it is unrealizable, chimerical and nominal. Nothing has the judge to be afraid of when he does not have to ground his decisions. The aggrieved party cannot complain of nor can she accuse him when ignores the foundations . . . . It will happen many times that in complicated affairs or very long proceedings, the judge renders his decision without reading [the record]: his laziness or mismanagement will always remain hidden and unimpeachable . . . . Explaining the Judge the grounds for his decision one obtains another valued advantage; namely to facilitate to the party the possibility to challenge it properly[.]<sup>46</sup>

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44. CALZADA, *supra* note 35, at 442.

45. *Id.* at 444.

46. See Valentín Alsina, *Reflexiones Breves sobre la conveniencia de que los jueces funden sus sentencias, y la de que se examinen y voten separada y consecutivamente las diversas cuestiones que haya en una causa*, in Víctor Tau Anzoátegui, *Acerca de la Fundamentación de las Sentencias en el Derecho Patrio*, 13 REVISTA DEL INSTITUTO DE HISTORIA RICARDO LEVENE 181, 192, 194 (1962), <http://www.derecho.uba.ar/investigacion/revista-historia-del-derecho/rihdl-13-1962.pdf>. Most of the translations in this article are my own. Some of them had to be adapted to provide more clarity or to adapt ancient language. In note, I offer the original version in Spanish:

Si para la sanción de una ley importa que el legislador esponga [sic] previamente sus motivos, con más razón importa esa esposición [sic] cuando se trata de la aplicación de ella. Este es el único modo de evitar errores o arbitrariedades, y de hacer efectiva la responsabilidad judicial, que en nuestro actual sistema, la creo irrealizable, quimérica y nominal. Nada puede temer el juez cuando no tiene que fundar sus pronunciamientos. La parte agraviada no puede acusarle ni quejarse, cuando ignora los fundamentos; y cuando quizá la sentencia se funde en alguna razón o ley que ella ignoraba . . . . También sucederá muchas veces que en asuntos complicados, en procesos voluminosos [*rectius*, voluminosos], sentencie el juez aun sin leerles: su incuria o desidia quedarán siempre ocultas y siempre inacusables. Esponiendo [sic] el juez el fundamento de su auto, se obtiene otra ventaja inapreciable; cual es la de facilitar al litigante el impugnarle debidamente.

*Id.* In this piece, Valentín Alsina also criticized the absence of foundations of many criminal judgments and the incoherent way the Court of Appeals acted when deciding cases by majority vote. In order to eliminate the possibility that despite both votes agrees in the result however they

A similar critique was years later made by another young lawyer, Miguel Estéves Saguí.<sup>47</sup> Both Alsina and Estéves Saguí considered the practice of secrecy and of not expressing the decisions' grounds to be anti-republican and contrary to personal security, the latter a liberal ideal to be attained at that time.<sup>48</sup>

Contemporarily, in 1834, it appeared a journal to be published twice a week, under the direction of another lawyer, Bernardo Vélez.<sup>49</sup> In its first number, Vélez stated that "all the educated nations have taken care of keeping a collection of judicial decisions, because with that measure one gets very sensitive materials for the people."<sup>50</sup> After highlighting the importance of publishing the judgments' justifications and its deterrent effect against the filing of "unjust" law suits, he stressed the importance of making public judicial decisions in order "to present to judges, lawyers and the general

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lay contradictory reasons that supported that result, he proposed the judges treat each question under decision separately and subsequently, that is, he was proposing the adoption of the method developed by Condorcet.

47. See the doctoral thesis by Miguel Estéves Saguí, *Disertación sobre la necesidad indispensable de que se expresen los motivos y razones que se han tenido en vista para pronunciar las sentencias* (Biblioteca Nacional de Buenos Aires, Colección Candiotti, Tesis de jurisprudencia, T. III, 1836-1837).

48. CALZADA, *supra* note 35 at 458-59. Levaggi argues that all these critics incur in exaggeration and that their main thesis, i.e. the non-founding of judgments, needs several qualifications; see Abelardo Levaggi, *La Fundamentación de las Sentencias en el Derecho Indiano* 45, 73, in 6 REVISTA DE HISTORIA DEL DERECHO, INSTITUTO DE HISTORIA DEL DERECHO (1978). For a critical appraisal of the criminal judgments of the time, see OSVALDO BARRENECHE, *CRIME AND ADMINISTRATION OF JUSTICE IN BUENOS AIRES 1785-1853* (2006). Generally speaking, there was a profound dissatisfaction with the way the criminal and commercial justice was administered at that time. See RICARDO LEVENE, *LA ACADEMIA DE JURISPRUDENCIA Y LA VIDA DE SU FUNDADOR MANUEL ANTONIO DE CASTRO* 78 (1941), <http://www.derecho.uba.ar/investigacion/pdf/2018-levene-la-academia-de-jurisprudencia-y-la-vida-de-su-fundador-manuel-antonio-de-castro-1941.pdf>.

49. Vélez was a lawyer and journalist. Among the many activities developed (he was also a legislator and a Judge), he was Vice President (1828) and President (1830 and 1831) of the Academia de Jurisprudencia, a prestigious graduate law center of the time attended by most of the lawyers referred in this section. See Rodolfo Trostiné, *Noticia Preliminar*, in BERNARDO VÉLEZ: ÍNDICE DE LA COMPILACIÓN DE DERECHO PATRIO (1832) Y EL CORREO JUDICIAL (REEDICIÓN FACSIMILAR) (1834) CON NOTICIA PRELIMINAR DE RODOLFO TROSTINÉ xxv-xxvi (1946), <http://www.derecho.uba.ar/investigacion/pdf/2018-velez-bernardo-indice-de-la-compilacion-de-derecho-patrio-y-el-correo-judicial.pdf>.

50. 1 *El Correo Judicial* 2, Buenos Aires, Aug. 27, 1834, reprinted in Trostiné, *supra* note 49, at xlvi ("En todas las naciones cultas se ha cuidado con esmero de conservar la colección de las resoluciones judiciales, porque con esta medida se consiguen bienes demasiado sensibles para los pueblos.").

public a whole collection of cases . . . to guide themselves with certainty in other identical or similar cases that can happen.”<sup>51</sup>

Initially, publishers like Vélez encountered some distrust from the judges and the press, who considered the publication to be a “conspiracy against the administration of justice.”<sup>52</sup> Besides that, he had serious problems of getting the judgments, because the courts were reluctant to hand over the materials despite the fact that he had been expressly authorized by the government to get those decisions.<sup>53</sup> This was the reason why several publications, the one just mentioned among them, short-lived.<sup>54</sup> Nevertheless, the objective these endeavors sought signaled in a different direction from the Spanish past reflecting that lawyers needs and aspirations were changing. They aimed at the judgments and the necessity that they stated the reasons on which the decision rested. They stressed the crucial relevancy of published case-law in attaining the principle of treating like cases alike.

Despite the obstacles just mentioned, lawyers’ claims were at last heard and remedied. In 1838, Buenos Aires legislature created a new Court of last resort, the *Tribunal de Recursos Extraordinarios por Nulidad e Injusticia Notoria* (Court of Extraordinary Writs for Nullity and Manifest Injustice), which was obliged to express in the decision the reasons on which it based the judgment. Besides, those judgments should be published and available to the public.<sup>55</sup> The decisions so rendered usually had a modest expression of reasons but a long recital of facts, lawyers’ motions and previous judicial decisions. Nevertheless, they represented a serious improvement on style. Despite that innovation, said improvement would not last. After Governor Juan Manuel de Rosas’ defeat in 1852, political reasons – though not related to the founding of judgments – led to elimination of this Court.<sup>56</sup>

Notwithstanding the Court’s elimination, the necessity to count with better reasoned judgments and its availability to the public became a crucial legal issue. Lawyers begun to organize themselves to offer a more consistent

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51. Trostiné, *supra* note 49, at xlvi (“La recopilación de estas decisiones presenta á los jueces, á los letrados, y al público todo una colección de casos, y otros tantos ejemplares, para que puedan regirse con acierto en otros idénticos ó semejantes que puedan ocurrirles.”).

52. Trostiné, *supra* note 49, at xlvi.

53. *Id.*

54. Another journal, *El Correo Nacional*, had the same inconvenience in 1827. See Anzoátegui, *supra* note 21, at 323.

55. CALZADA, *supra* note 35, at 476.

56. The *recurso extraordinario de nulidad y de injusticia notoria*, had been strongly criticized since 1821. Its mere filing produced a stay of the judgment appealed and this caused the unending delay in finishing the lawsuits. See RICARDO LEVENE, VII HISTORIA DEL DERECHO ARGENTINO 436 (Guillermo Kraut ed., 1945); LEVENE, *supra* note 47, at 77.

and powerful battlefield on that question. Consistently, some of them launched new magazines which published judicial decisions, praised the importance to take into account what the judges said in their opinions and its exemplar character to solve future similar cases. The lawyers' cause soon disseminated and years later, in 1854, *El Plata Científico y Literario* published a note written by a young lawyer and editor-in-chief, Miguel Navarro Viola, in defense not only of grounding the judgments but also of taking into account the case-law to that effect. He said:

How much convenient it is for us to study our tribunals decisions, analyze the *causes célebres* on which they are rendered, criticize those very judgments and form with all these works a body of our own jurisprudence[?] Apart of being that a deterrent for the judicial power and a guarantee for today's people, that guarantee also plays an important role prospectively. The people know that a founded judgment that is rendered today, won't be capriciously contradicted tomorrow by another decision in an analogous case. And, so, the decisions publicity is a guarantee against capricious decisions.<sup>57</sup>

In the same vein, in 1859 the Buenos Aires Bar founded *El Foro*, a journal which published judicial decisions and critical comments on them. It is noteworthy that among the collaborators of this bi-monthly revue was Valentín Alsina, the author of the first critical note on the necessity of stating the grounding of decisions referred to above.<sup>58</sup> Among the editorial board staff were other members who years later would also be appointed Justices of the Supreme Court, such as José Barros Pazos (1863-1877), Marcelino Ugarte (1870-1872), José Domínguez (1872-1887) and Luis Sáenz Peña (1890-1892).<sup>59</sup> Miguel Estévez Saguí, author of an influential doctoral thesis already mentioned on the founding of judgments, written in 1837, was also a staff member.

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57. Miguel Navarro Viola, *Prospect 3*, in 1 EL PLATA CIENTÍFICO Y LITERARIO (1854).

¿Cuánto más conveniente no nos es estudiar las sentencias de nuestros Tribunales, analizar las causas notables sobre que recaen, juzgar esas mismas sentencias, é ir formando de todos estos trabajos un cuerpo de jurisprudencia propia? Aparte de ser ello un freno para el mismo poder judicial, y una garantía para el pueblo en el presente, lo es también para su porvenir. Él sabe que una sentencia fundada que hoy se dé, no será mañana caprichosamente contrariada por otra en un asunto igual. Y esa garantía está toda en la publicidad.

*Id.*

58. See Alsina, *supra* note 46. The same Alsina was later appointed President of the Supreme Court in 1863 but he did not accept the post, alleging he was very tired for such a responsibility. Héctor José Tanzi, *El Nacimiento y los Primeros Pasos de la Corte Suprema de Justicia de la Nación (1853-1903): El Periodo de la Continuidad Institucional*, in 1 HISTORIA DE LA CORTE SUPREMA ARGENTINA 23, 41 (Alfonso Santiago ed., 2013).

59. See JONATHAN M. MILLER ET AL., CONSTITUCIÓN Y PODER POLÍTICO: JURISPRUDENCIA DE LA CORTE SUPREMA Y TÉCNICAS PARA SU INTERPRETACIÓN 1755 (1987); Tanzi, *supra* note 58, at 2031, app.

In a note dated in 1855, but published in 1869 in *La Revista de Buenos Aires*, one anonymous author (later revealed to be Miguel Navarro Viola),<sup>60</sup> went farther and claimed for publishing and recording judgments imitating England and the U.S. He stated:

But it is a fact that the best conceived and phrased code gives room to the competing interest of both parties and it is necessary an explanation of it as high as it is the law's origin. That explanation, that new decision, that true applied legislation, is formed by the Courts' decisions. Not any decision but judgments that carry with them the presumption of possible infallibility: the last judgment, that against which there is no other possible appeal according to the law. We found this body of judgments in England, in the United States and we found it in France, where a special journal is consecrated to such a task so useful to a modern bar . . . . What else could a litigant long for knowing what has been decided by the Court of last resort in cases similar to his and knowing his own luck beforehand?<sup>61</sup>

Months later, another lawyer, Vicente G. Quesada, also director of *La Revista de Buenos Aires*, submitted that provincial courts should imitate the national courts in their following precedents.<sup>62</sup> Quesada stressed – against

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60. See Vicente Quesada, *Jurisprudencia de las Sentencias*, XXI LA REVISTA DE BUENOS AIRES, HISTORIA AMERICANA, LITERATURA Y DERECHO 92 (1869); Quesada, *infra* note 67 and accompanying text.

61. Miguel Navarro Viola & Vicente Quesada, *Jurisprudencia de Sentencia*, in XIX LA REVISTA DE BUENOS AIRES, HISTORIA AMERICANA, LITERATURA Y DERECHO, 367, 368 (1869) (“Pero cuando es un hecho que el Código mejor concebido y mejor redactado abre ancha brecha á [sic] las pretensiones encontradas de los litigantes, se necesita una explicación tan alta como es elevado el origen de las leyes. Esa explicación [sic], esa nueva decisión, esa verdadera Legislación aplicada, la forman las sentencias de los Tribunales. No tampoco cualquier sentencia, sino sentencias tales que lleven consigo la presunción de infalibilidad posible: la última sentencia en un plkeito, aquella de que las leyes no admiten ya recurso alguno. Esta jurisprudencia de las sentencias la encontramos en Inglaterra, la encontramos en los Estados Unidos, la encontramos en Francia donde un periódico especial se halla consagrado a tarea de tan grande interés para el foro moderno . . . . Qué más querría un litigante, que saber lo que en casos análogos al suyo ha resuelto el último Tribunal y conocer su suerte de antemano?”).

62. Quesada, Navarro Viola and Miguel Estéves Saguí had been appointed co-Justices of the Supreme Court in 1865. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Jan. 9, 1865, Fallos 2:5 (1865) (Arg.). A co-Justice is a person that occasionally integrates the Supreme Court in cases where it is necessary to reach a certain majority to decide a case. These nominations were made once a year and they were later re-appointed several times. For a case in which Estéves Saguí acted as a co-Justice, see Enrique Yateman en representación de una Sociedad compradora de terrenos en Entre-Ríos contra el Gobierno de esta Provincia sobre cumplimiento de contrato, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 2, 1874, Fallos 15:7 (1874) (Arg.).

what it was considered anathema for others<sup>63</sup>— the higher court judgments’ *inevitable* binding character in future analogous cases. He wrote:

The national justice case-law is the immovable base on which the laws’ application resides. So, once a case is decided and the law applied with a determinate meaning, the people know that analogous cases will be governed by the inalterable holding of those cases.<sup>64</sup>

In the following paragraphs, Quesada relied on XIII Century Castilian law referred to customary law which stated, “We also say that in cases of doubt the law may be interpreted by the costume, so it must be understood as was previously understood by the others.”<sup>65</sup> He considered that “the costume” referred in the Castilian law were judicial decisions. To reinforce his argument, he cited Law No. 5 which stated that the costume may be determined by “the opinion, without contradiction, of two persons who know and understand of judging.”<sup>66</sup> Then, Quesada held:

These laws undoubtedly establish the case law as a legal means to decide legal controversies, and from here the importance of making public the judgments, not only because of their ratio decidendi but because like decisions of *two* [italics in original] cases make mandatory to decide the same in following analogous cases. Dr. Navarro Viola stated clearly the advantages of the case law and the necessity to take it as a rule of decision in deciding other cases in an article on this subject published in Volume XIX of this Revue.<sup>67</sup>

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63. Dalmacio Vélez Sárfield, a prominent figure of the time and author of the Argentine Civil Code of 1869, was among the strong opponents of a case law system. See Anzoátegui, *supra* note 21, at. 321.

64. Vicente G. Quesada, *Jurisprudencia de las Sentencias*, in XXI LA REVISTA DE BUENOS AIRES, HISTORIA AMERICANA, LITERATURA Y DERECHO 92 (1869), [https://books.google.com.ar/books?id=P2FFAAAAYAAJ&printsec=frontcover&hl=es&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](https://books.google.com.ar/books?id=P2FFAAAAYAAJ&printsec=frontcover&hl=es&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false) (“La Jurisprudencia de las Sentencias en la justicia nacional es la base incommovible sobre la cual reposa la aplicación de las leyes. De manera que una vez resuelta una causa y aplicada la ley en un sentido dado, el pueblo sabe que los casos análogos serán regidos por la doctrina inalterable de la jurisprudencia de las sentencias.”).

65. *Id.* at 106 (“Otro sí decimos que la costumbre puede interpretar la ley quando [rectius, cuando] acaeciese dubda [rectius, duda] sobre ella, que así [rectius, así] como acostumbraron los otros de la entender, así debe ser entendida y guardada.”) (quoting Law No. 6, tit. 2, pt. 1).

66. *Id.* (“[S]abiéndolo el Señor de la tierra e non lo contradiciendo, é teniéndolo por bien, puedenla facer, é debe ser tenida, é guardada por costumbre, si en este tiempo mismo fueran dados concejaramente dos juicios por ella, de otros sabidores e entendidos de juzgar e non habiendo quién se los contralle[.]”) (quoting Law No. 5, tit. 2, pt. 1).

67. *Id.* (“Estas leyes establecen indudablemente la jurisprudencia de las sentencias como un medio legal para decidir las causas litigiosas y de aquí nace la importancia de hacer públicos los fallos, no tan sólo por la doctrina legal que ellos contengan, sino porque con arreglo a lo resuelto en dos juicios debe resolverse en adelante todos los que sean análogos. El doctor Navarro Viola en su artículo sobre esta materia publicado en el tomo XIX de esta Revista, estableció con toda claridad

The *Corpus Iuris Civile* established the contrary principle in the “*non exemplis*” maxim (v.gr. decisions should be rendered in accordance, not with examples, but with the laws”),<sup>68</sup> and also in other Partida law.<sup>69</sup> But Quesada grounded his defense of the binding character of precedents on *Partidas* laws that clearly conflicted and run against them. He solved the contradiction in favor of the Partida laws mentioned by him and with express support in Navarro Viola’s defense of equal treatment to like cases. Similar ideas were held in the Provinces of Tucumán, Mendoza, Salta and Corrientes as well.<sup>70</sup>

### 5. The Bar Demanded Treating Like Cases Alike

As we have seen, the influential lawyers of the 1830s led a current of opinion that advocated for ameliorating the way justice was administered in the country. A sense of pragmatism, progress, equality, litigant’s right of defense and certainty clashed against abstract, old and unjust laws, secretly applied in rulings that didn’t express the reasons on which they rested. These lawyers proposed that judgments should be properly founded, public and published, as a guarantee against arbitrary adjudication. Some of them also proposed to elevate the courts of last resort caselaw to a higher standard of respect in order to treat equal cases alike, replicating the experiences of countries like England and the United States.

Although these ideas were rudimentarily exposed at that time, once we remember the influence the U.S. law exercised over the framers of the Argentine Constitution and on judges and Justices, we can better understand the *Tomkinson* case mentioned above. We now see the comprehensive intellectual background that explains why the Supreme Court decided the *Tomkinson* case based on precedent, apart from stating afterward other reasons. We can now understand why a group of judges educated mainly in Spanish law decided a case as a common law judge would have done it, that

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las ventajas de la jurisprudencia de las sentencias y la necesidad de que sirviera de norma en la resolución de los pleitos.”).

68. The translation is John P. Dawson’s. Dawson stressed the idea that the CORPUS IURIS CIVILIS “*non exemplis*” maxim, which established that judicial decisions were mere examples and need not to be followed, was embedded in a clause that was constructed as a parenthesis. He stated:

The impact of the maxim *non exemplis* might have been much less if the compilers of the *Corpus Iuris* had included texts that conflicted with it in a major way. There were a few late imperial constitutions preserved in the *Corpus Iuris* that did lay stress on judicial practice as an appropriate source of rules of procedure.

DAWSON, *supra* note 20, at 123. Curiously, in 1840, Vélez Sarsfield, the drafter of the Argentine Civil Code of 1869, acting as a lawyer, had opposed to the idea of following prior decisions on similar cases, invoking the “*non exemplis*” maxim and another Partida law that contradicted the one employed by Quesada.

69. See Anzoátegui, *supra* note 21, at 321-22, n. 5.

70. *Id.* at 324-25.

is, by invoking its similarity with an analogous case previously decided by them. In the following pages, I will examine how this approach evolved.

#### IV. HOW THE ARGENTINE SUPREME COURT DEALS WITH ITS OWN PRECEDENT

##### 1. Introduction

The way in which the Supreme Court adjudicated the *Tomkinson* case represented a novelty in Argentine constitutional adjudication. Looking backwards, until then no court had proceeded that way. Looking forward, that novelty was going to turn into an initiating experience. That precedential reliance was firmly embraced by the Supreme Court and, generally speaking, it became the usual way in which subsequent Court's compositions dealt with cases, either interpreting the Constitution or federal law: From then on, Supreme Court Justices would always take into account its own precedents.<sup>71</sup> In doing so, the Court had to face the same kind of problems that any common law court faced. The interesting thing is how the Supreme Court managed to solve those problems. So, the Court began a long journey of change, learning from its own and foreign experience. Let us see what resulted from that and how the Supreme Court behaves today when deciding cases.

##### 2. Different Styles for Speed Adjudication of Cases

The structure and style of judgments varies according to the necessities of the Court and the peculiarities of the case. Today, most cases are ruled on through extremely short decisions. The brevity resembles certiorari denials in the U.S. Even though the law specifically authorizes the Court to proceed in that way, this summary disposition of cases has received complaints from several scholars who argue, generally, that the said disposition is contrary to the due process of law. The Supreme Court has affirmed its constitutionality.<sup>72</sup>

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71. Miller, *supra* note 15, at 1559, n.556.

72. Articles 280 and 285 of the National Civil and Commercial Procedure Code expressly authorizes the Court to discretionary deny the extraordinary writ (the equivalent to the original writ of appeal before the Supreme Court, Judiciary Act, Section 25) in the absence of a sufficient federal question or when the questions presented result insubstantial or without transcendence. The Court is not obliged to express any reason of denial except the sole mentioning of Article 280. The Court has decided that Article 280 is constitutional. See *Asociación de Prestaciones Sociales para Empresarios c. Set Sociedad Anónima*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 21, 1999, Fallos 322:3217 (1999) (Arg.). *Contra*, MIGUEL A. EKMEKDJIAN, TRATADO DE DERECHO CONSTITUCIONAL 551 (1999); Juan Olcese, *La Institución del Certiorari Repugna al Concepto Nacional del Derecho de Defensa*, JURISPRUDENCIA

Other similar source of denial decisions are grounded on many unfulfilled formalities, fatal in character, imposed to the writ of appeal (called *recurso extraordinario federal*) by the rules of the Supreme Court enacted in 2007. Its fatal character has been strongly criticized too,<sup>73</sup> but nobody proposed a serious remedy to solve the Court's overloaded docket.

In the remaining bulk of cases, where the Court renders a decision on the merits, one may find judgments that in a few words dispose of cases based on precedent. According to one style, decisions are very short in length. They only assert that the present case is similar or analogous to a previous one, and because of that similarity the decision to adopt today must be equal to the one taken in yesterday's case. For instance, in *Lescano* the Court shortly said "[t]he questions involved in the present case, as far as this controversy is concerned, are substantially analogous to the one debated and decided in the case M.1380.XLI 'Medina, Orlando Rubén y otro c/ Solar Servicios On Line Argentina S.A. y otro s/ interrupción de prescripción,'" <sup>74</sup> decided on February 26, 2008, to which the Justices refer for the sake of brevity.

Short decisions like this one fail to explicit the relevant facts of both cases and the reasoning employed by the Court. Such a practice is contestable since the omitted process is the key element that justifies or not the result, but this deficit has not refrained the Court from so deciding and it hasn't received much scholarly complaints either. There are other judgments that after succinctly mentioning the relevant facts rely on previous precedent. For instance, in *Caballero*, the Court decided:

In its present composition, this tribunal agrees with the *ratio decidendi* of Fallos: 304: 1865 to which we must rely for the sake of brevity, taking into account the substantial similarity between this case and the questions presented and decided on that occasion. In effect, as the court

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ARGENTINA 980 (1997) (Arg.); Miguel M. Padilla., *El art. 280 del Código Procesal Civil y Comercial de la Nación y el derecho de acceso a la justicia*, LA LEY 358 (1992) (Arg.); Héctor E. Sabelli, *El rechazo sin motivación del recurso extraordinario cuando la cuestión federal es intrascendente, ¿es constitucional? (sobre el certiorari criollo)*, JURISPRUDENCIA ARGENTINA 1343 (2003) (Arg.); Gustavo L. Vitale, *Indefinición de la Corte Suprema de Justicia de la Nación en un Caso de Suspensión del Proceso a Prueba (el ilegítimo 'certiorari al revés')*, JURISPRUDENCIA ARGENTINA 1244 (2003) (Arg.).

73. See Germán González Campaña, *Acordada 4/07: Necesidad de Atenuar su Excesivo Rigor Formal*, LA LEY pt. VII (2017) (Arg.).

74. *Lescano, Demetrio y otro v. Estructuras Metalúrgicas Din S.A. y otro*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], June 3, 2008 (2008) (Arg.). This case is not published but, as any other unpublished case, can be found in the Supreme Court's website, [www.csjn.com.ar](http://www.csjn.com.ar).

of appeals moves away from art. 1 of decreto-ley 6277/58 . . . , we decide to reverse the appealed judgment.<sup>75</sup>

The case was governed by a legal rule, but the Court decides not to interpret the rule *de novo* but to rely on to the meaning assigned to that norm in the precedent. However, the decision has two peculiarities. One of them is the blunt expression “in its present composition” that relates to the fact that the Justices signing the precedent are different from the ones deciding the case today. Apparently for those Justices the mere change of personnel was a valid reason to alter the meaning attributed to a legal rule in a prior case.<sup>76</sup>

Unfortunately, after several years of not using that expression, it has reappeared in the Court’s case law what reveals that some Justices and scholars do think that new appointments in the Supreme Court authorizes to re-think, without qualifications, prior precedents.<sup>77</sup> The second peculiarity is that said reliance is not based on the very existence of a precedent on point. It is the present Court’s agreement with the decision taken therein what determines to follow the previous case decision. This is a sort of caveat, very usual in many judgments that affirm to rely on precedent. It is related to the soft character generally attributed to the precedent’s force, a characteristic that I will retake further.

### 3. Distinguishing Cases

#### 3.1. Introduction

One of the most striking common law techniques for lawyers educated in the Civil Law tradition is how common law courts deal with precedents’ facts and accordingly distinguish or not the present case from prior ones

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75. José Emilio Caballero c. C.R.J.P.P.F, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 21, 1985, Fallos 307(I):240, 243 (1985) (Arg.).

76. Due to the many coups d’état that happened in Argentine political life in the period 1930-1976, it was common that the Supreme Court’s composition was completely renovated with each coup. When democratic governments return to rule the country, they obviously replaced the *de facto* Justices with new ones. So, both groups of Justices used to employ that expression each time they saw fit. Apart from critiques that one can elaborate as to it, that expression became so usual that it was naturalized by the legal community and nobody said anything when that expression was later used, in democratic times, by a majority of Justices of a recently enlarged Supreme Court that overruled a prior leading case that has been rendered by Justices appointed by the preceding democratic government. See Ernesto Alfredo Montalvo, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 11, 1990, Fallos 313:1333, consideration 6 (1990) (Arg.); Alberto F. Garay, *La Corte Debe Sentirse Obligada a Fallar Conforme sus Propios Precedentes (Aspectos elementales del objeto y de la justificación de una decisión de la Corte Suprema y su relación con el caso ‘Montalvo’)*, JURISPRUDENCIA ARGENTINA 870 (1991) (Arg.).

77. Juan F. González Bertomeu, *¡Sin Precedentes!*, JURISPRUDENCIA ARGENTINA, SUPLEMENTO DE JURISPRUDENCIA DE LA CORTE SUPREMA DE JUSTICIA DE LA NACIÓN, ABELEDO PERROT 3 (2009).

based on their facts. Nothing of that sort compares in the civil law to the craftsmanship that many common law courts and scholars show in that enterprise, particularly, in difficult cases. Put it simply, the way they treat the facts of a case is sometimes astonishing for a civil law eye.<sup>78</sup> Every common lawyer knows this can be a problematic and imaginative process at times. But the law schools educate them in order to acquire familiarity with that task and to do it properly, intelligently, artfully once in the legal profession. An enterprise that, as a Cambridge law professor told me once, is not limited to the law school years but it is “a whole life experience.” Nothing of that sort happens in the Civil Law world.

Argentine Supreme Court case law, for instance, is full of precedents in which the Court, many times inferior courts and the parties to a lawsuit wrestle with similarities and dissimilarities. This activity has been performed from the very beginning by the Supreme Court and by district courts too: remember the analogy with a prior case discussed in the *Tomkinson & Co.* case decided in 1864.<sup>79</sup> This practice of comparing facts of cases is performed regularly since then and, in easy cases,<sup>80</sup> it is performed acceptably good. On the contrary, when dealing with the multitude of particulars offered by a line of past cases, courts -including the Supreme Court- inevitably make mistakes, sometimes clumsy mistakes through common law eyes. In my view this is the consequence of several reasons.

### 3.2. Some Reasons that Explain the Lack of Expertise in Dealing with

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78. To immerse oneself in KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1981) or *THE COMMON LAW TRADITION: DECIDING APPEALS* (William S. Hein & Co. Inc. ed. 1996), is some sort of science fiction for a regular civil law mind. As Professor Cappalli has rightly said, the common law is a method that “civilian lawyers (that is, lawyers who use the civil law) rarely come to understand . . . more than superficially.” RICHARD B. CAPPALLI, *THE AMERICAN COMMON LAW METHOD* 11(1996).

79. See *Tomás Tomkinson y Compañía y el Fiscal, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice]*, Apr. 26, 1864, Fallos 1:148 (1864) (Arg.); *Florez, José Ignacio c. Garmendia, Pedro, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice]*, Oct. 11, 1870, Fallos 9:434 (1870) (Arg.); *José R. Lozano pidiendo se declare inconstitucional un acto del Gobernador de Jujuy D. Teófilo S. de Bustamante, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice]*, June 2, 1874, Fallos 15:65 (1874) (Arg.). In *Lozano*, the Supreme Court succinctly affirmed the judgment below. The plaintiff had cited in support of his case a decision handed down by the Supreme Court four years before. The district court, after scrutinizing the facts of both cases, denied the similarity of facts alleged by the plaintiff.

80. This activity is “easy” when you have a precedent “on point”; it gets complicated when you have to compare the facts of the present case to the facts of, for instance, a line of cases which have differences that at first impression are not strictly or “sufficiently” similar (or vice versa). Those dissimilarities can also refer to the cases procedural settings.

### Facts

In Argentina the judicial practice of treating similar cases alike was the mid-nineteenth century response to the legal profession's demand of reasoned decisions, equal treatment of similar cases, respect to the parties right of defense and judicial transparency.<sup>81</sup> The influence that the style of the U.S. Supreme Court decisions had on the Argentine Supreme Court Justices may have also played an important role. Despite its auspicious beginnings, that practice did not evolve. Neither did it gain in sophistication as the cases offered more complicated factual situations, except in occasional cases scattered in the Court case-law. This under-development is also verifiable at the moment of justifying a decision with support in prior cases, something that I will postpone for the moment. I agree with Carrió in that "we have not developed a good technique to correctly ground a decision in a previous one."<sup>82</sup> For Carrió, the lack of such a technique is attributable to the beliefs lying at the base of the Civil Law tradition "that assign an excessive importance to the legislator role shadowing at the same time the judges' role."<sup>83</sup>

Besides that, since the sixteenth century – and skipping the enormous work developed by the Bologna school and the glossators since the eleventh century – the European jurists' and professors' interests centered not in the Justinian's *Digest* - more casuistic - but on the *Institutes* - more general - adopting its style and structure.<sup>84</sup> The study and teaching of law was centered almost exclusively on the interpretation of those texts from which scholars extracted principles and elaborated theories.<sup>85</sup> This theoretical works on Roman law that, as Samuel has observed "became very much easier to read and to absorb,"<sup>86</sup> gained popularity and prestige and soon this canonical-text-centered professorial activity became the predominant way in which the law was taught and learned in most of the European countries. These abstractions and generalizations gave room to the idea that legal reasoning is about general rules.

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81. See *supra* section III.3.

82. CARRIÓ, *supra* note 28, at 174.

83. *Id.* at 175.

84. GEOFFREY SAMUEL, A SHORT INTRODUCTION TO JUDGING AND TO LEGAL REASONING 12 (2016) ("Thus in France, the jurist Jean Domat (1625-1696) rearranged Roman Law in its 'natural order' so that the Roman Law was to be learned and applied, not through the reading and application of the original texts but through a set of principles.").

85. *Id.*

86. *Id.* Samuel supports his argument by reference to J. GORDLEY, THE JURISTS 145 (2013). Samuel's remark retains vitality even today.

These ideas, reinforced by the nineteenth century process of codification after the French Civil code and Montesquieu famous *dictum* relegating the judges' role to a sort of a mechanical activity (judges did not make the law; they just apply it; the law is made by the legislatures), later took root in Latin American soil. What counted, then, were laws, texts and the scholar's "scientific" elaborations about them.<sup>87</sup> The law will be viewed idealistically. So, as Carrió concluded, "another way of reasoning, a way more closely related to the factual situation that a judge confronts, appears to them as something a bit vulgar, mere casuistry, a petty enterprise."<sup>88</sup> As a consequence of those beliefs, the legal education a law student received and still receives is predominantly centered in scholarly works found in articles, manuals (hornbooks) and treatises annotating codes or statutes, general works that – apart from their intrinsic value as theoretical works – are written with abstraction to the case-law.<sup>89</sup> If cases are occasionally used, it is just to exemplify a specific situation.

Therefore, students lack any specific instruction to (i) identify with precision *inter alia* the facts of a case; (ii) reason from one case to another one and so forth nor (iii) connect those facts with the reasons on which the decision rests. Finally, (iv) to make a rule explicit from a judicial decision. So, unless it is part of their natural abilities or personal way of perceiving the world, under this kind of legal education students don't develop a skill to deal with particular cases because their objects of study are rights, duties, powers and theories about them. Accordingly, when today's civil law judges (and their clerks) that received that kind of instruction take into account prior decisions – a daily experience at the Supreme Court- the weaponry they have to face that activity is mostly inapposite because, as it was said, it is apt to wrestle with statutes, codes and theories about legal institutions. In other

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87. See also Genaro R. Carrió, *Sobre las Creencias de los Juristas y la Ciencia del Derecho*, 1 ACADEMIA REVISTA SOBRE ENSEÑANZA DEL DERECHO NO. 2, 111, 115 (2004). One could take a step further and add to such a short list the "Civil Law" as such, which is a subject-matter that transcends texts of a code or of a statute. However, its consideration is beyond my purpose in this essay.

88. CARRIÓ, *supra* note 28, at 177. This value judgment as to the case-law would have probably disturbed Sir Frederick Pollock idea of the case-law. FREDERICK POLLOCK, *The Science of Case-Law*, in JURISPRUDENCE AND LEGAL ESSAYS BY SIR FREDERICK POLLOCK 169 (1961).

89. In 1985, the school of law of the University of Buenos Aires began a process of reform in the way the law was taught and learned. Among the teaching methods, the reform gave room to the gradual implementation of the so-called case method. This also opened the door to publishing books that offer cases as materials of study (calling them casebooks would be misleading). Nevertheless, fifteen years later the prevailing method was still the dogmatic and magisterial. See Laura Clérico, *Nota sobre los Libros de 'Casos' en el contexto del Método de Casos*, in 1 ACADEMIA: REVISTA SOBRE ENSEÑANZA DEL DERECHO, NO. 2, 13 (2004).

words, their tools are fit to work with general rules and abstract theories about certain areas of the law “uncontaminated” by facts.

As a by-product of that education, continental lawyers, generally, and Argentine judges and Justices, legal clerks, professors and lawyers in particular, develop a “natural” tendency to generalize. That tendency -and I am still referring to the average lawyer, judge or professor- leads them to interpret or to analogize a prior decision or a group of decisions with a high degree of generality. Thus, that tendency to generalize may affect the operative facts of a case or the reasons, that is, the justification on which the decision rests or both. When this exaggerated generalization affects the operative facts, the court rapidly jumps to a much more general category of which the particular facts of a case are an example, skipping other intermediate possible categories.

The same tendency also manifests itself when the moment to ground the present decision arrives. Once in that stage, judges frequently generalize in excess the reasons on which a past decision lies (reasons that are probably written in an already broad language) and sometimes disconnect them from the specific facts of the case.<sup>90</sup> I do not naively pretend that only civil lawyers and judges generalize. It is very well known that in common law jurisdictions judges and lawyers need to generalize in order to extract the rule of a case.<sup>91</sup> It is also a reality that in the common law jurisdictions one may find decisions which go farther than necessary in its reasoning. Nevertheless, (i) the difference of degree among their generalizing tendency is very big<sup>92</sup> and (ii) the absence of an accepted doctrine or theory from which to criticize the way courts deal with cases, give courts a power that goes unchecked.

When one is trained in distinguishing minutely the facts of a case and in making up different applications a rule can have – as a common lawyer normally is – that person necessarily takes consciousness of a myriad of situations that the application of a principle can face and how that principle or rule -judicially created- takes different formulations according to the

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90. In private conversations with Supreme Court law clerks – most of whom conforms the real muscle and memory of the Supreme Court – they usually recognize the difficulties faced in their first months or years at the moment of analogizing cases or of justifying a draft opinion with support in past decisions. To reason inductively, from one case to another one, was almost a completely new experience. They must re-educate themselves in a different way of thinking about a case and its solution without any theoretical or doctrinal help apart from some scattered local articles on the subject. Unfortunately, they keep that experience almost secretly. I do not know of any article or public exposition where they have said so.

91. CAPPALLI, *supra* note 78, ch. II-V; Neil H. Andrews, *The Precedent System: Rule-Making at Common Law*, ch. I-III (forthcoming 2019).

92. One realizes that difference not only in decisional law but also when you compare provisions of a code with any American restatement of the law. The degree of detail found in the latter is alien to the former.

relevant facts which it is meant to control and the justifications offered to support it.<sup>93</sup> The same detailed analysis of the specific facts of the case at hand must be made when one has to subsume them in a rule or principle statutorily created. That approach minute to the particular facts of the case also relates to a doctrine, the doctrine of precedent, and forms part of it. So, because of her education, a common lawyer is inclined to think case by case, in a piecemeal approach.<sup>94</sup> She develops a “natural” constraint against generalizing in excess, apart from particular theories that try to offer a more expansive view.<sup>95</sup>

Argentine law has not formally incorporated the doctrine of Precedent. It is true that since its establishment and from time to time, the Supreme Court has employed several common law techniques and even some practices that are considered controversial in the common law world.<sup>96</sup> However, those uses lack consistency and regularity and neither the Supreme Court nor the

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93. The Supreme Court of Argentina also “creates” rules and frames remedies. A typical example is Angel Siri, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 27, 1957, Fallos 239:459 (1957) (Arg.), where the Supreme Court, with support on the freedom of the press and of expression clause, articulated in Article 14 of the Argentine Constitution, held that when a journal has been closed down by the police and there is no indication that such a closure has been ordered by a judicial authority any court is obliged to entertain the journal claim and immediately order to lift the closure irrespective of whether there exist a specific legal action to that effect or not. In the case, the journal’s owner claim has been made within a habeas corpus proceeding that involved his detention by the police. After his release, the state court refused to lift the closure because that claim could not be entertained in a habeas proceeding. In this ruling it is interesting to observe how the Court language generalizes a freedom of the press and of expression case to any case in which what is at stake is the violation of “constitutional guarantees.” See generally CARRIÓ, *supra* note 28. Following the generalization tendency, this case is considered as creating a right of action to protect constitutional rights, action or writ usually called “amparo” in Latin America. After ten years of this decision, the government enacted Law No. 16.986, which legally instituted the “amparo” to protect individual rights against governmental arbitrary action. See Law No. 16986, B.O. Oct. 20, 1966 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/45000-49999/46871/norma.htm>.

94. CAPPALLI, *supra* note 78, at 23. This constraint is also related to the notions of holding and *obiter dictum*. *Id.* at 25.

95. MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* (1991); FREDERICK SCHAUER, *THINKING LIKE A LAWYER* (1991).

96. In *Tellez v. Bagala*, the Court gave retro-prospective effect to a prior ruling rendered one week prior. *Tellez c. Bagala*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 15, 1986, Fallos 308:552 (1986) (Arg.); Juan Luis Strada, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 8, 1986, Fallos 308:490 (1986) (Arg.). Full prospective overruling, a technique resisted in the U.S. and in the U.K., was utilized by the Argentine Supreme Court in two cases in which the Court declared the federal laws in question unconstitutional. Nevertheless, neither of the petitioners benefitted from this result. See Carlos Alberto Rosza, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 5, 2007, Fallos 330:2361 (2007) (Arg.); Administración Federal de Ingresos Públicos c. Intercorp S.A., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], June 15, 2010, Fallos 333:935 (2010) (Arg.).

academia, despite some exceptions, has developed a systematic approach to them.<sup>97</sup>

When one focuses on the judicial decision in itself, as the Doctrine of Precedent punctiliously does, one discovers many techniques and principles developed and perfected through the Centuries to cope with some aspects of a decision (*i.e.*, how to deal with facts and to distinguish the relevant from the irrelevant; how to reason from one case to another, the relative importance of the reasons stated in favor of deciding in a certain way according to its level of proximity with the decision taken, the more or less importance of the decision verbiage depending on the system where the doctrine is used, the court applying precedent powers, the idea of incremental growth of the law through the judges work, etc.).

Many of those techniques and principles that the continental law has historically neglected and still neglects, could be relevant for the civil decisional law as long as they refer to (i) modes of reasoning legal problems (ii) ways of justifying legal decisions, and (iii) the use of reasons and reasoning employed in past cases as examples of reasoning to use (or not to use) in present cases. As a general proposition nothing should prevent civil law judges or lawyers, from getting help from these common law tools when performing the same kind of activities, treating them systematically and adapting them in case of being necessary or more convenient to their legal and constitutional frameworks. And this proposition should apply particularly in Argentina, where the Supreme Court has emphasized so strongly on the decisive importance of treating like cases alike.

Let me briefly show how the tendency to generalize in excess has manifested in some leading cases.

### 3.3. The Case of Sua Sponte Judicial Review

According to Article 116 of the National Constitution, federal judges have the power to decide “cases,” that is, a particular situation conformed by certain set of facts. Law No. 27 states that courts can only decide actual controversies submitted by aggrieved parties. I have already said that the Supreme Court adopted the American doctrine of “cases and controversies” to interpret Article 116, and that judges have jurisdiction to declare unconstitutional legislation that opposes the Constitution. This is the black

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97. See CARLOS COSSIO, *EL DERECHO EN EL DERECHO JUDICIAL: LAS LAGUNAS DEL DERECHO, LA VALORACIÓN JURÍDICA Y LA CIENCIA DEL DERECHO* (2002); SANTIAGO LEGARRE, *LA OBLIGATORIEDAD ATENUADA DE LA JURISPRUDENCIA DE LA CORTE SUPREMA* (2016); CARRIÓ, *supra* note 28, at 174-75.; GARAY, *supra* note 41, at 26; RÚA, *supra* note 31, at 224-25.

letter law and generally speaking nobody questions that.<sup>98</sup> However, despite the vitality of those principles, the controlling force of facts is often ignored: courts act as if the case were the springboard on which to jump and rule on a whole area of the law in question.

Since the middle of the twentieth century, several Argentine scholars have defended the general duty of judges to declare *sua sponte*<sup>99</sup> the unconstitutionality of any law applicable in a case that in their judgment is in opposition to the Constitution.<sup>100</sup> This argument is cast in very general terms, and refers to any situation in which a court, either first instance, appeal or highest court, considers that the law applicable to the case at hand is in opposition to a constitutional clause.<sup>101</sup> The argument runs against an undisturbed interpretation of Article 2 of Law No. 27 against that possibility, entrenched ideas concerning standing to sue, the opportunity to raise a constitutional question and an uninterrupted line of cases that denied that that power.<sup>102</sup>

Contrary to that background, in *Banco Comercial de Finanzas*<sup>103</sup> the Supreme Court admitted the possibility for courts to raise constitutional questions *sua sponte*. In this case, the highest provincial court had vacated the previous judgment for having declared unconstitutional the applicable

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98. See CARLOS JOSÉ LAPLACETTE, *TEORÍA Y PRÁCTICA DEL CONTROL DE CONSTITUCIONALIDAD* (2016).

99. In Argentina we refer to control of constitutionality *ex officio*.

100. See ALBERTO B. BIANCHI, *CONTROL DE CONSTITUCIONALIDAD: EL PROCESO Y LA JURISDICCIÓN CONSTITUCIONALES* 207 (1992); RAFAEL BIELSA, *LA PROTECCIÓN CONSTITUCIONAL Y EL RECURSO EXTRAORDINARIO* 98 (2nd ed. 1958); GERMÁN J. BIDART CAMPOS, *EL DERECHO CONSTITUCIONAL DEL PODER II* 325 (2nd ed. 1967); RICARDO HARO, *CONTROL DE CONSTITUCIONALIDAD* 81 (2003); see also Néstor P. Sagüés, *El Control de Constitucionalidad de Oficio ¿Deber de los Jueces Argentinos?*, 2013-D LL 35 (2013) (arguing that judges act *sua sponte* and declare that a law is contrary to the Constitution but puts some caveats to that action).

101. My aim here is to highlight how lawyers, professors and judges do not realize or neglect the importance of the facts of the case and how from those particular facts the Court elaborates a solution for “any case” of *sua sponte* review of legislation. For those interested in a critique of the doctrine, see LUIS F. LOZANO, *LA DECLARACIÓN DE INCONSTITUCIONALIDAD DE OFICIO* (2004); Alberto F. Garay, *Controversia sobre el Control de Constitucionalidad de Oficio*, 2008-II JA 1404 (2008); Alberto F. Garay, *Sobre el Control de Constitucionalidad de Oficio, Nuevamente*, 2014-IV JA, 19/11/14 (2014).

102. See Alberto F. Garay, *El Recurso Extraordinario y la Vindicación de Derechos constitucionales y Federales*, in III *TRATADO DE LOS DERECHOS CONSTITUCIONALES* 981 (Julio César Rivera (h), José Sebastián Elías, Lucas Sebastián Grosman & Santiago Legarre eds., 2014); LAPLACETTE, *supra* note 98, at 107.

103. *Banco Comercial de Finanzas*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 19, 2004, Fallos 327:3117 (2004) (Arg.); In a previous case, only a plurality of the Justices agreed to the *sua sponte* power. See Rita Mill de Pereyra y otros c. Provincia de Corrientes, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 27, 2001, Fallos 324:3219 (2001) (Arg.).

law without the request of the interested party. The Supreme Court reversed the highest court judgment. The Court justified the possibility to declare unconstitutional a law without the request of interested party was as follows:

It is worth remembering that it is true that courts cannot give abstract opinions in matters of constitutionality. But the need for an express request from an interested party does not necessarily flow from that principle, because the control of constitutionality entails a question of law and not of fact, and Judges have the power to supplement the law that parties do not invoke or invoke erroneously -a power contained in the old adage *iura novit curia*-<sup>104</sup>. This power entails the duty to keep the supremacy of the Constitution (Article 31, Magna Charta) applying the highest-ranking norm, in case of collision, that is to say, the constitutional norm, and disposing the one of inferior rank.<sup>105</sup>

As it emerges from the previous transcript, the Supreme Court did not consider the specific fact and procedural setting of the case. It spoke completely in an abstract way about “*the control of constitutionality*,” “*iura novit curia*” and the “*supremacy clause*.” It did not make any qualification at all. And the case demanded qualifications because (i) the law in question had already been declared unconstitutional by the Supreme Court in the past,<sup>106</sup> (ii) the provincial intermediate court which acted *sua sponte* had grounded its decision in the Supreme Court precedent which had declared the law unconstitutional in a similar case and (iii) the highest provincial court had acted contrary to said Supreme Court ruling.<sup>107</sup>

The aforementioned circumstances showed that the case was so particular that it deserved to be treated in its own terms. To go beyond the specific facts of the case, beyond its particular procedural setting, and talk generally about the judges’ power to *sua sponte* declare a law unconstitutional was unnecessary and inapposite.<sup>108</sup> At the same time, several scholars celebrated the decision claiming that from now on it would be possible for judges to declare laws unconstitutional without the request of

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104. This adage did not specifically address questions of judicial review of legislation. Originally, it has served judges to apply a law not invoked by the interested party to solve the case. It has never been used to invalidate a law on constitutional grounds, when the interested party did not request that invalidation. See *Mill de Pereyra*, Fallos 324:3219 at 3262 (Moliné O’Connor, dissenting).

105. *Id.* at 3224.

106. *Id.* at 3221, 3223. The leading case was *Banco Sidesa S.A.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], July 15, 1997, Fallos 320:1386 (1997) (Arg.).

107. *Mill de Pereyra*, Fallos 324:3219, at 3225.

108. The Supreme Court added, always in general terms, that the *sua sponte* review of legislation did not offend the right of defense “*of the parties*” neither did it violate the principle of separation of powers. *Id.* at 3224-25.

aggrieved parties. One of them, C. Drake, stated that “our supreme tribunal has given room to the mechanism of the unconstitutionality *sua sponte* allowing judges to face this question without party request[.]” W. Carnota affirmed that in the light of the decision convincing arguments the debate about the Judges duty to act *sua sponte* and declare unconstitutional any law “appears as legal archeology.”<sup>109</sup>

Three years later, the academic enthusiasm waned. The Supreme Court enacted a set of Rules regulating the writ of appeal before it.<sup>110</sup> By Rule 3.d the appellant was obliged to state when and under what terms the federal question had been introduced by him or her in the case, a requirement historically attached to this appeal by the Supreme Court case-law. But that “formality” seemed unnecessary and even contradictory with the *Banco Comercial de Finanzas*’ holding, according to one scholar. If judges – including the Supreme Court Justices – are in the obligation to act *sua sponte*, her argument goes, they are obliged to identify and decide all the constitutional questions a case, any case, could have irrespective of the party’s requests.<sup>111</sup>

Apart from the impracticality of this general proposal – courts are generally overloaded – and putting aside the case of class actions, it is noteworthy the way in which most scholars everybody neglects the particular facts and the procedural setting of the case and the unnecessary generality of the reasons stated. It’s as though the *sua sponte* power has cast a spell that has made them blind to the facts.

### 3.4. The Cases of Drug Possession for Personal Consumption

There are cases in which the conditions under which a certain behavior has occurred are crucial to adjudge it as legal or illegal, constitutional or unconstitutional. Drug possession for personal consumption is one of those cases. In *Bazterrica*, the Supreme Court declared 3-2 that a law criminalizing

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109. Walter Carnota, *La Fundamentación de la inconstitucionalidad de oficio*, 2005-A LL 67 (2005) (Arg.); see Carlos E. A. Drake, *Control oficio de constitucionalidad*, 2006-1 LNBA 26 (2006). The same generality can be observed in Leandro Fernández, *Nuevos horizontes en el control de constitucionalidad*, 2005-C LL 482 (2005) (Arg.).

110. See Rule 3.b, Acordada No. 4 (2007), published in Fallos 330:1315 (2007). However, in *Jorge Luis Rodríguez Pereyra c. Ejército Argentino*, the Supreme Court, ignoring Rule 3.b Acordada 4 (2007), seemed to strongly endorse the *sua sponte* power of review. Jorge Luis Rodríguez Pereyra c. Ejército Argentino, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Nov. 27, 2011, Fallos 335:2333 (2012) (Arg.). Two years later, in *Mansilla*, the Court further weakened this approach. Carlos Mansilla c. Fortbenton Co Lanoratories S.A., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 6, 2014, Fallos 337:179 (2014) (Arg.).

111. See Fabiana B. Berardi, *De la articulación de la cuestión federal en tiempos de control de oficio*, 2005-III JA 446 (2005) (Arg.).

mere possession of narcotics for personal consumption was unconstitutional.<sup>112</sup> The majority vote – formed by a plurality opinion of two Justices and one concurrent opinion – considered that the law violated the constitutional right to privacy. The three Justices agreed in the result but stated independent reasons. However, the facts of the case were mentioned exclusively by the concurrent Justice, who referred to a bunch of particulars in a couple of lines, namely, what narcotics were at stake (marijuana and cocaine) and its (scarce) quantity.<sup>113</sup> No Justice stated under what circumstances the drugs had been found by the police- a relevant fact to determine the privacy of the behavior.

The rest of the lengthy concurrent vote and the plurality opinion dealt entirely with the politics of generally incriminating the mere possession of drugs (also, in general) for personal consumption, the experience of other countries dealing with the same issue, criminal theories involved, United Nations works, philosophical underpinnings of protecting strictly personal decisions that do not compromise other people, etc. The Justices wrote as if this single case would present the Court all the possible factual permutations and combinations. Of course, the dissent stated the contrary position in the same general terms.

After this decision was rendered, liberals effusively celebrated it but there was an important opposition on the part of many non-liberal social forces, politicians and academics, undoubtedly fed by the generality with which the majority had spoken. One would have thought that, due to the generality of the reasons stated, the majority votes had already decided the whole question. However, subsequent cases showed the importance of distinguishing on the facts of each case and re-directed the analysis to the path from which it had never deviated.<sup>114</sup>

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112. Gustavo Mario Bazterrica, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 23, 1986, Fallos 308:1392 (1986) (Arg.).

113. *Id.* at 1429 (Petracchi, J., concurring) (“el apelante dedujo recurso extraordinario, sosteniendo que dicha norma viola la garantía establecida en la primera parte del art. 19, de la Constitución Nacional, especialmente en atención a la exigua cantidad de sustancia hallada en poder del procesado (3,6 grs. de marihuana y 0,06 grs. de clorhidrato de cocaína[.]”) (translated as “the appellant filed the writ of appeal holding that said statutory norm violated the guarantee established in Article 19, National Constitution, especially taking into account the scarce quantity of substance found in the defendant[.]”).

114. *See* Alejandro Carlos Capalbo, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 29, 1986, Fallos 308:1392 (1986) (Arg.); María M. Noguera y otras, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Feb. 17, 1987, Fallos 310: 294 (1987) (Arg.); Gustavo Adolfo Von Wernich, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 24, 1987, Fallos 310:2836 (1988) (Arg.); Nancy G. Giménez y otros, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 1, 1988, Fallos 311:185 (1988) (Arg.); García, Alejandro M. y otros, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Nov. 1,

So, what initially appeared as a general *carte blanche* in favor of drug possession and consumption turned into a standard that would stress the conditions (not endangering nor harming third parties' rights or goods) under which the possession of drug for personal consumption was discovered.

Four years later, and after a legislative reform that *inter alia* reduced the punishment to be applied in drug possession for personal consumption cases,<sup>115</sup> the Court decided the *Montalvo* case.<sup>116</sup> A new majority in the enlarged Supreme Court<sup>117</sup> overruled *Bazterrica* completely, ignoring that long line of subsequent cases in which the Court, case by case, had restricted *Bazterrica*'s reach carving out an important number of exceptions to the leading case's holding.<sup>118</sup> The *Montalvo* Court also based its decision on reasons and assertions as general as the ones employed in *Bazterrica* and failed to describe minutely the facts of the case. Again, the Court spoke *ex cathedra*.

Thirteen years after *Montalvo*, and once again with a new majority, the Supreme Court re-considered the issue and, in *Arriola*,<sup>119</sup> overruled *Montalvo*. Late Justice Petracchi, author of the concurring vote in *Bazterrica*, referred to his original opinion. Two recently appointed Justices and another concurring vote that formed the majority bulk followed Petracchi's vote in *Bazterrica*, without adding or clarifying anything about the facts of that case and their bearing on the facts of the present one. Late Justice Fayt, dissenting in *Bazterrica* and with the majority in *Montalvo*, recasted his vote now in favor of protecting the liberty at stake. But the only one that highlighted the poor description of facts in *Bazterrica* and *Montalvo*, the pernicious generality in which those cases were drafted, the relationship

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1988, Fallos 311:2228 (1988) (Arg.); Myriam Gerstein, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 20, 1988, Fallos 311:2721 (1988) (Arg.); Fiscal c. Ideme, Daniel y Galesi, Alberto, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 25, 1989, Fallos 312:587 (1989) (Arg.); Sergio H. Di Capua, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 5, 1989, Fallos 312:1892 (1989) (Arg.); Emilio F. Rossi, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 19, 1989, Fallos 312:2475 (1989) (Arg.).

115. See Law No. 23737, art. 14, B.O. Oct. 11, 1989 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/138/norma.htm>.

116. Ernesto Alfredo Montalvo, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 11, 1990, Fallos 313:1333 (1990) (Arg.).

117. The number of Supreme Court Justices had been augmented from five to nine in 1990. See Law No. 23774, art. 21, B.O. Apr. 16, 1990 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/175/norma.htm>. Years later, that number was again reduced to five. See Law No. 26183, art. 21, B.O. Dec. 18, 2006 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/120000-124999/123154/norma.htm>.

118. See *supra* note 114.

119. Sebastián Arriola et al., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 25, 2009, Fallos 332:1963 (2009) (Arg.).

of the “case” with judicial review, the limits of the judicial power and the relevance of subsequent cases’ facts in order to get a holding, was the concurring vote of the late Justice Carmen Argibay.<sup>120</sup>

As it emerges from the cases restated above, the tendency to generalize, inherent in the civil law education, leads the Court to underestimate the precise facts of a case, categorizing them in very broad terms. The foregoing conclusion must be completed with another consequence of the education received. Contrary to common law doctrine,<sup>121</sup> in the Argentine Supreme Court (and in any court in Argentina) judicial language plays a very important role in that practice.

That is one of the reasons why decisions repeat lengthy prior decisions paragraphs. Generally, this way of conceiving of precedents resembles what professor Llewellyn called the “*loose view*” of precedent. In his words:

That is the view that a court has decided and decided authoritatively *any* points or all points on which it chose to rest a case, or on which to choose, after due argument, to pass. No matter how broad the statement. No matter how unnecessary on the facts or the procedural issues, if that was the rule the court let down, then that the court has held.<sup>122</sup>

#### 4. *Holding and Obiter Dictum*

##### 4.1. The Notion of Holding or Ratio Decidendi of a Case

As it was shown above, the Supreme Court and the district courts use to ground their decisions in Supreme Court precedents. But to affirm that inferior courts follow Supreme Court precedents is a sort of vague statement because it does not explain what “a precedent” is for those courts. The way district courts used Supreme Court judgments or a line of them in the nineteenth century to give support to their decisions was sometimes cryptic,

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120. The same generality and disdain for the facts of the case can be observed, among many others, in a famous abortion case. See *F. A. L. s/ Medida autosatisfactiva*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 13, 2012, Fallos 335:197 (2012) (Arg.).

121. Andrews, *supra* note 91, ch. III (“As mentioned, the judicial craft is not the same as legislative drafting. And so, the words (*ipsissima verba*) uttered by a superior court (whether oral and thus captured by a law reporter or written in a reserved judgment have no binding literal value as a set of words or series of propositions.”) (internal citations omitted). The same rule has been advanced in constitutional matters. See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (2001). A trend that tries to offer a lighter view of that classic understanding on both sides of the Atlantic can be found in FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 179 (2009); and NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* (2008).

122. LLEWELLYN, *supra* note 78, at 74.

either just citing a certain case by the parties' names only,<sup>123</sup> or just affirming that the decision they were adopting was equal to the one taken by the Supreme Court earlier.<sup>124</sup> Generally, they did not make explicit a principle, rule or *ratio decidendi* emanating from the judgment.<sup>125</sup> The same can be said of the way the Supreme Court worked during that Century.

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123. See, for instance, D. Ricardo Vadillo contra Pedro Palma y hermanos, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], July 7, 1881, Fallos 23:366, 367 (1881) (Arg.) (“Este juzgado no tiene jurisdicción para conocer., artículo 14 de la Ley Nacional de jurisdicción y competencia; jurisprudencia hecha por la Corte Suprema fallo: 146, Volume 3, 2nd serie, p. 505) (translated into English as “[T]his court has no jurisdiction., Article 14 national law of jurisdiction and venue; Supreme Court precedent, fallo: 146, Volume 3, 2nd serie, p. 505.”).

124. Rodríguez Balmaceda y Cía., contra el Fisco Nacional, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 5, 1868, Fallos 6:159, 160 (1868) (“[T]he Supreme Court of Justice . . . , has decided for the second time, giving to the word ‘party’ used in the cited Article of the Constitution a restrictive interpretation and declaring that the Nation is not a ‘suable party’ (case 77, p. 43, Volume 2[.])” (“La Corte Suprema de Justicia . . . ha resuelto por segunda vez dando á la palabra «parte» del citado art. de la Constitución una interpretación restrictiva y declarando que la Nación no es ‘parte demandable’ (causa 77, pág. 43, del tom. 2, de la publicación de los Fallos por su Secretario.”); Don Ramón Dávila, contra Don Ricardo Valdez, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 6, 1881, Fallos 23:726, 727 (1881) (Arg.) (“[A]nd Supreme Court precedents in analogous cases”) (“y la jurisprudencia seguida por la Corte Suprema en casos análogos[.]”); D. Tristán A. Malbrán, contra D. Antonio Marechal, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Feb. 26, 1885, Fallos 28:28, 30 (1885) (Arg.) (“And finally, that the latter are doctrines that the Supreme Court has made prevail in several decisions rendered after the one cited by the defendant; see 2nd. serie, Vol. 3, p. 7 and Volume 4, p. 392.”) (“Y finalmente, estas son las doctrinas que con más acierto y en conformidad a la Constitución y leyes, ha hecho prevalecer en diversas resoluciones posteriores al fallo citado por el demandado, vease 2ª. serie, Tomo 3º, pág. 7 y tomo 4º, pág. 392.”).

125. Of course, there were exceptions. For instance, in *Agustín Richeri* the district court said: [I]n the decision published at page 476, Volume 2, 2nd series, the Supreme Court, has declared that national courts do not have a supervisory power over the Municipalities for the delay in deciding matters conferred to the latter; and the fact of delaying the payment of the salary is one of those cases.

*Agustín Richeri* contra la Municipalidad de Buenos Aires, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Feb. 12, 1880, Fallos 22:37 (1880) (Arg.) (“Que... la Suprema Corte, en el fallo publicado en la página 476, tomo 2, serie 2ª, ha declarado que la Justicia Nacional no puede ejercer superintendencia en las Municipalidades por tardanza de éstas en resolver lo que á ellas corresponde; y el hecho de retardar el pago del sueldo se halla en este caso.”); *see also* Don Herlado Eckell, contra Empresa del Ferro-Carril del Sud, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 14, 1885, Fallos 28:75, 76 (1885) (Arg.) (“It is the law, that all the consequences of a maritime accident . . . must be litigated exclusively before the district court with jurisdiction over the waters where the accident happened, and so it is decided by the Supreme Court in the case Mensajerías Fluviales con Don Santiago Cánepa cited by Eckel.”) (“Que es de estricto derrecho, que todas las consecuencias jurídicas de un siniestro maritime . . . corresponden privativamente al juez de sección en cuyas aguas ocurre el hecho, y así se halla resuelto or la Suprema Corte en el caso que cita Eckell de las Mensajerías Fluviales con Don Santiago Cánepa.”); Varios comerciantes extranjeros [sic] contra D. Samuel Palacios y Compañía, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 17, 1885, Fallos 28:78 (1885) (Arg.) (“[I]t barely deserves mentioning that our Constitution,

Something that emerges from the case law is that both district courts and the Supreme Court were more focused in finding the similarities between cases than in making a rule, principle or *ratio decidendi* explicit from de judgment. This focus on similarities was kept until today. But the practice to regularly make the rule of prior cases explicit did not develop. There are also twentieth and twenty-first century decisions in which the Supreme Court uses the expression “holding”<sup>126</sup> or in some other times uses *ratio decidendi*,<sup>127</sup> to aim at what the Court decided in a previous case. However,

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in its Article 100, taken from the North-American, Article 3, Section 2, and our law on jurisdiction and venue, art. 2, section 2, adapting what is established by the Judiciary Act of 1789, state the federal jurisdiction the cases between a citizen and a foreigner; and the Supreme Court, in applying this principle, has observed a rigorous uniformity.” (“2° que apenas merece mencionarse que nuestra Constitución, en su artículo 100, tomado de la Norte-Americana, artículo 3°, Sección 2ª., adoptando lo dispuesto en la ley Judicial de los Estados Unidos de 1789, atribuyen al fuero federal las causas en que sean partes un ciudadano y un extranjero; y la Suprema Corte de la Nación, en la aplicación de este principio, ha observado una rigurosa uniformidad. T° 8, Série [sic] 1ª, pág. 156. T° 9°, pág. 350. T° 11, Série [sic] 2ª, pág. 393Tómo 14, pág. 731.”).

126. María Gabriela Osswald s/solicitud en autos “Willner, Eduardo Mario c. Osswald, María Gabriela s/exhorto”, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 17, 1995, (Fayt and Petracchi, dissenting) Fallos 318:541 (1995) (Arg.); Armando Boto c. Obra Social Conductores de Transporte Colectivo de Pasajeros, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 6, 1997, Fallos 320:786 (1997) (Arg.); César Luis Walta, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Nov. 21, 2004, Fallos 327:3829 (2004) (Arg.); Silvia Amanda Sevilla, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 30, 2014, unpublished opinion (2014) (Arg.); Champion IBSA c. Estado Nacional, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], July 10, 2018, unpublished opinion (Rosenkrantz, dissenting) (2018) (Arg.).

127. See Víctor Peláez, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 19, 1995, Fallos 318:1967 (1995) (Arg.); Isacio Aquino c. Cargo Servicios Industriales S.A., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 21, 2004, Fallos 329:5913 (2004) (Arg.); Casa Casmma S.R.L., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 26, 2009, (Argibay, concurring) Fallos 332:616 (2009) (Arg.); Horacio Osvaldo Benítez c. Plataforma Cero S.A., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 22, 2009, Fallos 332:2815 (2009) (Arg.); Carlos Fabián Cerigliano c. Gobierno de la Ciudad Autónoma de Buenos Aires, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 19, 2011, Fallos 334:398 (2011) (Arg.); Elsa Alejandra Monroy c. Infantes S.R.L., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 17, 2013, Fallos 336:1468 (2013) (Arg.); Hugo Miguel Cristiani c. IOSE, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Nov. 18, 2014, unpublished opinion (2014) (Arg.); Orlando Mario Gómez c. Estado Nacional, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Nov. 27, 2014, Fallos 337:1337 (2014) (Arg.); Villar, Lisandro Nelson c. COMFER, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], June 16, 2015, unpublished opinion (2015) (Arg.); Norma Alicia Lentine de Sarnari c. Estado Nacional, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 17, 2018, unpublished opinion (2018) (Arg.).

those notions are used loosely, without much precision.<sup>128</sup> The idea of “holding” or of *ratio decidendi* has never been subjected to the sophisticated analysis that they have received in the Common Law.

As I said before, instead of looking for a certain *ratio* or holding and make it explicit it is very common to find judgments in which the Court quotes, extensively or briefly, portions of a prior decision containing (i) the reason or reasons on which the decision rests or (ii) purposes or goals expressed in it. In cases referred in (i), the Court uses to quote -sometimes extendedly-<sup>129</sup> some selected paragraphs of it which, for today's Court, conveys the reason or reasons considered relevant to decide both cases alike. Other times, as was stated above,<sup>130</sup> *brevitatis causae* (for the sake of brevity) the sole reason for deciding is the ambiguous and vague reference to “the foundations” of a specific prior case. But as in the past, in present time the Court does not consider itself routinely obliged to take a step further and extract a principle or rule from the prior decision.

It is obvious that styling decisions in this way gives the Court some flexibility, yet it does it at the cost of indeterminacy. Without the constraints of any prior canonical formulation and without the obligation to explicitly state the rule from a past case, the Court can easily follow the precedent in future cases, but it could also revise and adjust its factual predicate. The Court could also revise and adjust the reasons, or the language used in the precedent in order to broaden or narrow its reach. Finally, by the same token, the Court could distinguish it. It is no secret that leaving those possibilities open weakens the precedent's guiding strength but neither the Court nor the academia has driven their attention to it.

Another disadvantage of the “flexible” style just mentioned is that, in contested matters which confront individual or minority rights *vis à vis* the Executive or Congress, the new decision of the Court relying in such a wide

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128. A curious case that attests the loose use of the word “holding” is found in *Amelia Ana Villamil c. Estado Nacional*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 28, 2017, Fallos 340:345 (2017) (Arg.). The Court did not make the holding explicit. Instead, it said: “The aforementioned difference results immaterial because it was not part of the Larrabeiti Yañez holding (stated in consideration No. 5 of said judgment).” *Id.* (“En efecto, la diferencia mencionada resulta inmaterial puesto que ella no fue parte del holding de «Larrabeiti Yañez» (expresado en el considerando 5º de dicha sentencia).”). If one reads the case *Anatole Alejandro Larrabaciti Yañez c. Estado Nacional*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 30, 2007, Fallos 330:4592 (2007) (Arg.) one finds that consideration No. 5 is fifty-six lines long and has references to three previous cases, one statute, one code article and different facts.

129. *See Carlos Eugenio Mansilla c. Fortbenton Co. Laboratories S.A. y otros*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 6, 2014, Fallos 337:179 (2014) (Arg.).

130. *See supra* section IV.2.

foundation and favoring the latter can be perceived by the public as spurious, politically influenced and this perception would inevitably undermine the Supreme Court credibility.

But in any case, why is this so? Why doesn't the Supreme Court formulate the rule of the case? Or why does it feel comfortable with just referring to some portions considered important or relevant? Is the aforementioned flexibility a good enough reason? The flexibility is an important reason but not the only one. Another reason already mentioned is that the legal profession tends to consider that a judgment is not a source of law in the Civil Law tradition: sources of law are constitutions, statutes, executive orders and administrative regulations.

This idea is at the base of that tradition. Sources of law are binding on all; judicial precedents only bind the parties to a lawsuit and the *jurisprudencia* -taken here as a collection of prior similar cases decided alike by the highest court within a jurisdiction- may be persuasive but never binding. So, if judicial decisions are not sources of law, they do not deserve scholars' nor judges' attention. Besides, and this is something not to underestimate, the overriding majority of Supreme Court Justices has not received any kind of training in the doctrine of precedent. Their education is overwhelmingly Continental.<sup>131</sup>

These ideas are mechanically repeated in Argentina and they coexist with the fact that courts, and particularly the Supreme Court, often use precedents and distinguish facts and procedural settings of prior cases. What is more –as we have seen in the drug possession for personal use and the *sua sponte* power cases,<sup>132</sup> the Court often renders decisions as if it were legislating. Taken at face value, this way of deciding expands its denied law generating capacity and blurs the distinction between holding and obiter dictum, a distinction which, as we will see, the Court repeatedly holds.<sup>133</sup> On the other side of the counter, and reasserting the relevance of this practice, lawyers also rely on precedents to support their arguments and some scholars have developed theories and doctrines based almost exclusively on Supreme Court's case-law.<sup>134</sup>

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131. Exceptions to this predominance are evidenced by former Chief Justice Genaro R. Carrió and, today, Chief Justice Carlos F. Rosenkrantz. Both Chief Justices pursued graduate studies and taught at U.S. universities.

132. See *supra* sections IV.3.1 and IV.3.2.

133. DUXBURY, *supra* note 121, at 90 (“If, within the common law tradition, the distinction between ratio decidendi and obiter dicta were not recognized judges would be able to create a more or less unlimited amount of new law and courts would be overwhelmed by precedent.”).

134. ALEJANDRO CARRIÓ, GARANTÍAS CONSTITUCIONALES DEL PROCESO PENAL (6th ed. 2015) (Arg.); GENARO R. CARRIÓ, EL RECURSO EXTRAORDINARIO POR SENTENCIA ARBITRARIA (Abeledo Perrot ed., 2nd ed. 1978) (Arg.); GENARO R. CARRIÓ, RECURSO DE AMPARO Y TÉCNICA

Separation of powers has been another reason historically argued in the Civil Law against the Doctrine of Precedent. Courts do not create law because that function belongs to the legislatures. However, it is undeniable that nowadays the doctrine of separation of powers is not generally endorsed as strictly as it was in the eighteenth and nineteenth centuries. That way of conceiving the separation of powers has been scholarly and judicially abandoned decades ago since the emergence of the Administrative State in the second third of the twentieth century.

Finally, at least in some occasions the Supreme Court has incidentally applied rules and standards that weren't enacted previously by any legislature or constitutional convention. They were the Court's own creation.<sup>135</sup> It is evident that the powers wielded by the Supreme Court in those cases, many of them supported in U.S. Supreme Court case law, cannot be squared with that old-fashioned notion of separation of powers that deny the possibility for the court to incidentally "create law" in the course of adjudicating cases.

#### 4.2. The Expression *Obiter Dicta*

The first time the Supreme Court was obliged to distinguish between what was decided in a judgment and other observations made in it, was in 1871, in a lawsuit coming from a provincial court. In *Banco de Londres* case,<sup>136</sup> when the defendant answered the complaint, she questioned the constitutionality of the provincial law on which the plaintiff based his action. With support on that defense, the defendant asked for removal from the provincial court to a federal court, motion which was denied. Nevertheless, apart from that, it seems that in the decisions denying removal both provincial courts also defended the constitutionality of the provincial law. The Supreme Court decided that the provincial court's denial of removing the case to a federal court was appropriate for three reasons: (i) the plaintiff's original right of action was based on a provincial law; (ii) the suit did not arise under the Constitution and (iii) the "defendant's defense on the unconstitutionality

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JUDICIAL (Abeledo Perrot ed., 2nd ed. 1987) (Arg.); JORGE A. GONDRA, JURISDICCIÓN FEDERAL (Edición de la Revista Jurisprudencia Argentina 1944) (Arg.); ESTEBAN IMAZ & RICARDO REY, EL RECURSO EXTRAORDINARIO (Abeledo Perrot ed., 2nd ed. 1992) (Arg.); SANTIAGO LEGARRE, OBLIGATORIEDAD ATENUADA DE LA JURISPRUDENCIA DE LA CORTE SUPREMA (Ábaco de Rodolfo Depalma ed., 2016) (Arg.); FELIPE S. PÉREZ, LA CONSTITUCIÓN NACIONAL Y LA CORTE SUPREMA: CON LA JURISPRUDENCIA SOBRE LOS ARTÍCULOS DE LA CARTA POLÍTICA (1962) (Arg.); JULIO CÉSAR RIVERA (H), LA LIBERTAD DE EXPRESIÓN Y LAS EXPRESIONES DE ODIO (Abeledo Perrot ed., 2000) (Arg.); BARRANCOS Y VEDIA, GRAVEDAD INSTITUCIONAL (Abeledo Perrot ed., 1991) (Arg.).

135. See cases *supra* accompanying notes 93 & 96, at 42-43.

136. *El Banco de Londres y Río de la Plata del Rosario c. D. Casimiro Rivadaneira*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 30, 1871, Fallos 10:134 (1871) (Arg.).

of the provincial law, is not enough to deprive the provincial court of its jurisdiction to decide the cases governed by provincial laws and litigated between neighbors of the same province.”<sup>137</sup> The Court added:

[T]hat the question on the constitutionality of the law on which the plaintiff based his right has not been decided yet . . . for the words registered in the decision at page twenty one and page forty five . . . , are not dispositive of the question nor do they have *res judicata* effect.<sup>138</sup>

After several years, general expressions used in prior decisions gave the Supreme Court a second opportunity to fine-tune the notion of what weight the Court was willing to recognize to them. In this occasion the general expressions at issue did not belong to a provincial court judgment as in the prior case, but they were Supreme Court’s.

In *Elortondo*,<sup>139</sup> the defendant had questioned an expropriation statute on constitutional grounds. The government defended the law based, *inter alia*, on two Supreme Court precedents. The unconstitutionality defense had been rejected by the district court and the defendant appealed. The majority of the Supreme Court held that the amount of property taken by the law exceeded what was strictly needed for the construction of an important Avenue in the city of Buenos Aires, a narrow interpretation of the “public use” concept contained in Article 17 of the Constitution.<sup>140</sup>

For the dissent, the legislative decision was not reviewable by the Court. Besides, according to this vote, the opinion of the Court was in sharp contradiction with what the Court had said in several prior expropriation cases as to the ample leeway the government had at the moment of determining the amount of land to be taken. In the dissent’s terms: “[T]he ‘Ferro-Carril Central Argentino’ case is so conclusive, that if the established

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137. *Id.* at 137 (“[Q]ue la objeción de inconstitucionalidad hecha por el demandado a la referida ley, no basta para privar a los Tribunales de esa Provincia, de la jurisdicción que les compete para conocer y decidir en causas regidas por leyes provinciales, y seguidas entre vecinos de la Provincia misma[.]”).

138. *Id.* at 138 (“[Q]ue la cuestión sobre constitucionalidad de la ley invocada por el demandante no ha sido resuelta ni aun está debidamente sustanciada todavía, pues las palabras que a ese respecto se registran en los considerandos de los autos que corren a fojas veinte y uno y fojas cuarenta y cinco de los que se hallan agregados, no son parte dispositiva ni hacen cosa juzgada.”).

139. *Municipalidad de la Capital c. Isabel A. de Elortondo*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 14, 1888, Fallos 33:162 (1888) (Arg.).

140. CONSTITUCIÓN NACIONAL [CONST. NAC.] ART. 17 (Arg.), [http://www.infoleg.gob.ar/?page\\_id=63](http://www.infoleg.gob.ar/?page_id=63). Article 17 states, part: “The property is inviolable and no inhabitant of the Nation can be deprived of it, but by virtue of judicial decision grounded in the law. The expropriation for public use must be established by law and previously indemnified.” *Id.* (“La propiedad es inviolable, y ningún habitante de la Nación puede ser privado de ella, sino en virtud de sentencia fundada en ley. La expropiación por causa de utilidad pública, debe ser calificada por ley y previamente indemnizada.”).

precedents deserve any respect it is unconceivable how the constitutionality of this statute has been brought before this Court.”<sup>141</sup>

The majority, after distinguishing the present case (an urban expropriation), from the precedents in which the plaintiff relied (rural expropriations), without even mentioning the *Banco de Londres* case, added:

[B]ecause whatever it is the generality of the concepts used by the Court in those cases, they cannot be understood but as related to the circumstances of the case that caused them, being as it is a maxim of law, that general expressions used in judicial decisions must always be taken in connection with the case in which they are used, and if they go beyond the case they may be respected but they cannot oblige the court in any manner whatsoever for the subsequent cases.<sup>142</sup>

This paragraph never ceases to amaze me, because what the Court presented as a “*maxim of law*” was certainly not a maxim of Argentine or Spanish law, but closer to a Common Law maxim.

Additionally, the paragraph just translated may also sound familiar to the American ears, and this is due to the fact that it was undoubtedly taken from the opinion of the Court penned by Chief Justice John Marshall in *Cohens v. Virginia*.<sup>143</sup> Many times the Supreme Court of Argentina cited cases decided by the U.S. Supreme Court. Those foreign precedents, as Miller says, had a legitimating force when interpreting analogous constitutional clauses and for many influential thinkers they represented the correct understanding of the Argentine clauses.<sup>144</sup> I ignore why in this particular opportunity the Court silenced the paragraph’s reference and omitted to add italics to it, when the aforementioned reliance was that frequent and the notion referred was devoid of any particular political

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141. *Elortondo*, Fallos 33:162, at 199 (“[E]l caso del Ferro-Carril Central Argentino es tan concluyente, que no se concibe cómo la cuestión de constitucionalidad de esta ley ha podido traerse ante esta Corte, si algún respeto han de merecer los precedentes establecidos.”).

142. *Id.* at 196 (“[P]orque cualquiera que sea la generalidad de los conceptos empleados por el Tribunal en esos fallos, ellos no pueden entenderse sino [sic] con relación a las circunstancias del caso que los motivó, siendo, como ejemplo, una máxima de derecho, que las expresiones generales empleadas en las decisiones judiciales deben tomarse siempre en conexión con el caso en el cual se usan, y que en cuanto vayan más allá, pueden ser respetadas pero de ninguna manera obligan el juicio del Tribunal para los casos subsiguientes.”).

143. *P.J. Cohen & M.J. Cohen v. Virginia*, 19 U.S. 264, 399 (1821) (“It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”). This paragraph is offered by Murphy and Kernochan as an example of *obiter dictum*. HARRY W. JONES, JOHN M. KERNOCHAN & ARTHUR W. MURPHY, *LEGAL METHOD* 131 (1978 ed.).

144. See Miller, *supra* note 15, at 11, ch. V.

meaning that could have refrained the Court from disclosing its American pedigree.<sup>145</sup>

Finally, the notion of *obiter dictum* has been used many times by the Supreme Court with or without reference<sup>146</sup> to its formulation in *Elortondo*, and is currently employed by it.<sup>147</sup> One can fairly say that the identification of peripheral, tangential or in passing comments in a decision is an activity incorporated into Supreme Court practice.

## 5. The Binding Character of Supreme Court Precedents

### 5.1. Introduction

We have seen that the Supreme Court of Argentina has used its past decisions in support of today's since its very beginnings. District courts have

145. According to García-Mansilla and Ramírez Calvo, some scholars have a sort of bias against the U.S. that lead those scholars to minimize the powerful influence the United States Constitution and, specifically, the influence its liberal values had on the Argentine Constitution, thereby falsifying the historical truth. See GARCÍA-MANSILLA & CALVO, *supra* note 2, at 6.

146. An interesting case in which the Court did not refer to *Elortondo* but applied the notion of *obiter dictum*, claiming the power of the deciding Court to say what was the rule of law for which the precedent is made to stand, is Félix Antonio Degó, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 20, 1958, Fallos 242:73 (1958) (Arg.).

147. Luis y Jutto Vila y otros c. Provincia de Córdoba, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 6, 1937, Fallos 178:308 (1937) (Arg.); Margarita M. Fornasini de Ponce, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 23, 1951, Fallos 219:583 (1951) (Arg.); Compañía Azucarera Tucumana S.A., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], June 2, 1975, Fallos 292:84 (1975) (Arg.); Eduardo Manuel Bocaccio, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 18, 1983, Fallos 305:1694 (1983) (Arg.); Horacio Verbitzky y otros, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], June 13, 1989, Fallos 312:916 (1989) (Arg.); Santiago Omar Riveros y otros, Dec. 11, 1990, (Petracchi and Oyhanarte, concurring opinion) Fallos 313:1392 (1990) (Arg.); Abaco Compañía Financiera S.A., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 24, 1992, Fallos 315:449 (1992) (Arg.); C. J. A., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 4, 1995, Fallos 318:2481 (1995) (Arg.); Sebastián Arriola y otros, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 25, 2009, (Argibay, concurring opinion) Fallos 332:1963 (2009) (Arg.); Unión de Usuarios y Consumidores c. E.N., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 1, 2013, Fallos 336:1612 (2013) (Arg.); Carolina Marite Muñoz y otro, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 6, 2014, Fallos 337:505 (2014) (Arg.); Isabel Lindow de Angio c. Gobierno de la Provincia de Santiago del Estero, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 3, 2015, Fallos 338:134 (2015) (Arg.); Leonel Ignacio Acosta, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 22, 2017, Fallos 340:1084 (2017) (Arg.); Recurso de Queja No. 1, Imputado: Carlos del Señor Hidalgo Garzón, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 4, 2018, unpublished opinion (Maqueda and Lorenzetti, concurring opinions) (2018) (Arg.).

also relied in Supreme Court precedents when deciding cases, generally taking for granted that Supreme Court decisions had to be followed. Among the federal cases that reached the Supreme Court during the nineteenth century, I could not find any district court decision that openly refused to follow Supreme Court precedents. On the contrary, the rhetoric employed by those courts allows me to infer that they considered themselves bound to follow Supreme Court precedents on point, notwithstanding the fact that there are not decisions in which a district court elaborates on this subject until 1883.<sup>148</sup>

The same can be said as to the way the Supreme Court worked during that Century.<sup>149</sup> Until today, I registered only one important nineteenth century case, *Sojo*,<sup>150</sup> rendered in 1887, in which the Supreme Court, in a split decision, 3-2, expressly overturned the decision in *Acevedo*.<sup>151</sup> Something not to disregard in the *Sojo* case is that the majority vote was conformed with the dissenter in *Acevedo* and two recently appointed Justices that hadn't participated in the *Acevedo* decision.<sup>152</sup> As we have seen above, it is precisely the binding character of Supreme Court past decisions what

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148. One district court decision that expressly affirmed that inferior courts should follow Supreme Court decisions rendered in analogous cases and which proceeded accordingly is *Rodríguez Balmaceda y Cia. c. El Fisco Nacional*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 5, 1868, Fallos 6:159, 160 (1868) (Arg.). However, the district judge limited the scope of the ruling to questions of jurisdiction, stating “as to the reach of the Federal Justice, the district courts must subordinate their proceedings to the jurisdiction established in the resolutions of their Superior.” *Id.* (“y que los Juzgados de primera instancia deben subordinar sus procedimientos a la jurisdicción establecida por las resoluciones de su Superior en cuanto al alcance de la justicia Federal[.]”) (internal citations omitted); see *Magdalena Videla c. Vicente Aguilera*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 9, 1870, Fallos 9:53 (1870) (Arg.). The first decision that reached the Supreme Court in which a district court expressly affirmed, *obiter dictum*, that there was no “legal” obligation to conform its decisions to Supreme Court precedents but followed them, was rendered in 1883 in the *Pastorino* case. *Bernardo Pastorino c. Ronillón, Marini y Cia.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], June 23, 1883, Fallos 25:364 (1883) (Arg.); see *infra* note 189, at 73, and accompanying text.

149. Miller, *supra* note 15, at 1559 (“Traditionally, both the Argentine Supreme Court and lower courts took the Argentine Supreme Court’s precedents seriously. At least through the 1890’s Argentine Supreme Court precedents were regarded as binding on the lower courts . . . Regarding the Supreme Court itself, the Court regularly cited its own precedents and sought to follow them[.]”) (internal citations omitted).

150. Eduardo Sojo, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 22, 1887, Fallos 32:120 (1887) (Arg.).

151. Eliseo Acevedo, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 1, 1885, Fallos 28:406 (1885) (Arg.). The Court formed a quorum, with only three Justices out of five. The majority was signed by Domínguez and Federico Ibaguren. Frías voted in dissent.

152. Recently appointed Justices Victorica and Zavalía, and experienced Justice Frías formed the majority opinion of the Court. Justices Ibaguren and de la Torre (both in the majority decision in *Acevedo*) dissented. See *Sojo*, Fallos 32:120; *Acevedo*, Fallos 28:406.

Justice Zavalía – now in the majority overruling decision – will claim two years later in his dissent in *Elortondo*.

There is much literature on *stare decisis* in the common law world. As expected, not everybody offers the same idea about the binding effect of highest courts decisions. Besides, in the U.S. one important difference to take into account refers precisely to the subject matter. I am aware that *stare decisis* offers its weakest form in constitutional adjudication.<sup>153</sup> In Argentina we don't find such an abundant and varied offer. Yet, the problem has been expressly discussed judicially and academically in some occasions, as we'll see in the following pages.

## 5.2. The Supreme Court's Respect for its Own Precedents

### 5.2.1. Political Instability of the Past

Before speaking about *stare decisis* it is necessary to take a fast trip through Argentine political convoluted life in the twentieth century. Until 1930 one does not perceive that the Court has overruled its own precedents very frequently. There's being some changes in the case law, but they did not damage the Court's credibility.<sup>154</sup> Constitutional law scholars of the time did not attack the Court for rendering overruling decisions too often either.<sup>155</sup> Nevertheless, since 1930, political instability was a constant feature of Argentine life until 1983. In between those years, Argentina experienced six coups d'état (1930, 1943, 1955, 1962, 1966 and 1976).

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153. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV., 723, 741 (1988) (“Resort to *stare decisis* presents formidable problems. In the common-law area, the doctrine has been the target of unremitting attack throughout this Century . . . . If *stare decisis* cannot maintain a powerful grip on the common-law system that spawn it, it is not surprising that it appears to have fare still worse in the highly charged atmosphere of constitutional adjudication.”).

154. Santiago Legarre agrees with this assessment. See Santiago Legarre, *Precedent in Argentine Law*, 57 LOYOLA L. REV. 781, 788 (2011) (“[A]t the appellate level, including the Supreme Court, courts tend to follow prior decisions and treat them, to some extent, as precedent.”).

155. Probably the most famous cases of the first third of the 20th century were those that attacked the first rent control law. See generally Agustín Ercolano c. Julieta Lanteri de Renshaw, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 28, 1922, Fallos 136:161 (1922) (Arg.); José Horta c. Ernesto Harguindegui, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 21, 1922, Fallos 137:47 (1922) (Arg.); Leonardo Mango c. Ernesto Traba, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 26, 1925, Fallos 144:219 (1925) (Arg.). On the mortgage moratorium law, see Oscar Agustín Avico c. Saúl G. de la Pesa, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 7, 1934, Fallos 172:21 (1934) (Arg.).

In 1930 the Court was left untouched and in 1943 the military *junta* covered a vacancy in the Court appointing one Justice.<sup>156</sup> In 1947, Perón put into effect his own Court packing plan. As a consequence of it, the Supreme Court Justices were successfully impeached and replaced with members of the political party in government. The only exception was the Justice that had been appointed by the military government in 1943, who remained in Court. In 1949 a Constitutional Convention replaced the 1853-1860 Constitution with a completely new one.

In 1955, a new *coup d' état* overthrown the government and removed the Justices of the Supreme Court, appointing five new Justices. In 1957, the 1949 Constitution was abrogated by the *de facto* government and it reinstated the 1853-1860 Constitution. Also in 1957, a Constitutional Convention reinstated the 1853-1860 Constitution and added several amendments. The same replacements and appointments happened in 1966 and 1976 *coups d' état*, and new Justices were also appointed by the democratically elected governments in 1973 and 1983.

#### 5.2.2. *Stare Decisis and the Supreme Court Case Law: A Rule that Allows Exceptions*

As one can fairly infer from the previous survey, the political instability of Argentina in the period 1930-1983 should have had its counterpart in the Supreme Court case law. To say the least, it would be too much to ask a Supreme Court appointed by a democratic government to respect precedents established by its *de facto* predecessors.<sup>157</sup> The decisions of the later may be persuasive but never binding. Its spurious origin undermines its authority.

However, the political situation has been different since 1983. Governments have been freely elected by the people and Supreme Court appointments have been made in accordance with the Constitution. Generally speaking, and considering the historical background against which the Supreme Court acts, during this period there has been stability in the Court case law except for highly important cases that for different reasons may be considered worth of overruling by a circumstantial majority. In exceptional cases of the sort just referred the Justices don't appear to feel constrained by precedent.

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156. Juan Domingo Perón was the Vice President of that *de facto* government and, at the same time, was acting as Minister of War and Secretary of Labor.

157. The Supreme Court has either explicitly or implicitly overruled its own precedents many times, regardless of the legitimacy of the Courts that handed down those decisions. See Alberto F. Garay, *Federalism, the Judiciary and Constitutional Adjudication in Argentina*, 22 INTER-AM. L. REV. 161, 189, n.201 (1991).

In Argentina one may confirm Justice Scalia's assertion that "overruling of precedent rarely occurs without change in the Court's personnel."<sup>158</sup> The descriptive difference with Scalia's assertion rests in context: in the twentieth and twenty-first centuries the Argentine Supreme Court's personnel, many times the full Court's personnel at once, has been replaced more frequently than in the U.S. Supreme Court.<sup>159</sup> The drug possession for personal consumption saga, commented above, is a good example in a highly contested issue. The *Bazterrica* case<sup>160</sup> – decided by 1983 Supreme Court appointees – overruled *Colavini*,<sup>161</sup> a case that had been rendered eight years before by a Supreme Court composed of different Justices, all of them appointed by the 1976 *de facto* government. Five years later, in *Montalvo*,<sup>162</sup> a majority of the Court overruled *Bazterrica*.<sup>163</sup> Finally, the *Arriola* case,<sup>164</sup> overruling *Montalvo*, was decided in 2009 after two Justices of the *Montalvo* majority (plus other two Justices previously appointed by President Menem) were impeached during Néstor Kirchner's government.

If the Court renews its personnel very frequently and if there is not a strong tradition favorable to *stare decisis*, it only seems inevitable that the Supreme Court's case law will reflect this.<sup>165</sup>

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158. *South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting).

159. See the list of Justices until 1987 in JONATHAN MILLER ET AL., *CONSTITUCIÓN Y PODER POLÍTICO: JURISPRUDENCIA DE LA CORTE SUPREMA Y TÉCNICAS PARA SU INTERPRETACIÓN* 1155-57 (1987); see *El Período de la Continuidad Institucional*, in 1 *HISTORIA DE LA CORTE SUPREMA ARGENTINA* 23, 41 (Alfonso Santiago ed., 2013).

160. See the cases cited *supra* note 112 and accompanying text.

161. Ariel Omar Colavini, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 28, 1978, Fallos 300:254 (1978) (Arg.).

162. See cases, *supra* note 116 and accompanying text.

163. However, that majority decision was obtained after President Menem's government enlarged the Supreme Court from five to nine members in 1990, appointing finally six new Justices due to two preexisting vacancies.

164. See cases, *supra* note 119 and accompanying text.

165. Garay, *supra* note 41. A quick survey of the last fifteen years shows the following overruling decisions: Banco Comercial de Finanzas S.A. (en liquidación Banco Central de la República Argentina), Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 19, 2004, Fallos 327:3117 (2004) (Arg.), *overruling* Ganadera Los Lagos S.A. c. Nación Argentina, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], June 30, 1941, Fallos 190:142 (1941) (Arg.); Isacio Aquino c. Cargo Servicios Industriales S.A., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 21, 2004, Fallos 327:3753 (2004) (Arg.), *overruling* Juan Ramón Gorosito c. Riva S.A., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Feb. 1, 2002, Fallos 325:11 (2002) (Arg.); María del Carmen Sánchez c. ANSeS, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 17, 2005, Fallos 328:1602 (2005) (Arg.), *overruling* Sixto Celestino Chocobar v. ANSeS, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 27, 1996, Fallos 319:3241 (1999) (Arg.); Alberto Damián Barreto y otra c. Provincia de Buenos Aires, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 21, 2006, Fallos 329:759 (2006) (Arg.), *overruling*

One of the first times the Court expressly treated its overruling power was in *Baretta*,<sup>166</sup> a case decided in 1939. Two years before *Baretta*, the Court had decided *Vila*<sup>167</sup> where it had designed a new standard under which to consider cases on provincial taxes levied by a Province allegedly contrary to several articles of the Constitution. After the *Baretta* Court decided to follow *Vila*'s holding, it also stated:

The Court's decision . . . must comply . . . with the conclusions reached in *Vila*, because the Tribunal could not move away from its case law but under causes sufficiently serious as to justify the change of criteria. It would be extremely inconvenient to the public[,] if precedents were not duly regarded and implicitly followed. And even if the latter does not mean that the authority of those antecedents are not decisive in every respect, nor that in constitutional matters the principle of stare decisis applies without any reservation[,] it is not less true that if the error and inconvenience do not clearly emerge from the decisions already rendered, then the solution of the instant case must be found in the referred precedents.<sup>168</sup>

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Beatriz Isabel de Gandía c. Provincia de Buenos Aires, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 6, 1992, Fallos 315:2309 (1992) (Arg.); Gobierno de la Ciudad de Buenos Aires c. Provincia de Tierra del Fuego, Dec. 18, 2007, Fallos 330:5279 (2007) (Arg.), *overruling* Gobierno de la Ciudad de Buenos Aires c. Casa de la Provincia del Chubut, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 5, 2003, Fallos 326:2479 (2003) (Arg.); Sebastián Arriola y otros, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 25, 2009, Fallos 332:1963 (2009) (Arg.), *overruling* Ernesto Alfredo Montalvo, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 11, 1990, Fallos 313:1333 (1990) (Arg.); César Alejandro Baldivieso, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 20, 2010, Fallos 333:405 (2010) (Arg.), *overruling* Norma Beatriz Zambrana Daza, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 12, 1997, Fallos 320:1717 (1997) (Arg.); Leopoldo Héctor Schiffirin c. Poder Ejecutivo Nacional, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 28, 2017, Fallos 340:257 (2017) (Arg.), *overruling* Carlos Santiago Fayt c. Estado Nacional, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 19, 1999, Fallos 322:1616 (1999) (Arg.).

166. Miguel Baretta c. Provincia de Córdoba, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 15, 1939, Fallos 183:409 (1939) (Arg.).

167. Luis y Justo Vila y otro c. Provincia de Córdoba, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 6, 1937, Fallos 178:308 (1937) (Arg.).

168. *Baretta*, Fallos 183:409, at 413 (“La sentencia . . . debe ajustarse . . . a las conclusiones de aquél, porque no podría el tribunal apartarse de su doctrina, sino sobre la base de causas suficientemente graves, como para hacer ineludible tal cambio de criterio. Sería en extremo inconveniente para la comunidad –dice Cooley citando al Canciller Kent, *Constitutional Limitations*, T. 1, pág. 116– si los precedentes no fueran debidamente considerados y consecuentemente seguidos. Y aun cuando ello no signifique que la autoridad de los antecedentes sea decisiva en todos los supuestos, ni que pueda en materia constitucional, aplicarse el principio de ‘stare decisis’, sin las debidas reservas –conf. Willoughby, *On the Constitution*, pág. 74– no es menos cierto que cuando de las modalidades del supuesto a fallarse, no resulta de manera clara, el error y la inconveniencia de las decisiones ya recaídas sobre la cuestión legal objeto del pleito, la solución del mismo debe buscarse en la doctrina de los referidos precedentes.”).

This case has been quoted or cited by the Supreme Court in many occasions.<sup>169</sup> If one takes into account the Supreme Court case law until 1930, the compromise assumed by the Court in *Baretta* and in many other cases handed down since 1983 in which it mentions or quotes with approval the principle announced in *Baretta*, one could assert that the Supreme Court tends to respect its own precedents. Thus, from all those cases and the regularity that they represent, one can make explicit a rule that command the aforementioned respect. Undoubtedly, that due respect would not be an inexorable command, as Justice Brandeis<sup>170</sup> and others have approvingly held many years ago, but a rule with exceptions is still a rule.<sup>171</sup>

The foregoing ideas were adopted by the Argentine Supreme Court in what appears to be a consistent line of precedents that started with a dissent<sup>172</sup> and years later became the opinion of the Supreme Court. In *Barreto*,<sup>173</sup> the Court held that the respect of its own precedents is not a rigid rule and allows some exceptions. After reciting the *Baretta* quoted paragraph, the Court considered that among the causes that authorize an overruling are (i) the erroneous character of the decision in question, (ii) the lessons of the experience and (iii) the changing historical circumstances.<sup>174</sup> The exceptions announced are expressly rooted in U.S. Supreme Court precedents.

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169. See *Sucesión Emilia Namen de Cheuan c. Dirección Nacional de Aduanas*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 20, 1995, unpublished opinion (1995) (Arg.); *Alberto Damián Barreto y otra c. Provincia de Buenos Aires*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 21, 2006, Fallos 329:759 (2006) (Arg.); *Arte Radiotelevisivo Argentino c. Estado Nacional*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Feb. 11, 2014, Fallos 337:47 (2014) (Arg.); *Eduardo Díaz García c. Swiss Medical ART*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 4, 2018, unpublished opinion (Rosatti dissenting) (2018) (Arg.); *Recurso de Queja No. 1, Imputado: Carlos del Señor Hidalgo Garzón*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 4, 2018, unpublished opinion (2018) (Arg.); *Daniel Alberto Tejada c. Asociart S.A.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 18, 2018, unpublished opinion (Rasatti dissenting) (2018) (Arg.).

170. *Burnet v. Coronado Oil & Gas Co.*, 286 U.S. 393, 405-06 (1932).

171. HERBERT L.A. HART, *THE CONCEPT OF LAW* 136 (Oxford University Press, 10th ed. 1971) (“It does not follow from the fact that such rules have exceptions incapable of exhaustive statement, that in every situation we are left to our discretion and are never bound to keep a promise. A rule that ends with the word ‘unless . . .’ is still a rule.”).

172. See *Ernesto Alfredo Montalvo*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 11, 1990, Fallos 313:1333 (Petracchi, J., dissenting) (1990) (Arg.).

173. *Alberto Damián Barreto y otra c. Provincia de Buenos Aires y otro*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 21, 2006, Fallos 329:759 (2006) (Arg.); see *Mabel Itzcovich c. Anses*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 29, 2005, Fallos 328:566 (2005) (Arg.); *Carlos Alberto Rosza y otro*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 23, 2007, Fallos 330:2361 (2007) (Arg.).

174. *Barreto*, Fallos 329:759, at 765.

### 5.2.3. *Is the Horizontal Stare Decisis a Sound Principle?*

Objections to the binding character of Supreme Court decisions abound in Argentina. Most of them are the same as those expressed two centuries ago in England by Hobbes or Bentham,<sup>175</sup> or in the twentieth century in the U.S. by Brandeis<sup>176</sup> and many more. All of them appeal to the decision's correctness (its "error") and, in the case of Brandeis, to the idea that to follow or not to follow a Supreme Court precedent is "a question entirely within the discretion of the court." The same ideas may have a different impact in a civil law mind. The ideas of the "decision's correctness" or "the discretion of the Court" – operating without the constraining principles of the Common Law in the background – taken to its full extension would authorize a Court to overturn a decision if simply thinks that the decision's holding is wrong.

In my opinion horizontal *stare decisis* is an indispensable tool in any court system. It fosters equal treatment, legal certainty, foreseeability and economy, values traditionally ascribed to the doctrine of precedent<sup>177</sup> and implicit in the idea of the supremacy of law that permeates the systems of Civil Law. "Nobody is above the law" is a repeated phrase in both legal traditions and that limit also operates on the Justices. I submit that such a limit may be rooted in the Constitution and in the precedents that interpret it.

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175. See DUXBURY, *supra* note 121, at 17 ("Bentham was forthright on this point: although we speak of a judge creating a rule when pronouncing a decision, this decision can be 'nothing more than a particular rule, bearing upon the individual person and things in question.' 'Rules? yes,' he asserted, 'Rules of law? No', for the binding force of the decision does not extend beyond the particular instance . . . . Hobbs appreciated that precedents may be treated as authoritative, but did not consider they must be: judicial reason, he claimed, is neither the artificial perfection of reason extolled by Coke nor the 'right reason' of the sovereign, but merely the natural reason of any competent person; judges are as prone to error as anyone else, and so while a judge today might well follow an example set by his forbears because he finds it satisfactory, he should not consider it binding – even 'though sworn to follow it' – if he considers it mistaken.").

176. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-07, 412-13 (1932) (Brandeis, J., dissenting) ("Stare decisis is not, like the rule of *res judicata*, a universal, inexorable command . . . . Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions . . . . In cases involving constitutional issues of the character discussed, this Court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained, so that its judicial authority may, as Mr. Chief Justice Taney said, 'depend altogether on the force of the reasoning by which it is supported.'") (internal citation omitted); *Hertz v. Woodman*, 218 U.S. 205, 212 (1910) ("The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided.").

177. RICHARD WASSERSTRÖM, *THE JUDICIAL DECISION: TOWARDS A THEORY OF LEGAL JUSTIFICATION* 56-74 (1961).

On the one hand, as I have showed in Part II above, the idea of treating similar cases alike has an ancient pedigree in Argentine history. This was a demand of the legal profession that the Supreme Court respected since its establishment in the nineteenth century. During those years, there weren't frequent overrulings. That principle was also respected by the district courts. At the same time the American Constitutional practice furnish the Argentine federal system with tools that presupposed the principle of *stare decisis*, the idea of precedent and of *obiter dictum*.<sup>178</sup> As a consequence of this respect, the case-law was stable until 1930s. So, one can fairly say that the need of stability in judicial decisions was implicit in the idea of Judicial Power consecrated in the Constitution. Obviously, you can't attain stability if the system does not articulate some kind of *stare decisis*. It is not a mere coincidence that during this period of legal stability the Argentine economy grew at a formidable rate and citizens enjoyed a high standard of living despite some corrupt political practices.<sup>179</sup>

On the other hand, the appointment of a new Justice cannot be viewed as a sufficient reason to overrule a decision because a dose of impersonality is of the essence of the judicial function, particularly when the Court is interpreting the Constitution.<sup>180</sup> If a simple change of personnel would be considered a sufficient reason to legitimate an overruling one could say that the Court is acting as if it were the Congress before new legislation. Simple majority rule and contingent value predilections can be argued for by legislators as inherent in their political capacity. Further, they can legitimately argue that the people voted them to implement those values through appropriate legislation.

But a Supreme Court Justice (or judges generally) can neither claim the same power nor the same representation as legislators. They do not carry a popular representation and their positions are for life (as long as they observe good behavior). Their decisions must be impartial and detached from any political affiliation. A Justice must not confuse the constitutional rights and powers with their personal preferences.

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178. Bear in mind the *Elortondo* case, analyzed *supra* section IV.4.2.

179. See Miller, *supra* note 15, at 1534.

180. The idea of impersonality is stressed by Monaghan as to the U.S. Supreme Court. See Monaghan, *supra* note 153, at 752. The Supreme Court of Argentina has returned to the bad habit of highlighting the presence of new Justices in the Supreme Court when overruling a prior decision. See Alberto Damián Barreto y otra c. Provincia de Buenos Aires y otro, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 21, 2006, Fallos 329:759 (2006) (Arg.) (“Tribunal’s members that subscribe this decision consider that the generalized notion of ‘civil cause’ that is in use since the 1992 precedent just mentioned must be abandoned.”) (“4°. Que los miembros del Tribunal que suscriben esta decisión consideran que debe abandonarse la generalizada calificación del concepto de ‘causa civil’ que se viene aplicando desde el citado precedente de 1992.”).

As Justices O'Connor, Kennedy and Souter said in *Casey*:

[O]ur obligation is to define the liberty of all, not to mandate our own moral code . . . . To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.<sup>181</sup>

Changes in the constitutional case law must be tolerated and may be made. But in order to implement them, special circumstances must concur. The Argentine Supreme Court, following the categories allowed by the U.S. Supreme Court has articulated them. Apart from the case of “error” – a category too much malleable as to consent to it without reservations – the remaining circumstances can be fairly tested. If the Justices behave with candor, and I stress upon the word candor, those categories may fulfill the purpose for which they were created.

#### 5.2.4. *The Vertical Reach of Precedent*

When the U.S. Supreme Court decides a constitutional issue, its holding binds every federal and state court addressing the same constitutional issue.<sup>182</sup> In Argentina the same rule is a matter of debate. Initially, federal courts appear to follow Supreme Court case-law. For instance, in the *Rodríguez Balmaceda*,<sup>183</sup> case the question was whether the Government could be sued. After considering an analogous case decided by the Supreme Court, the district judge stated that “as to the reach of the Federal jurisdiction, the district courts must subordinate their proceedings to the jurisdiction established in the resolutions of their Superior.”<sup>184</sup> The Supreme Court, after reciting the rule that stated that the Government couldn't be sued, rule mentioned by the district court, expressly referred to the same Supreme Court case cited by the district judge on support of its decision and affirmed the judgment.<sup>185</sup>

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181. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850, 864 (1992) (citing *Mitchell v. W T. Grant Co.*, 416 U. S. 600, 636 (1974) (Stewart, J., dissenting) (“A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve”); and *Mapp v. Ohio*, 367 U. S. 643, 677 (1961) (Harlan, J., dissenting).

182. See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576 (1987).

183. *Rodríguez Balmaceda y Cía. c. el Fisco Nacional*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 5, 1868, Fallos 6:159 (1868) (Arg.).

184. *Id.* at 160 (“y que los Juzgados de primera instancia deben subordinar sus procedimientos a la jurisdicción establecida por las resoluciones de su Superior en cuanto al alcance de la justicia Federal[.]”) (internal citations omitted).

185. *Id.* at 161 (“No pudiendo ser demandada la nación ante los Juzgados Federales, como lo tiene ya declarado la Suprema Corte, en el caso citado por el Juez de Sección, y en otros análogos,

Two years later, in *Videla*,<sup>186</sup> the federal judge, after making explicit the holding of a prior Supreme Court's decision, stated that:

[T]he federal courts must conform their proceedings and resolutions to the Supreme Court's resolutions rendered in analogous cases . . . . The present case is identical to the case of Mr. de la Peña and his wife Elena Eiras . . . so the case must be decided in the same way, subordinating its decision to the Supreme Court declarations[.]<sup>187</sup>

The Supreme Court upheld the appealed judgment. The Supreme Court held: "in accordance with the grounds stated therein, the judgment is affirmed."<sup>188</sup> The brevity of the Supreme Court judgment raises problems of interpretation. For it is not altogether clear whether the Supreme Court approves the whole opinion, some parts of it or just the holding. In spite of that ambiguity, in my view, if the Court had considered that the "*subordination*" announced by the district court was a wrong assumption, it would have corrected it. Particularly, because it was the second time a district court declared that subordination. Besides, as I stated before, federal courts usually followed Supreme Court precedents to decide those cases under their jurisdiction.

Nevertheless, thirteen years later, another district judge stated a different argument that would change the judges' position as to Supreme Court's precedents. In *Pastorino*,<sup>189</sup> the plaintiff had argued that his claim was based on a Supreme Court precedent. The district court reviewed the precedent and concluded that it did not support the plaintiff's claim. Following that, the judge said:

On the other side, the Supreme Court resolutions only decide the concrete case under its consideration, and they do not legally obliged but to the parties to the lawsuit; the difference between the legislative function and the judicial one lays therein. If it is true that it exists a moral obligation of inferior judges to conform their decisions to the Supreme Court's in

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se confirma el auto apelado de fojas treinta y seis, con costas; y satisfechas éstas y repuestos los sellos, devuélvase.”).

186. Magdalena Videla c. Vicente García Aguilera, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Apr. 9, 1870, Fallos 9:53 (1870) (Arg.).

187. *Id.* at 54 (“[Q]ue los Juzgados Seccionales deben ajustar sus procedimientos y resoluciones, a las decisiones de la Suprema Corte, que en casos análogos dicte haciendo jurisprudencia . . . . Que siendo este juicio idéntico al de la señor de la Peña y su esposa Elena Eyras . . . , debe resolverse el caso del mismo modo, subordinándose a las declaraciones de la Suprema Corte.”).

188. *Id.* at 55 (“Y vistos: por su fundamento se confirma, con costas, el auto apelado de fojas catorce y vuelta, y satisfechas éstas y repuestos los sellos, devuélvase.”). At the time, the Supreme Court commonly used this formula.

189. Bernardo Pastorino c. Ronillón, Marini y Cia., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], June 23, 1883, Fallos 25:364 (1883) (Arg.).

analogous cases . . . that obligation is mainly grounded in the presumption of truth and justice that informs the wisdom and integrity that characterize to the magistrates that conform it. That obligation has the purpose of preventing useless appeals, but this does not take away from the judges the power to appreciate with its own criteria those resolutions and depart from them when, in its judgment, they do not conform to clear legal rules, because no court is infallible. Besides there are precedents than run counter previous ones decided in analogous cases.<sup>190</sup>

The judge's *dictum* is not entirely clear. It undoubtedly was an *obiter dictum* because that exposition was not necessary to reach the result. The district judge expressly recognized it in the following lines. The appeal to the "moral" obligation, in a Civil law country, clearly diminishes the force of the obligation. It is an obligation that is not established by statute or code rule. It is merely "moral," that is, an obligation to be fulfilled if, and only if, the obliged considers that it deserves to be fulfilled. So, the obligation depends entirely on the obligated willingness. But, be it as it may, this *dictum* seems to be limited to very anomalous cases in which the Supreme Court precedent is rendered contrary to "clear legal rules" ("*preceptos claros del derecho*"). The district judge paragraphs previously quoted did not have any serious repercussion in the Supreme Court. It laconically affirmed the lower court's decision "by its foundation" and only reversed it in a minor question of fact.

Many years later, in *Cermámica San Lorenzo*,<sup>191</sup> the Supreme Court introduced a very disturbing caveat. In this case, the inferior court had decided against a Supreme Court's precedent, without considering the statutory interpretation the Supreme Court had made therein and despite the fact that the aggrieved party had supported her defense on that precedent. The Supreme Court reversed, because the decision under consideration had decided against the precedent "without making new arguments that would justify a change in the position settled by the Court in its character of final

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190. *Id.* at 368.

Que por otra parte, las resoluciones de la Corte Suprema sólo deciden el caso concreto sometido á su fallo y no obligan legalmente sino en él, en lo que consiste particularmente la diferencia entre la función legislativa y la judicial; y si bien hay un deber moral para los jueces inferiores en conformar sus decisiones como la misma Corte lo tiene decidido en casos análogos, á [sic] los fallos de aquél Alto Tribunal, él se funda principalmente en la presunción de verdad y justicia que á [sic] sus doctrinas dá [sic] la sabiduría é [sic] integridad que caracteriza a los magistrados que la componen, y tiene por objeto evitar recursos inútiles, sin que esto quite a los jueces la facultad de apreciar con su criterio propio esas resoluciones y apartarse de ellas cuando á [sic] su juicio no sean conformes á los preceptos claros del derecho, porque ningún Tribunal es infalible y no faltan precedentes de que aquellos han vuelto contra resoluciones anteriores en casos análogos.

*Id.*

191. *Cerámica San Lorenzo*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], July 04, 1985, Fallos 307:1094 (1985) (Arg.).

interpreter of the Constitution and of the laws enacted as a consequence of it[.]”<sup>192</sup>

On one level, the decision is contradictory. The Supreme Court cannot hold that lower courts have no real legal obligation to follow Supreme Court precedents, while simultaneously holding that a lower court which departs from precedent must furnish novel grounds for disregarding it, or else the Supreme Court will reverse. It is obvious that if the lower court must provide “*new grounds*” in case of departure, it is because the precedent binds in the sense that, regardless your own contrary point of view on the matter, you have to follow the precedent on point.

Additionally, the Supreme Court cited three cases in support of its conclusion: *Pastorino*,<sup>193</sup> *Santín*<sup>194</sup> and *Pereyra Iraola*.<sup>195</sup> *Pastorino* calls for a moral obligation to follow precedent unless the latter shows a departure from “clear legal rules.” *Santín* accepts a departure from precedent based on “new and justifiable controverting grounds.”<sup>196</sup> And *Pereyra Iraola*, stresses that discarding Supreme Court precedents would damage the constitutional order.<sup>197</sup> It is evident that one cannot make explicit a rule that embodies the three cases. Still, to allow lower courts departure from precedent as long as they have “novel grounds” was an invitation to disagree. Because, in what sense of “novel” or “new” has an argument to be in order to satisfy *Cerámica San Lorenzo*?

This vague requirement gives great leeway to the rebellious judges’ imagination, it fosters unending litigation, deteriorates the Supreme Court credibility, it breeds uncertainty and it turns the law unstable. If you add to this short list the pernicious idea that for some scholars and judges the appointment of new Justices would legitimate *per se* a precedent’s overruling, you have created a chaotic system where anything or almost anything goes.

Dawson’s remarks about the French legal system are a perfect fit for those who oppose *stare decisis* in Argentina. As he put it:

An effective case-law technique employed by judges through the medium of the reasoned opinion, with the responsibilities that it should entail, has

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192. *Id.* at 1097 (“carecen de fundamento las sentencias que se apartan de los precedentes de la Corte sin aportar nuevos argumentos que justifiquen modificar la posición sentada, por el Tribunal, en su carácter de intérprete supremo de la Constitución Nacional[.]”).

193. See *Ronillón*, Fallos 25:364, at 368.

194. *Jacinto Santín c. Impuestos Internos*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 6, 1948, Fallos 212:51 (1948) (Arg.).

195. *Sara Pereyra Iraola c. Provincia de Córdoba*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Oct. 15, 1948, Fallos 212:160 (1948) (Arg.).

196. *Santín*, Fallos 212:51, at 59.

197. See *Pereyra Iraola*, Fallos 212:160, at 160.

the purpose and should have the effect of limiting the powers of judges. Its absence in France has resulted from a desire to limit the power of judges, but it has produced instead a much greater freedom for judges than we would consider tolerable.<sup>198</sup>

The same excessive freedom for judges has occurred in Argentina. In the following years after *Cerámica San Lorenzo* the Supreme Court had to overturn many lower court decisions that ruled against Supreme Court precedents.<sup>199</sup> However it is impossible to extract a rule from them. The standard is so vague that covers a too wide range of cases.

## V. CONCLUSION

For Argentines, the Doctrine of Precedent is, as such, a foreign tradition, respectable but alien to its legal system. Argentines consider that they belong to the Civil Law tradition. Both claims may be true, but they are incomplete. From the moment it was established, the Argentine Supreme Court had to answer an ancient demand of the legal community: to judicially treat like cases alike and in so doing to consider prior decisions. Those demands also included the publication of decisions. The Supreme Court took all these requests seriously. It recorded its decisions – taking as a model the U.S. Supreme Court tradition – and made them public. It decided cases taking into account previous decisions and the latter practice disseminated in the federal courts. So, Supreme Court decisions were also used by lower courts to ground theirs.

At one point, intuition and Logic were not enough to cope with the kind of problems that such a methodology entailed. At a certain point, without a systematic way of approaching those difficulties, the method could not evolve and got stuck. Legal certainty, stability, equality or fairness, foreseeability, and judicial economy are values underlying the Doctrine of Precedent, but they also belong to the idea of supremacy of laws, so cherished

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198. DAWSON, *supra* note 20, at 415.

199. Patricia Dorotea Cuello c. Lucena, Pedro Antonio y otro, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 7, 2007, Fallos 330:3483 (2007) (Arg.); Fernando Salmerón y otro c. La Cabaña S.A. Línea 242 y otros, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Feb. 3, 2009, unpublished opinion, (2009) (Arg.); Martín Villarreal c. The Security Group S.A., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 12, 2009, Fallos 332:1098 (Lorenzetti, dissenting) (2009) (Arg.); Héctor Octavio Murillo c. Compibal S.R.L., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Sept. 30, 2008, Fallos 331:2149 (Lorenzetti, dissenting) (2009) (Arg.); Syngenta Agro S.A. c. Municipalidad de Córdoba, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], May 28, 2013, unpublished opinion (2013) (Arg.); see Santiago Legarre & Julio César Rivera, *La Obligatoriedad atenuada de los fallos de la Corte Suprema y el stare decisis vertical*, REVISTA JURÍDICA LA LEY, 2009-E LL 821, 828 (2009) (Arg.).

in the Civil Law tradition. I need not to recall that in the Civil Law tradition legal certainty was and still is a fundamental tenet to be attained mainly by way of statutes (or codes) enacted by legislatures. The original intent was to fetter judges. In that scenario, generality or equal treatment also played an important role. One of the ingredients of any statute should be its generality. They should apply evenhandedly to those cases falling within the legislative umbrella. Like cases should be treated alike.

If those values are still present in the Civil Law tradition at the legislative level, why they are considered irrelevant or ignored at the moment of applying it by the judicial power? In the preceding pages I have tried to show how those values are forgotten or baffled just because there is a blind resistance to adapt a refined technique developed through the Centuries in the Common Law world. The doctrine of precedent is not a panacea and it's under re-elaboration from time to time. But the doctrine furnishes a framework to deal with cases that the Civil Law tradition does not have.

In my view, when a legal order leaves its judges at liberty to interpret the law or the Constitution contrary to Supreme Court's precedent, such legal order is betraying the system to which it belongs. The idea of one Supreme Court at the top of the federal judicial system consists, basically, in empowering that Court with the final word. Constitutional cases should not be re-litigated anew each time any federal or provincial court deems it appropriate. The "new grounds" exception commented above, undermines the constitutional scheme. As to horizontal stare decisis, the exceptions to that rule give enough room to accommodate the constitutional meaning to the years to come. In the end, it is power we are talking about. And power must have limits.

So, recognizing that precedents are more than just "persuasive" sources of law is a more accurate and fair description of a Supreme Court's power. The values underlying the law of the Constitution limit the Legislative power, as in fact it does, and must also limit the judicial power. Seeing this opens the door to seeing the limits to that power. Refusing to see it allows unequal treatment of equal cases and leaves us at the mercy of uncontrolled power.

# PARALLEL LINES ON THE ROAD TO STARE DECISIS: A RESPONSE TO PROFESSOR ALBERTO GARAY

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Professor Alberto Garay's article, *A Doctrine of Precedent in the Making: The Case of the Argentine Supreme Court's Case Law*<sup>1</sup> is an illuminating and panoramic exploration of the tension in Argentine law between its civil law tradition and, at least in matters of constitutional law, the influence of American legal reasoning. The latter resulted from the efforts of Argentine legal reformers of the nineteenth and twentieth centuries to use American doctrines to create a liberal constitutional order through the judiciary as had been done in the United States. Alas, Professor Garay ruefully charges, this effort has fallen short, in significant part because Argentine lawyers and judges have proved less-than-capable at replicating the American style of judicial decision-making and decision-establishing. This, in turn, he attributes to the Argentine civil law tradition and its continuing baleful influence on his country's legal education. The result is that Argentine lawyers and judges are unable to grasp intellectually, much less to practice, the common-law-bred, case-based method of American adjudication.

Among the related problems that Professor Garay identifies are the historical and continuing disrespect for judicial decisions in contrast to statutes as sources of law, and the uncertain nature of such decisions as binding law that controls subsequent litigation horizontally (cases in the same-level court) or vertically (cases in inferior courts). He traces these difficulties to long-standing legal philosophy and practice derived from Roman law as far back as at least the Emperor Justinian. That Roman law tradition permeated the European legal culture, including that of Spain, Argentina's mother country, whose legal epistemology Argentina has yet to jettison. Professor Garay contrasts that tradition unfavorably with what he

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1. Alberto Garay, *A Doctrine of Precedent in the Making: The Case of the Argentine Supreme Court's Case Law*, 25 SW. J. INT'L L. 358 (2019).

perceives as the both more practical and normatively preferable common law epistemology that evolved in England and was transplanted to the United States.

After reading Professor Garay's article, I was struck less by the stark differences he has sought to portray, than by the similarities of the two approaches, especially in the domain of constitutional adjudication. Moreover, his account of the development of this facet of Argentine jurisprudence over the past two centuries reveals a distinct parallel in some particulars to several centuries of evolution of English counterparts. That said, his critique shows the difficulty of creating an instant legal tradition, a process that, more realistically, requires incremental adjustments which may depend more on fortuitous cultural and political developments than on top-down imperatives. But, in the end, it appears that the differences between the civil law and common law traditions are of degree, not of kind. Both systems must address certain common and, at times, vexing issues that arise out of the nature of law, courts, and dispute resolution and that exist apart from particular traditions.

I shall address, by necessity briefly, Professor Garay's criticism that judicial decisions are not treated as law under the civil law tradition, in contrast to the common law; the uncertain position of precedent in Argentina to bind other courts, in contrast to the United States; and the habit of Argentinian lawyers and judges to look for broad generalizations when evaluating or deciding cases, in contrast to the narrower and more fact-specific legal principles employed in common law jurisdictions. These comments will focus, when feasible, on constitutional adjudication, while recognizing that such cases may not cleanly reflect jurisprudence in the traditional domain of common law, such as the law of contracts, property, or crimes.

One other significant and unavoidable area of inquiry is how the desire of judges, as of all political actors, to establish and protect their courts' institutional legitimacy affects these questions. This is particularly true in the context of constitutional judicial review, an area that produces more direct confrontations between the judges and other politicians. As necessary, I will enter that area, but it deserves much more in-depth attention than I can give here.

#### ARE JUDICIAL DECISIONS LAW?

This topic has been debated as long as advanced societies have had courts and judges to resolve conflicts through a process based on reason. When addressed directly, the inquiry may lead to grand statements that rest

on “self-evident truths” (i.e. unproven postulates) and reveal political preferences as much as they enlighten about the nature of law.<sup>2</sup>

Much depends in this investigation on definitions, especially of the central term, “law.” Thomas Aquinas’s classification of human law as “an ordinance of reason for the common good, made by him who has care of the community, and promulgated” is a workable starting point.<sup>3</sup> Ordinances and statutes are positive acts that are legally binding and reflect the voluntary action (“will”) of either the “whole people” or a duly constituted political authority (“someone who is the viceregent of the whole people”).<sup>4</sup> In their “judicial” role, judges (and their decisions) lack that characteristic. By common understanding, judges are not in office to “have care of the

2. For example, Thomas Aquinas declared:

As the Philosopher [Aristotle] says, *it is better that all things be regulated by law, than left to be decided by judges*: and this for three reasons. First, because it is easier to find a few wise men competent to frame right laws, than to find the many who would be necessary to judge aright of each single case.--Secondly, because those who make laws consider long and beforehand what laws to make; whereas judgment on each single case has to be pronounced as soon as it arises: and it is easier for man to see what is right, by taking many instances into consideration, than by considering one solitary fact.--Thirdly, because lawgivers judge in the abstract and of future events; whereas those who sit in judgment judge of things present, towards which they are affected by love, hatred, or some kind of cupidity; wherefore their judgment is perverted.

Thomas Aquinas, *Summa Theologica*, “Of Human Law,” in *THE GREAT LEGAL PHILOSOPHERS* 70, 71 (Clarence Morris ed., Univ. Penn. Press 1971) (1959). Thomas’s first point is simply personal opinion, with which jurists on the bench, academics in the law schools, or other assorted opponents of codes and decrees might vehemently disagree. See, e.g., Friedrich Carl von Savigny:

A free communication between the Law-Faculties and the Courts . . . would be an excellent mode of bringing about this approximation of Theory and Practice . . . . Let jurisprudence be once generally diffused among the jurists in the manner above-mentioned, and we again possess, in the legal profession, a subject for living customary law.--consequently, for real improvement.

Friedrich Carl Von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, “What Are We to do Where There Are no Codes” Chapter VIII, in *THE GREAT LEGAL PHILOSOPHERS*, *supra*, at 297, 299-300. The second is highly dubious as an empirical proposition, at least as to the first clause. The third part may be a more fundamentally sound critique of judges. It certainly has been made by more recent skeptics of judicial impartiality and modesty:

Although a speech-restricting injunction may not attack content as *content* . . . it lends itself just as readily to the targeted suppression of particular ideas. When a judge, on the motion of an employer, enjoins picketing at the site of a labor dispute, he enjoins (and he *knows* he is enjoining) the expression of pro-union views . . . . The second reason speech-restricting injunctions are at least as deserving of strict scrutiny is obvious enough: They are the product of individual judges, rather than of legislatures – and often of judges who have been chagrined by prior disobedience of their orders.

*Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 793 (1994) (Scalia, J., dissenting).

3. Thomas Aquinas, *Summa Theologica*, “Of the Essence of Law,” art. 4, in *THE GREAT LEGAL PHILOSOPHERS*, *supra* note 2, at 57, 60.

4. Aquinas, *Summa Theologica*, “Of the Essence of Law,” art. 3, in *THE GREAT LEGAL PHILOSOPHERS*, *supra* note 2, at 59; see *Ordinance*, *BLACK’S LAW DICTIONARY* (6th ed. 1990); *Statute*, *BLACK’S LAW DICTIONARY*, *supra* (“A formal written enactment of a legislative body . . . declaring, commanding, or prohibiting something[:] the written will of the legislature[.]”).

community,” but to resolve specific disputes and achieve “justice” between the parties, a justice that is often defined – and limited – by the command of a lawgiver. For that reason, among others, it has been a frequent trope of common law judges and commentators that the judges do not “make” law, but merely “find” it.

Law also requires ability to coerce conformance, which, again, exists only in the people collectively or “some public personage, to whom it belongs to inflict penalties.”<sup>5</sup> Judges can impose penalties, but depend on legislation (or customs of the people) to create, and executive power ultimately to inflict, those penalties.<sup>6</sup> Further, “law” ideally has certain operative characteristics, among them constancy, predictability and knowability, along with broad conformity to some principle, idea or form of “the good.”<sup>7</sup> This is the “reason” of the law directed towards its end—to promote the flourishing of the community and the individuals in it. Aristotle teaches, “The law is reason unaffected by desire.”<sup>8</sup> In further explaining the distinct and superior nature of law over judicial decisions, Thomas asserts that statutes are the work of wise individuals deliberating about an issue carefully and dispassionately, whereas a judge must give judgment speedily and is more likely to be affected by bias for or against a party.<sup>9</sup> In line with classic Greek reasoning, legislators make laws in consideration of the general good, because they consider many instances, rather than one.<sup>10</sup> In a phrase, they see the forest,

5. Aquinas, *Summa Theologica*, “Of the Essence of Law,” art. 3, *supra* note 4.

6. THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

The executive not only dispenses the honors, but holds the sword of the community; the legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated; the judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

*Id.*

7. See Garay, *supra* note 1, at 315. Such characteristics are associated with the use of the term in other contexts, for example, in the natural world, such as the “law” of gravity, or in other realms of human inquiry, such as the universal moral “law” of classical writers.

8. ARISTOTLE, *POLITICS*, Book III, at 77 (Benjamin Jowett trans., Kitchener, Batoche Books 1999) (1885). This phrase has been interpreted variously, using different words for the Greek concepts, e.g., “Hence, law is intelligence without appetition.” “In law you have the intellect without the passions.” These formulations all convey the basic message of law as a consummate product of the human mind at work, undistracted by human emotions. That is classic Greek metaphysics inherited from Socrates/Plato.

9. See Aquinas, *supra* note 2.

10. See PLATO, *REPUBLIC* (Benjamin Jowett trans., New York, Anchor Books 1973) (1871). Socrates speaking to Adeimantus said:

And is not a State larger than an individual? --It is. --Then in the larger the quantity of justice is likely to be larger and more easily discernible. I propose therefore that we enquire into the

not just individual trees. In similar vein, because they are more numerous, assemblies and councils are more likely to make decisions that advance the public good than individuals will.<sup>11</sup> Having appellate courts composed of multiple judges encourages collegial decision-making, and, thereby, advances collective wisdom in theory.

Finally, law must be promulgated, so that it is known, and people can adjust their actions accordingly. This is particularly important for the criminal law. Judges' decisions, however, are not known until after the disputed action has occurred. Moreover, as discussed below, and as described by Professor Garay, judicial decisions – or, more significant, the facts and legal principles on which they are based – often have not been published.<sup>12</sup>

Of course, the very fact that law, in this postulation, is a positive command that addresses future occurrences of yet-unknown specific factual contexts makes judges necessary. Aristotle and Thomas both acknowledge the unavoidability of judicial decisions, with the former providing a more analytic explanation of why judicial decisions are not law. Law speaks in general terms as it “takes into consideration the majority of cases.” But if a case arises that does not specifically fit the circumstances that the lawmaker envisioned under the law and thereby creates an exception to that law, a judge solves this problem “by deciding as the lawgiver would himself decide if he were present on the occasion.” The judge may do equity, a type of justice, but his work is not law. Rather, it is a “rectification of the law where law is defective because of its generality.” Nor may he decide as a free actor; that would make him a lawgiver. Rather, he must merely be the voice of the lawgiver and find that which the latter would have said.<sup>13</sup>

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nature of justice and injustice, first as they appear in the State, and secondly in the individual, proceeding from the greater to the lesser and comparing them.

*Id.* bk. II, at 59-60.

11. See ARISTOTLE, *POLITICS*, *supra* note 8, bk. III, pt. 11, at 65-68, and his rather circumspect discussion about the “wisdom of the multitude.” The thesis is that, while one must be cautious about this idea and while it is not without intrinsic weaknesses, when it comes to governing, the many might be preferable in some instances to the few. *Id.* at 67 (“[I]f the people are not utterly degraded, although individually they may be worse judges than those who have special knowledge—as a body they are as good or better.”). This is Aristotle’s response to Plato’s challenge in *Republic* that government by an expert elite is best suited to produce a just *polis*. Aristotle is defending the democratic element of the Athenian constitution.

12. See, e.g., Garay, *supra* note 1, at 272-73, 274-75.

13. ARISTOTLE, *NICOMACHEAN ETHICS*, Book V, at 141-42 (Martin Ostwald trans., New York, Bobbs-Merrill 1962) (c. 384 B.C.E.). In this part of the book, Aristotle is expounding one of his favorite ethical topics, “justice.” Aristotle’s full discussion elegantly ties together law, equity, the distinct roles of the lawmaker and the judge, and at least two of his diverse conceptions of justice:

The jurisprudential musings of Aristotle and his Christian interpreter, Thomas Aquinas, are important mirrors of medieval perceptions of law and the role of judges. That period, of the eleventh through fourteenth centuries, is significant because it is often identified as the time when the foundations for the modern continental civil law system and the English common law system were laid and when those systems gradually began to diverge. Thomas was perhaps the most influential of the Medieval Scholastics. His wide-ranging and systematic inquiry into philosophy and religion gave his interpretations great authority with church and lay authorities. Of course, he was hardly the only scholar engaged in the development of medieval understanding of law for civil or ecclesiastical courts. Nor was he among the earliest. The development of a new Roman law on the continent had been proceeding for well over a century before him, beginning with renewed interest in the early twelfth century in Justinian's *Corpus Iuris Civilis* at the Law School of Bologna, Italy, and proceeding through the works of Irnerius and the other Glossators and Commentators over the following two centuries. What is clear is that, to these continental scholars, legislation was law, but judicial decisions were not. Their position is consistent with the Justinian directive that "Decisions [of a judge] should be based on laws, not on precedents. This rule holds good even if the opinions relied upon are those of the most exalted prefecture or the highest magistracy of any kind."<sup>14</sup> At the very least, this declares positive enactments to be superior to judicial decisions. More likely, it denies to judicial decisions the status and legitimacy of law altogether.

The "rediscovered" Roman law of Justinian, over time, became systematized and "scientific" through the efforts of the scholars. It became potentially suitable as a universal law to be applied across the increasingly prosperous and commercially connected European realms of the High

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What causes the problem is that the equitable is not just in the legal sense of "just" but as a corrective of what is legally just. The reason is that all law is universal, but there are some things about which it is not possible to speak correctly in universal terms. Now, in situations where it is necessary to speak in universal terms but impossible to do so correctly, the law takes the majority of cases, fully realizing in what respect it misses the mark. The law is nonetheless correct. For the mistake lies neither in the law nor in the lawgiver, but in the nature of the case. For such is the material of which actions are made. So in a situation in which the law speaks universally, but the case at issue happens to fall outside the universal formula, it is correct to rectify the shortcoming, in other words, the omission and mistake of the lawgiver due to the generality of his statement. Such a rectification corresponds to what the lawgiver himself would have said if he were present, and what he would have enacted if he had known (of this particular case) . . . . And this is the very nature of the equitable, a rectification of law where law falls short by reason of its universality . . . . Such a characteristic is equity; it is a kind of justice and not a characteristic different from justice.

*Id.* In similar, but briefer, manner, Thomas Aquinas observes that "[c]ertain individual facts which cannot be covered by the law *have necessarily to be committed to judges[.]*" Thomas Aquinas, *Summa Theologica*, "Of Human Law," *supra* note 2, art 1, at 71.

14. ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 203 (Liberty Fund 1986) (1966).

Middle Ages. However, its initial success was limited, as it had to compete with the “customary Roman law” derived from the code of the Roman Emperor Theodosius II and often modified by local custom. This customary Roman law arose out of the need to deal practically with the changing conditions in diverse communities over the course of generations. It was the province of merchants, lay rulers, property owners, and their advisors on concrete legal matters, rather than of the law professors.

In England, as well, the Roman law was influential in ecclesiastical courts and, to a lesser extent, in some civil courts. The writings of Ranulf de Glanvill in the late twelfth century and Henry de Bracton several decades later show strong Roman law influence. For Bracton, described as “the flower and crown of English jurisprudence,”<sup>15</sup> judicial decisions were not themselves law. He wrote an influential treatise, his “Note Book” on *The Laws and Customs of England*, which sought to provide a systematic body of (what he deemed) good law. While Bracton used cases gleaned from the Plea Rolls or drawn from his memory, he ignored contrary cases that were more recent in time. His abundant case citations were examples, merely illustrative, not authoritative. Thus, contrary to the classic common law rule-making, where the cases are analyzed and the operative legal principle is induced from them, “his” law produced the case citations; the cases did not produce the law.<sup>16</sup>

While this mode of thinking about the essence of judicial decisions has an ancient pedigree,<sup>17</sup> it is not limited to the civil law tradition or to medieval English treatise writers. In the 1842 U.S. Supreme Court case *Swift v. Tyson*,<sup>18</sup> Justice Joseph Story distinguished state statutes from state court decisions and declared that the federal courts in diversity cases of national effect (such as commercial matters) were not bound by state court decisions. He reasoned that court decisions were merely evidence of law, but not

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15. THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 258 (Little, Brown & Co., 5th ed. 1956) (1929).

16. *See id.* at 344; The argument that cases were examples of an *a priori* legal principle, but not law themselves, was maintained even a century later, when C.J. Bereford in 1315 quoted Bracton that “one must judge not by examples, but by reasons.” *Id.* at 345; *see also* Garay, *supra* note 1, at 279-80.

17. Some scholars claim that the Code of Hammurabi was not a decreed systematic body of law, as the Code of Napoleon was. Rather, it was a collection of non-binding precedents, or simply summaries of cases, to help judges decide justly: “May any king who will appear in the land in the future, at any time, observe the pronouncements of justice that I inscribed on my stela.” “May that stela reveal . . . the traditions, the proper conduct, [and] the judgments of the land that I rendered[.]” Other scholars assert that the Code is a statement of ideal law. RUSS VERSTEEG, *LAW IN THE ANCIENT WORLD* 4-6 (2002).

18. 41 U.S. 1 (1842).

themselves law that would impose the rule of decision in the case. It is also instructive that the word commonly used, even in the formal record of a case, to describe a court's justification for its action is "opinion." An opinion is a belief about something else that exists independently of that opinion, here the judge's belief about the facts, the applicable law, and their relation to each other.

Two other, partly overlapping rationales have been advanced frequently by judges and commentators in common-law jurisdictions to support the proposition that judicial cases are not law. They are that the common law applied by the courts is merely custom or customary law, and that judges do not "make" law, but merely "find" it. What connects these rationales is the need to determine what their exponents mean by the "common law." What separates them is their different answers to that question.

The term "common law" has been defined multifariously, depending on the need of the occasion. First, the term may refer to a system of law developed in England and adopted in other countries with a legal heritage connected to England, in contrast with civil law countries whose law is derived more directly from some codification traceable to Roman law.<sup>19</sup> Second, within the English tradition, common law has been contrasted with equity, with different sources of claims, procedures, remedies, and courts. Third, common law also is often defined broadly as legal principles and rules derived from judicial cases, in distinction to legislation. Fourth, it is the law applied by the English royal courts, in contrast to the manorial courts and the ecclesiastical courts. Fifth, more generally, it may be a body of principles regarding personal relations and the government of society, which derive their authority from usage and custom of immemorial antiquity. The focus here will be on the last two, as they relate to the question of whether judicial decisions are law.

If the common law is a body of principles of "immemorial antiquity," it pre-exists any instantiation of it in a particular judge's opinion in a specific case. A case, indeed, is nothing but an example of that principle in action and, thus, not itself law. In that sense, judges do not make that law, but merely find it and apply it. In Platonic language, the form of action (the common law pleading) by which the case is brought through the proper writ is merely the material perception of the eternal Form of that action which the judicial craftsman (the judge) adapts to the problem in front of him. This view of the common law edges close to classical "natural" or "higher" law thinking and leads yet again to the perennial connection in ethical

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19. *People v. Rehman*, 61 Cal. Rptr. 65, 85 (1967) ("The common law is all the statutory and case law background of England and the American colonies before the American Revolution.").

jurisprudence between law and reason. Drawing on Stoic metaphysics, Cicero had written, “True law is right reason, consonant with nature, diffused among all men, constant, eternal . . . . It needs no interpreter or expounder but itself, nor will there be one law in Rome and another in Athens, one in the present and another in the time to come[.]”<sup>20</sup>

The royal judges, engaged in the practical application of law to resolve disputes with an eye to effective governance of the realm, likely did not speculate about the universalism and idealism of Cicero’s conception of Law. Still, their more parochial view of the peculiarly English source of the common law, showed the same affinity for grounding “rights” (and justice) in a received body of ancient unwritten law based on reason and reflected in usage.<sup>21</sup> Thus, Bracton could say that,

[W]hile they use *leges* and a written law in almost all lands, in England alone there has been used within its boundaries an unwritten law and

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20. HOGUE, *supra* note 14, at 9 (quoting C. H. McIlwain *The Growth of Political Thought in the West*, and Cicero *De Republica*); see also Marcus Tullius Cicero, *De Legibus* [*On the Laws*] Book I, in THE GREAT LEGAL PHILOSOPHERS, *supra* note 2, at 40, 44 (“Law is the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite . . . . [T]he origin of Justice is to be found in the Law . . . . But in determining what Justice is, let us begin with that supreme Law which had its origin ages before any written law existed or any State had been established.”); Cicero, *supra*, Book II:

Even if there was no written law against rape at Rome in the reign of Lucius Tarquinius, we cannot say on that account that Sextus Tarquinius did not break that eternal Law by violating Lucretia, the daughter of Tricipitinus! For reason did exist...and this reason did not first become law when it was written down, but when it first came into existence[.]

*Id.* at 50-51.

21. Equating the common law, and custom, with a set of superior norms binding on ordinary positive law was an intermittent, but ultimately unsuccessful, judicial project in England. The strongest affirmation was by Edward Coke, as Chief Justice of Common Pleas, in *Dr. Bonham’s Case*:

And it appears in our books, that in many cases, the common law will controul acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason . . . the common law will controul it and adjudge such act to be void.

8 Co. 107a, 118a (1610), quoted in EDWARD S. CORWIN, THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 44 (Cornell Univ. Press, 9th Printing 1974) (1928). Lawyers, commentators, and, apparently, a few jurists subsequently endorsed this constitutional theory, traceable to Magna Carta. The exact boundaries of Coke’s assertion are unclear, since there was not at the time a clear separation of functions for Parliament, then still called the “High Court of Parliament.” Ultimately, it failed to control Parliament’s *legislative* supremacy. Control over the king’s prerogative, and the claim that the king was subject to this higher law, led to a different result, as Charles I found out much to his chagrin and bodily integrity in 1649. Moreover, living far from Parliament and in a comparative state of nature, the North American colonists of the seventeenth and eighteenth centuries were more receptive to Coke’s idea. Various nineteenth century jurists developed it further into a full philosophy of law, and American courts have used it to flesh out their construction of unenumerated constitutional rights under substantive due process. For a thorough analysis of this issue, see CORWIN, *supra*.

custom. In England legal right is based on an unwritten law which usage has approved . . . . For the English hold many things by customary law which they do not hold by *lex*.<sup>22</sup>

This is the common law as the “brooding omnipresence in the sky” that Justice Oliver Wendell Holmes, Jr., rejected as an accurate reflection of how the common law actually is generated and applied.<sup>23</sup> More in accord with Holmes’s view would be the approach of legal positivists in England and the United States. One of the foremost articulators of English legal positivism was John Austin, who championed a “scientific” approach to the analysis of law. For Austin, “law” is a command of a political sovereign to a political subordinate, which command is enforced by the state.<sup>24</sup> Austin did not consider custom or customary law, as such, to be law. He criticized the nineteenth century German school of historical jurisprudence for claiming that customary law is true law because it is enforced by the courts and is adopted spontaneously by the governed through long adherence.<sup>25</sup> Austin agreed that judges can “transmute a custom into a legal rule.” However, this is not due to an inherent nature of judicial decision-making as legislating. The judge is acting by permission of the sovereign. The principle he uses from the pre-existing customary law is not actual law because he makes it, but because he is permitted to do so to the extent the sovereign law-maker chooses. After all, that customary law can be limited or eliminated by the law-maker, and it must be enforced by the state.<sup>26</sup> Under either of these

22. HOGUE, *supra* note 14, at 10, n.5.

23. *S. Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or semi-sovereign that can be identified.”) (superseded by statute as stated in *Hetzl v. Bethlehem Steel Corp.*, 50 F.3d 360 (1995)).

24. “LAWS PROPER, or properly so-called, are commands[.]” John Austin, *Lectures on Jurisprudence; The Province of Jurisprudence Determined*, in *THE GREAT LEGAL PHILOSOPHERS*, *supra* note 2, at 336. “The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors[.]” *Id.* at 337 (Lecture 1); “A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain [‘sanction’] in case the desire be disregarded.” *Id.* at 338. Since law is set by “political” superiors, sanction for violation of law must also be by the state; *see also* Thomas Hobbes, *Leviathan*, “Of Other Lawes of Nature,” in *THE GREAT LEGAL PHILOSOPHERS*, *supra* note 2, at 113, 119 (“Whereas Law, properly is the word of him, that by right hath command over others.”).

25. For a prime example of the German historical jurisprudence, see Von Savigny:

The sum, therefore, of this theory is that all law is originally formed in the manner, in which, in ordinary but not quite correct language, customary law is said to have been formed: i.e. that it is first developed by custom and popular faith, next by jurisprudence--everywhere, therefore, by internal silently-operating powers, not by the arbitrary will of a law-giver.

Von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, “Origin of Positive Law,” Chapter II, in *THE GREAT LEGAL PHILOSOPHERS*, *supra* note 2, at 290, 291.

26. “A subordinate or subject judge is merely a minister. The portion of the sovereign power which lies at his disposition is merely delegated. The rules which he makes derive their legal force

approaches, Bracton's unwritten customary law approved by long usage or Austin's positive command of the sovereign (which reflect contrasting views of the legal essence of the customary common law), judicial decisions themselves are not inherently law. At most, judicial decisions are manifestations of law which is created by the actions of others, that is, the state in its corporate form or the people organically.

Customary law is continued adherence to a particular rule in response to similar events. This rule becomes established by diffuse and informal adherence by members of the community generally or by some directly affected and influential subgroup thereof. The reasons for adherence to that rule may be shaped by social mores, religious doctrine, metaphysical assumptions, economic relations, legal traditions, and sundry nebulous historical influences that reflect the collective experience of that community.<sup>27</sup> If a legal conflict arises, the judge will discern the appropriate legal rule based on that experience in relation to the relevant facts. The legal tradition from which the judge draws likely will include known cases with similar facts. If the facts reveal a novel problem, the judge will look to that collective experience to induce from it a new rule or reshape an existing one.

In medieval England, the customary law of the broad community was derived from Anglo-Saxon practice and experience, and generally administered in manorial courts. That was the "common law of the country."<sup>28</sup> The royal courts, such as Common Pleas and King's Bench,

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from authority given by the state: an authority which the state may confer expressly, but which it commonly imparts in the way of acquiescence. For, since the state may reverse the rules which he makes, and yet permits him to enforce them by the power of the political community, its sovereign will 'that his rules shall obtain as law' is clearly evinced by its conduct, though not by its express declaration." Austin, *Lectures*, *supra* note 24, at 342.

27. Determining what constitutes custom and how it resembles, differs from, and relates to, law is complex and often imprecise. Philosophers of law routinely strive for clear answers as they construct—or at least describe—a jurisprudential system. These philosophers have been products of complex civilizations with well-developed law and formal legal bureaucracies. For an interesting anthropological overview of how custom and law interact, if at all, in less complex societies, see generally, E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN* (2006).

28. On the continent, as well, there developed and long existed, a "common law of the country." As Savigny wrote about the German areas,

Up to a very recent period a uniform system of law was in practical operation throughout the whole of Germany under the name of the common law, more or less modified by the provincial laws, but nowhere altogether without force. The principal sources of this common law were the law books of Justinian.

Von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, "Civil Law in Germany," Chapter V, in *THE GREAT LEGAL PHILOSOPHERS*, *supra* note 2, at 295. Savigny was discussing the synthesis in Germany of Roman law principles and local practices to shape a uniform common law in many areas of law, while local conditions produced a multitude of diverse rules in others, a synthesis that began during feudal times. This is remarkably like the situation in England

developed a different variant of “common law,” one that was rooted in the necessity of the king and the Norman aristocracy to maintain control over the English masses. At the same time, and continuing even after the clear status lines between Norman rulers and English subjects had been obliterated, the courts were instrumental in establishing a uniform “national” law in areas of particular concern to the Crown in a feudal system evolving gradually into a precursor to the modern state: criminal law, land law, and revenue. This latter version, the “common law of the royal courts,” has been the real origin of what became the body of English common law. It would be a gross oversimplification, however, to limit the content of that common law to judicial decisions. The various statutes adopted by other organs of the English “nation,” that is, the Great Council and, later, the bicameral Parliament, are part of the totality of the English common law. So are the vestiges of Roman law principles, the “customary rules” of merchants, and eventually, various maxims and remedies developed by the body of English law referred to as equity.

If, by common law is meant only that more restricted sense, that it is the body of law created by the royal judges as the functionaries of the king in matters of particular consequence for the monarch, rather than being the old customary law of the people, the notion that the judges are merely finding pre-existing law becomes difficult to maintain. The judges sat in the King’s Council and helped make the law that emerged from that administrative process. They also participated in legislating statutes if the Great Council was assembled. This arrangement is not surprising. The judges were drawn initially from the loyal Norman nobility, and there was not the same conception of a functional separation of powers during the birth of the common law as in the modern age. Indeed, even after the process of separating king and Parliament and, eventually, Lords and Commons, was completed in late-medieval England, the English conception of separation of powers, with its feudal origins, was quite distinct from the later American version that rests on a classless conception of popular consent and operates through formal differences of function that accord the courts a role well beyond that conceded to the English courts.<sup>29</sup>

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in the early decades after the Norman invasion. Only gradually did the influence of the Roman law wane in the royal courts.

29. The English version was based on the separation of interests, in that the House of Commons represented one class or estate, the House of Lords another, and the Crown the realm as a whole politically and symbolically. Montesquieu’s approbation of divided government, so popular among European republicans of his time and of Americans during the framing of the state and national constitutions in the 1780s, looked to the classic model of Polybius that he saw embodied in English institutions. After describing, in fashion reminiscent of Plato and Aristotle, six forms of government (three original, noble forms, and their three inevitable degenerate forms),

As discussed below, over time the mission of the king's courts to secure Norman power waned in favor of their role as arbitrators of legal disputes among competing interest groups in a changing political and economic order. The judges' function in ordinary legal matters changed well before the modern era from creating a "law of the ruler" to protecting a "rule of law." What remained constant in this development of the common law was the sense that the judges in their judicial function were not "making law." They were "legal" actors, not "political" ones, and their work represented a cautious balance of continuity and change within an order rooted in custom, that is, reason reflecting on experience.

One may attribute this cautious and, typically, incremental approach to a healthy respect for the judges' vulnerable position in the constitutional order. Their practical effectiveness depended on the cooperation of others. Their constitutional legitimacy depended on their agency. Whether under the constitutional theory of late feudalism and its stable universal order based on status and immemorial custom, or the early modern constitutional focus on the sovereign's will, or the more recent constitutional order founded on the "voluntary" consent of the governed, the judges have power over individual

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Polybius extolled the Roman Republic's constitution as a balanced combination of the three noble forms, monarchy (consuls), aristocracy (Senate), and democracy (assemblies and tribunes), representing different interests. See Polybius, *The Histories*, Book 6, Chapters 3-18, in OXFORD WORLD'S CLASSICS 371, 372-85 (Robin Waterfield trans., Oxford University Press 2010) (1922). Montesquieu borrowed much from Polybius and acknowledged his own philosophical debt to the Greco-Roman historian. Montesquieu's theory of divided government starts with the idea of separating the three different aspects of governmental power, which distinguishes him from Polybius, and much endeared him to American constitutional theorists in the latter eighteenth century. But his fascination with the English constitution as a model for his native France also led him to recognize the class-based nature of the bicameral Parliament. Moreover, while he advocated a separate and independent judiciary, it was not one equal to the task of governing:

Of the three great powers, which we have mentioned above, as necessarily belonging to every civil society, the judicial power is, by the arrangement above-described, removed so far out of sight, and rendered so incapable of inspiring the persons in whom it is vested with ambitious or dangerous designs, that it may almost be said to be annihilated.

Therefore, another institution would be needed to balance the ambitions of king and commons, those political institutions most likely to try to usurp each other's role and, thus, be a threat to the common liberty. Montesquieu looked to the House of Lords for that mediating constitutional role. See Charles-Louis de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, Book XI, Chapter VI, "Of the Constitution of England." American writers on the Constitution, as well, cited Polybius and, more rapturously, Montesquieu. Hamilton distorted the preceding sentence of the "celebrated Montesquieu" to say, "of the three powers above mentioned, the JUDICIARY is next to nothing." But their version of Montesquieu's "scientific" analysis of government resulted more directly in a "Newtonian" machinery of functionally interlocking parts not at all tied to class identity and interests. The judiciary's role was strengthened, as well. Thus, Hamilton, in defending the nascent practice of judicial constitutional review, assigned to the courts the "mediating" role between the people's liberty and the exercise of power by institutions of the government. See THE FEDERALIST No. 78 (Alexander Hamilton), *supra* note 6, at 404.

litigants. However, their power only exists under the terms set by another governing authority.<sup>30</sup> In that sense, they do not make law. The positive law of the practical sovereign or the customary law of the people controls. This approach becomes a useful protective cloak for the judges, who have no inherent power to raise revenue or armies and helps insulate them from political repercussions. They can point to others—the legislators, the people – and say, “You made the law; we only find the relevant principle and apply it.”<sup>31</sup>

In constitutional controversies, this becomes a more delicate proposition, due to the inherently “political” nature of such matters in comparison to, say, the doctrine of mutual mistake of fact as a defense to contract formation. If anything, that has only encouraged American courts further to nurture public perception of them as oracles of the Constitution. A truly impressive specimen is found in the opinion of Justice Owen Roberts in *United States v. Butler*:

It is sometimes said that the court assumes a power to overrule or control the action of the people’s representatives. This is a misconception. The

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30. For a modern example of this, the jurisdiction of the federal courts is defined by the Constitution and Congress’s judiciary acts.

31. The claim that a judge is not a law-maker, but merely a law-finder, has come under considerable academic attack for more than a century. Among the most biting critics were the “Legal Realists” of the mid-twentieth century, who rejected the “formalism” of the older position. Judge Jerome Frank in Chapter XIX, “Precedents and Stability,” of his important contribution, *Courts on Trial*, string-quoted critics of the older view. JEROME FRANK, *COURTS ON TRIAL* 237 (Atheneum, college ed. 1970) (1949). He called it a myth and protested the harm it did to society by obscuring the role of the judge. He re-defined “law,” and then concluded that judges make law, which is, he asserted, “legislating.” However, it is “judicial legislating,” not “legislative legislating.” I suppose that if courts can split due process (“procedure”) into substantive due procedure and procedural due procedure, Frank can be pardoned for his word-craft. I do not here challenge Frank’s critique, which, like the Realist critique generally, raises many cogent points. But it, too, rests on assumptions and definitions subject to dispute. More troubling, as is the case with most “skeptical” approaches, washing a constructive theory with “cynical acid” (to borrow a term from Oliver Wendell Holmes), merely dissolves that structure. It does not thereby provide an alternative coherent and systematic construction, here, a jurisprudence of the nature of law and of judging within a socio-political system.

At the risk of overstatement, a purported analytical approach that attributes apparently conflicting decisions by a judge in somehow similar cases to what the judge had for breakfast or some conscious or unconscious bias (including ideological bias in favor of a particular policy) is dangerously simplistic and itself can cause harm to the legitimacy of a legal order. As any lawyer knows, sometimes legal fictions serve a purpose of dealing with difficult issues with the least amount of difficulty. I have not included further discussion of the arguments of legal skeptics because the “older” attempts to define law and resolve how judges’ decisions fit (or not) within that definition has been around in some form for millennia and advocated by men of great intelligence. Of course, the classic formalist views have also been important in the development of the common law and how the judges viewed their role. If this be a fiction, a “noble lie,” it may be a confession of institutional weakness by the judges and a simple attempt to preserve their political legitimacy and promote the effective administration of justice. That, alone, gives it value.

Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty -- to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question.<sup>32</sup>

English courts are spared this difficulty. Regarding constitutional issues that go to fundamental matters of government, the English judges long have hewed to the admonition in Sir Francis Bacon's aphorism from 1625 that the "Judges must be lions, but lions under the throne." With the Glorious Revolution in 1688 and the triumph of Parliamentary supremacy, the judicial lions may have moved figuratively from the king's palace to another enclosure, but their subordinate role in constitutional matters has not changed appreciably.<sup>33</sup>

#### THE LONG, DIFFICULT ROAD TO *STARE DECISIS*

In one sense, however, a decision of a court might be deemed law. Even if a decision lacks the essence of law relative to other institutions of government or to the population generally, it could have the effect of law as to other courts in their judicial capacity. This would depend on the extent, if any, such a decision would bind the future judge and compel him to apply the law "found" by his predecessor. The historical pattern of uncertainty about this matter in the Argentine courts that Professor Garay describes, is also apparent in the similarly halting and erratic Anglo-American experience.

The role of the judges in developing the common law as the custom of the king's courts accompanied and assisted the formation of the modern nation-state in England a few generations before similar developments on the continent. With the passage of time, the number of judicial decisions increased, and the scope of the common law broadened into areas previously left to the domain of the nobility in the manorial courts. As the number and importance of the judges grew, there arose, predictably, the need for constancy and uniformity in the application of legal rules to solve similar disputes, at least within the respective courts of Common Pleas, King's

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32. 297 U.S. 1, 62-63 (1936); *see also* Garay, *supra* note 1, at 269 (speaking about the historical acceptance in Argentina of Montesquieu's assessment that judges are only "the mouth of the law").

33. English judges today can declare an act of Parliament to be incompatible with the European Convention on Human Rights, but that does not void the act. *See infra* note 66.

Bench, and Exchequer. Initially, the use of previously-decided cases served the same function as tradition in other areas of human action, that is, to provide stability and predictability to human interactions. As well, such use of precedent by a judge gave legitimacy to his decision, based on the practical success of prior decisions in resolving similar disputes. Precedent also promoted social harmony by fostering the psychologically calming and, thereby, politically important, perception of equality before the law.<sup>34</sup>

As the earlier reference to Bracton shows, the initial use of precedent was to serve as examples and illustrations. There was no clear sense that those prior cases were “binding” on the judges.<sup>35</sup> The evolution of *stare decisis*, of precedent in one case “binding” subsequent courts, was gradual and not fully realized until the nineteenth century.<sup>36</sup>

However, a different consideration arose if there was a *series* of cases that was decided similarly. That line of cases represented more than just the

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34. See Garay, *supra* note 1, at 319-20. “Equality before the law,” or “equal protection of the law” has been a cherished declaration in Western ethical theory of the state and the law at least since the emergence of Stoic philosophy in the 3rd century B.C. To what extent this reflects reality as experienced by people in the class-based orders of the past or the administrative state of today with its myriad of legislation and regulations enforced by numerous agencies through prosecutorial and administrative discretion is open to considerable debate. Perhaps it is more an aspirational concept or a politico-legal fiction, another “noble lie” that we tell ourselves to provide an ethical basis for government.

35. Professor Arthur Hogue in his *Origins of the Common Law* pointed out that Bracton and others often referred to prior cases not by name but by general statements such as “It has been decided before this.” HOGUE, *supra* note 14, at 201. Moreover, the desire for consistency in mundane cases and incrementalism in novel cases drove the use of cited precedents: “[I]f any new and unwonted circumstances . . . shall arise, then if anything analogous has happened before, let the case be adjudged in like manner, since it is a good opportunity for proceeding from like to like.” (Latin phrases omitted.) *Id.* at 200. While Bracton used many hundreds of cases, subsequent English writers into the early modern period used few, if any, in their treatises.

36. Professor Plucknett noted merely a “faint beginning of a more modern spirit” as recently as 1454 in the comments on a case by Chief Justice Prisot:

If we have to pay attention to the opinions of one or two judges [in recent cases] which are contradictory to many other judgments by many honourable judges in the opposite sense, it would be a strange situation, considering that those judges who adjudged the matter in ancient times were nearer to the making of the statute than we are, and had more knowledge of it.

PLUCKNETT, *supra* note 15, at 346. The reason this is “faint” is that, while the chief justice appears to believe that he is obligated to follow the older cases, he is still just balancing and weighing competing legal authorities, something that was done in the civil law countries, as well. Plucknett also pointed out the droll fact that the chief justice was disturbed by the idea that using the more recent cases cited by counsel would, as the court declared, “assuredly be a bad example to the young apprentices who study the Year Books [irregularly compiled records of cases], for they would never have confidence in their books if now we were to adjudge the contrary of what has been so often adjudged in the books.” *Id.* Plucknett described other cases found in the *Year Books* in which the judges expressly voice concern that their decisions be clear and comprehensible to the law students present in court. This is one demonstration of the close connection between the work of the courts reflected in the concrete cases they decided and legal education, which Professor Garay admires about the common law system.

opinion of one judge. Instead, the application of that principle over time and by different judges was evidence that it had become part of custom, its legitimacy rooted in experience, and its existence verified by the judges' memory of what they themselves had decided or had learned in their legal training, and by what could be found, albeit in an annotated manner, in the Year Books. As time went on, and a unified modern nation state increasingly replaced the feudal order, any distinction between the common law as the "custom of the king's courts" and the "custom of the country" was meaningless. Common law and custom had become fully synonymous. From a sociological perspective, custom was how the people generally, or some important interest group (such as the merchants or other elite), responded repeatedly to actions by individuals that was an affront to some broadly accepted norm of behavior. From a jurisprudential perspective, custom had the essence of law in that it had been repeatedly applied in predictable fashion to similar facts and was a coherent form of social control. Even if not technically deemed binding on a court, this custom became difficult to ignore in the absence of compelling reasons of societal necessity. This was analogous to the "jurisprudence" of civil law countries that was developed by the continental scholars and judges expounding on Roman law molded to fit local conditions. It is similarly analogous to the tradition of *jurisprudencia* that shapes adjudication in the Argentine courts which Professor Garay describes.<sup>37</sup>

The relatively centralized system of legal training at continental European law schools allowed for development of codes and treatises that provided a structure for the systematizing of legal principles to guide future decision-making. The comparatively haphazard English system of studying the law by observing the actions of the royal courts and "reading the law" in the Year Books was the result of the bench being put in charge of the training of lawyers in 1292. Those apprentices eventually became lawyers, from whom the professional judiciary was drawn.<sup>38</sup> To understand the practical

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37. Garay, *supra* note 1, at 269-71. This mode of thinking, too, is rooted in classical Greek epistemology. See *supra* note 10 and Socrates's colloquy with Adeimantus about it being easier to discern larger forces at work in the city than in the individual man. A legal principle derived from an individual case decided by one judge is more likely to be influenced by the particular facts of that case, whereas in a series of cases the peculiarities of any one of them are more likely to be muted when determining the principle that decides all. Put another way, one can induce a legal principle more soundly from multiple experiences than one. Or, yet another analogy: One point does not a line make; with three points, one has more assurance of the line's slope.

38. See PLUCKNETT, *supra* note 15, at 217-20, 224-26:

In 1292 a royal writ was sent to Meetingham, C.J., and his fellows of the Common Bench, in these terms: 'Concerning attorneys and learners ("apprentices") the lord King enjoined Meetingham and his fellows to provide and ordain at their discretion a certain number, from

application of the common law to particular controversies required the student, the practitioner, and the judge to know cases. However, knowledge of cases was not and cannot be enough. There are too many “examples” with too many factual variables, and an atomized learning of cases lacks the structure that the human mind needs to impose order on an apparently chaotic system. That calls for the use of more general operative rules to govern similar cases. Even if a legal system relies on judges and individual cases to discern those rules, stability and predictability require those rules to be known and generally fixed.

One way to meet that requirement is to make the rule in a case binding on determinations of future such disputes. Acceptance of the binding nature of previously-decided cases through a strict application of *stare decisis* was a slow process that realistically could not begin before there was a systematic and accessible record of cases and of the reason for the judge’s decision.<sup>39</sup> That had to await the appearance of modern mass printing, an organized system of case reports, and a more hierarchical structure of the judiciary.

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every county, of the better, worthier, and more promising students . . . , and that those so chosen should follow the court and take part in its business; and no others.’

*Id.* at 217-18; *see also* LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 24, 318-22 (2d ed. 1985); HOGUE, *supra* note 14, at 246.

39. *See* HOGUE, *supra* note 14, at 181 (commenting on the Plea Rolls):

The records were kept solely for use in royal administration, and the king was particularly interested in knowing who owed him money and how much. The king’s officers did not then make records of legal cases for the benefit of the legal profession. Only such facts of a case as were of value to the royal administration were entered in the rolls . . . . But the reasoned opinion of the justices employed in the decision was not considered of value in the thirteenth century. The decision alone was recorded. Even after the beginning of reporting and the making of those unusual volumes known as *Year Books*, the modern doctrine of *stare decisis* could not develop because uniform reports of cases could not be widely distributed until the beginning of printing in the fifteenth century. When there were not printed records or reports, who could verify citations to previous decisions without first obtaining permission to consult the royal plea rolls?

Bracton’s herculean effort, described earlier, to research the unannotated Pleas Rolls for his “Note Book” was not replicated.

Versteeg describes judges in the Egyptian New Kingdom period (1552-1069 BC) as relying on authoritative precedent, with judicial case records being kept as early as the Middle Kingdom period (2040-1674 BC). He quotes an instruction to the vizier Rekhmire: “As for the office in which you hold audience, it includes a large room which contains [the records] of [all] the judgements . . . . Do not act as you please in cases where the law to be applied is known.” He extracts from this the application of *stare decisis*, and attributes an essential conservatism to Egyptian law marked by judges relying on custom and precedent. VERSTEEG, *supra* note 17, at 129. While this sounds remarkably like modern Anglo-American judicial practice, Versteeg may be optimistic if he believes that these statements are more than aspirational and actually reflect a coherent philosophy of horizontal and vertical *stare decisis*. As he acknowledges, records were typically private documents kept by parties whose rights were affected in a case. Some official archives may, at time, have been kept, however, and one of his cited sources claims that there were examples of judgments based on decisions hundreds of years old.

Mass printing of court records and decisions was possible by the sixteenth century. A system of reporters replaced the *Year Books*, often under the name of a prominent judge or lawyer, even if the report was not made by that person. These reports were not the modern style that describes the factual background (including, in some versions, the lawyers' arguments), followed by the reasoning and the decision. Rather, they often were discussions of the cases, frequently with commentary by the reporter, and, when in less competent hands, cursory and inaccurate.<sup>40</sup> Plucknett identifies a significant improvement in the reports in the latter half of the eighteenth century, with proper structure and judges reviewing the draft reports of their decisions, which set the pattern for the establishment of the official Law Reports in 1865.<sup>41</sup>

A similar development occurred in the United States. Until 1816, the reporter of Supreme Court opinions acted unofficially, and, until 1874, even the official reporter published the reports privately as part of his compensation. The very early reports of Supreme Court opinions were eclectic collections of cases from diverse courts, state and federal, supreme and inferior, as suited the reporter's fancy and his expectation of what would interest the readers and spur sales.<sup>42</sup> As was the case with the English versions, these reports often were descriptions of the events and of the decision and reasoning, accompanied by commentary, but not verbatim transcripts. One such example is *Hayburn's Case*,<sup>43</sup> in which the reporter, Alexander Dallas, referred to "the Court" impersonally, described

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40. PLUCKNETT, *supra* note 15, describes Edward Coke's *Reports*, the best of the lot, as follows:

There was no clear boundary in his mind between what a case said and what he thought it ought to say, between the reasons which actually prompted the decision, and the elaborate commentary which he could easily weave around any question. A case in Coke's *Reports*, therefore, is an uncertain mingling of genuine report, commentary, criticism, elementary instruction, and recondite legal history. The whole is dominated by Coke's personality, and derives its authority from him.

*Id.* at 281.

41. *Id.*

42. What became the first series of United States Reports was assembled by Alexander Dallas, the unofficial reporter from 1790-1800. His first volume, of four in total, focused on Pennsylvania cases decided before and after the Revolutionary War. One of the first cases in the book is a 1760 case, *Stevenson v. Pemberton* from the Pennsylvania (Provincial) Supreme Court. Other cases were from various local courts before and after the war. There were cases from the Federal Court of Appeals under the Articles of Confederation (a special court of limited jurisdiction that heard appeals from state court judgments in admiralty). The first Supreme Court case, *West v. Barnes*, did not appear until the second volume, 2 U.S. (2 Dall.) 401 (1791). Not until Dallas's successor, William Cranch, became reporter, were the United States Reports limited to U.S. Supreme Court cases.

43. 2 Dallas 409 (1792).

subsequent events and extraneous communications, summarized the argument and decision, but provided only cursory reference to the factual background. There was no discussion of the *ratio decidendi* behind the Court's decision.<sup>44</sup> Still, these reports soon took on a standard form that separated the lawyers' arguments from the Court's pronouncement. Within the latter, the new model distinguished between the facts, the legal reasoning applied to those facts, and the decision. By the nineteenth century, in England and the United States, the material conditions were in place that would allow for the evolution of the theory of the "binding" nature of a single precedent, at least when directed from a superior court to an inferior.<sup>45</sup>

However, there was one more hurdle. Adding to the jurisprudential chaos in England were the often-overlapping jurisdiction and specialized procedures of the common law courts of Common Pleas, King's Bench, and Exchequer. To provide more flexibility in responding to new legal issues, and to cut through arcane procedures in dealing with old ones, various equity courts arose that developed alternative structures and jurisdiction. Unfortunately, as time passed, the equity courts underwent their own process of bureaucratization, and equity as an alternative body of substantive and procedural law became more formalized and calcified. The former innovation then added to the complexity and opacity of the entire legal system. A more rational court system was needed, a process begun in the sixteenth century, but not completed until the Supreme Court of Judicature Acts of the 1870s. Its most recent iteration is the Constitutional Reform Act 2005.

A rudimentary appellate structure existed within the system through various avenues, most significantly the Court of Exchequer Chamber. That court exercised the formal appellate function beginning in 1585 until the late nineteenth century reforms.<sup>46</sup> Not surprisingly, decisions of that court

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44. A particularly curious example is the 1794 case of *United States v. Yale Todd*, in which the Supreme Court for the first time apparently found a law of Congress unconstitutional. That case, for which there was a record in the Supreme Court of the lower court's decision and the motion by the attorneys, and an extract of the minutes of the Supreme Court showing a decision, nevertheless lacked a report of the Court's opinion. The "official" report appears nearly 60 years later, in *United States v. Ferreira*, 13 How. 40 (1851). The "report" is a paraphrase of the record in *Yale Todd*, attached to the later case as a "Note by the Chief Justice [Roger Taney]." It is not clear how much of the report is verbatim from the original case and how much is interpretation and commentary by the Chief Justice, although it is clear that there is much of the latter. See Wilfred J. Ritz, *United States v. Yale Todd (U.S. 1794)*, 15 WASH. & LEE L. REV. 220 (1958).

45. The reports, being well structured and annotated, also served as an educational tool for judges, lawyers, and law students, even better than the rudimentary versions had done in previous centuries. Professor Garay mentions a similar aim in nineteenth century Argentina. Garay, *supra* note 1, at 274-75 n.37.

46. While appeals were possible from the Court of Exchequer Chamber to the House of Lords, this was unusual before the late nineteenth century. Even more unusual--and controversial--were

received prominence in the decisions of the other courts at a fairly early stage. Professor Plucknett describes one case in 1483 when the chamber reached a decision on a case originating in the court of common pleas by a majority: “When the chief justice of the common pleas gave judgment, he explained that he disagreed with the decision of the chamber, but was bound to adopt the view of the majority.”<sup>47</sup>

By the seventeenth century, Chamber decisions in particular cases, not just lines of cases as custom, increasingly became recognized as binding on (lower) courts.<sup>48</sup> Some judges began to distinguish the holding of a prior case from mere *dictum*, an unnecessary step if a precedent is not at all “binding.” Chamber decisions, then, seem to be the germ of the modern theory of vertically binding precedent gradually emerging four centuries after Bracton. However, even that hesitant step was unsteady and was not taken uncritically. Moreover, decisions of other courts were not binding. Thus, decisions by the House of Lords, a court higher in theory than the Exchequer Chamber, were not binding on lower courts until the nineteenth century. That might have been due to the fact that the Exchequer Chamber had professional judges, whereas the House of Lords at the time included non-lawyers in its judicial function. Precedent at the same level court clearly was not binding, a practice even more engrained if two different courts, such as King’s Bench and Common Pleas, had concurrent jurisdiction over the same type of dispute.

Judges considered themselves free to ignore individual precedents well into the nineteenth century. Various arguments were used, if following a precedent would lead to an undesirable result. Coke argued that the inconvenient precedents did not represent the true state of the law, a form of “distinguishing” cases that courts still routinely use today in the United States, England, and, apparently, Argentina. Lord Mansfield in the eighteenth century blamed the often unreliable reports for such troublesome precedents and preferred to decide cases on more sympathetic (and controlling) “principles.”<sup>49</sup> Professor Plucknett also observed that the habit

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attempts to bring cases to the House of Lords in original jurisdiction, unless it involved the trial of a peer. All original and appellate jurisdiction of the House of Lords has now been transferred to other courts, except in the (mostly hypothetical) case of a trial of impeachment, none of which have occurred since 1806.

47. PLUCKNETT, *supra* note 15, at 347.

48. “[I]n 1602 a decision of the chamber was referred to as ‘the resolution of all the judges of England’ which was ‘to be a precedent for all subsequent cases,’ [citation in footnote omitted] and in 1686 Herbert, C.J., announced it as ‘a known rule that after any point of law has been solemnly settled in the Exchequer Chamber by all the judges, we never suffer it to be disputed or drawn in question again.’” *Id.* at 348.

49. *Id.* at 349.

of the English courts even in the eighteenth century was to “string-cite” cases to cover the same point. He concluded that:

Their very number is significant: under a developed system of precedents one case is as good as a dozen if it clearly covers the point . . . . The eighteenth century, however, still seems tempted to find safety in numbers, and to regard the function of citations to be merely that of proving a settled policy or practice.<sup>50</sup>

Or, to rephrase this idea, in contrast to a precedent in isolation, the “settled practice” was the “custom” represented in the common law, as had been envisioned by the English courts for several centuries. The cited cases were merely examples. It was the “jurisprudence” of the continental scholars, albeit developed by the courts and the practitioners, in a manner analogous to the *jurisprudencia* and its use by Argentine courts.<sup>51</sup>

With the reorganization of the English courts into a clearer hierarchy, the emergence of standardized reporting, and public dissemination of the reasoning behind the decisions during the nineteenth century, the stage was finally set to make a precedent binding on subsequent courts. Indeed, the English system relies on a comparatively strict fiction that has had, in the opinion of one skeptic, a debilitating effect on the traditional flexibility of the common law through its connection to living custom. “[I]f perchance a court has given a decision on a point of that custom, it loses for ever its flexibility and is fixed by the rule of precedent at the point where the court touched it.”<sup>52</sup> One may question such pessimism. Judges are political creatures that seek to protect their sinecures, as all bureaucrats do. When the need for flexibility arises and an inconvenient precedent must be ignored, English judges still have sundry rules of construction and creative interpretation, for case precedents as well as for statutes, to lend them a hand.

In the newly-formed United States, an economically and socially simpler society less burdened by the historical encrustations of the English legal structure, the court systems were more rationally organized at an earlier time. Especially at the federal level, the Constitution provided for a Supreme Court with mostly appellate jurisdiction overseeing a system of lower courts. Congress acted quickly to begin its systematic control over judicial organization in the Judiciary Act of 1789. Moreover, the Supreme Court early established its supreme authority over inferior courts to provide uniformity of legal principles.<sup>53</sup>

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50. *Id.*

51. Garay, *supra* note 1, at 269-70.

52. PLUCKNETT, *supra* note 15, at 350.

53. Professor Garay explains that the Argentine constitution expressly authorizes the Congress to enact certain national codes, which, if done, prohibits the provinces from regulating those matters.

As to that last point, the culprits in this saga were the state supreme courts, particularly the Virginia Court of Appeals, which balked at accepting the finality of decisions and legal holdings of the U.S. Supreme Court in matters defined by Article III, Section 2 of the Constitution. In *Martin v. Hunter's Lessee* in 1813,<sup>54</sup> and *Cohens v. Virginia* in 1821,<sup>55</sup> the Supreme Court held that it had the constitutional authority to review state court decisions that involved the Constitution, treaties, or statutes of the United States. In *Martin*, Justice Joseph Story laid out several textual and historical reasons for the supremacy of the U.S. Supreme Court. But his clearest argument was practical:

From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere -- wherever it may be vested, it is susceptible of abuse. In all questions of jurisdiction, the inferior or appellate court must pronounce the final judgment; and common sense, as well as legal reasoning, has conferred it upon the latter.<sup>56</sup>

Story then stressed:

[T]he importance, and even necessity, of uniformity of decisions throughout the whole United States upon all subjects within the purview of the Constitution. Judges of equal learning and integrity in different States might differently interpret a statute or a treaty of the United States, or even the Constitution itself; if there were no revising authority to control these jarring and discordant judgments and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be

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He describes this as a remarkable difference from the U.S. constitutional system. I am not convinced. If the U.S. Congress enacts a law under one of its delegated constitutional powers, such as the expansive power to regulate interstate commerce, the states (who have concurrent power to regulate under their general "police power") are prohibited from regulating if either their law conflicts with the congressional statute or, in the absence of direct conflict, Congress nevertheless intended to preempt the field of regulation and exclude the states.

Moreover, even if Congress has not legislated in that field, the states are precluded from regulating it, if the state law is inconsistent with the very placement of that power in the hands of the national government. One example would be, if the nature of the power is such that it must be exercised by the nation, not a state. The power to regulate naturalization (and, by extension, immigration) would be an example. What is odd in relation to the American system, is Professor Garay's explanation that such national legislation in Argentina is litigated in provincial courts exclusively, with no review by the Argentine Supreme Court. See Garay, *supra* note 1, at 265-66. In the United States, state courts may hear claims under federal statutes, unless Congress has made jurisdiction exclusive in the federal courts, but, under Article III, Section 2, of the Constitution, the U.S. Supreme Court retains appellate authority over such state court decisions.

54. 14 U.S. (1 Wheat.) 304 (1816).

55. 19 U.S. (6 Wheat.) 264 (1821).

56. *Martin*, 14 U.S. (1 Wheat.) at 345.

different in different States, and might perhaps never have precisely the same construction, obligation, or efficacy in any two States.<sup>57</sup>

In sum, finality and uniformity necessarily require that a decision of the U.S. Supreme Court, including its holding, is binding on inferior courts through vertical *stare decisis*.

Just one Supreme Court opinion that is on point is binding in subsequent similar cases heard by lower courts. Yet there, too, “constitutional custom,” established through repeated decisions of the Supreme Court (and possibly influenced by the actions of the other branches of government) lends extra force to the constitutional principle. Justice Story again:

Strong as this conclusion stands upon the general language of the Constitution, it may still derive support from other sources. It is an historical fact that this exposition of the Constitution, extending its appellate power to State courts, was, previous to its adoption, uniformly and publicly avowed by its friends and admitted by its enemies as the basis of their respective reasonings, both in and out of the State conventions. It is an historical fact that, at the time when the Judiciary Act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. *It is an historical fact that the Supreme Court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases brought from the tribunals of many of the most important States in the Union, and that no State tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court until the present occasion.* This weight of contemporaneous exposition by all parties, this acquiescence of enlightened State courts, and *these judicial decisions of the Supreme Court through so long a period do, as we think, place the doctrine upon a foundation of authority which cannot be shaken without delivering over the subject to perpetual and irremediable doubts.*<sup>58</sup>

Horizontal *stare decisis* is a different matter. In balancing stability and flexibility, the theory of precedent in American courts is less strict than in England. A precedent of a court is persuasive, but not binding, on a successor court or on a different court of equal dignity, such as the effect of a decision in one federal circuit court on a similar case in a different federal circuit court.<sup>59</sup>

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57. *Id.* at 348.

58. *Id.* at 351 (emphasis added).

59. That comment may not apply if the case is decided by a panel of a particular court, such as a panel of a federal circuit court or a division of a state intermediate appellate court. A decision

This practical consideration is supported conceptually by the idea that a sovereign acting at one point cannot bind the hands of a later sovereign with equal authority who has not consented to that earlier action, and neither can an entity exercising an aspect of that sovereignty bind a successor of equal authority. Thus, a legislature cannot by statute bind its successor,<sup>60</sup> an executive cannot by decree bind his successor, a court cannot by decision bind its successor, and an “explicit and authentic act of the whole people”<sup>61</sup>

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by one panel on an issue may bind a subsequent, different panel of that same court until the matter is addressed by that appellate court, *en banc*, or by a higher court. It is also crucial to remember that *stare decisis* in any form applies only within the judicial branch. There is a vast difference between *Marbury v. Madison*, 5 U.S. 137 (1803) and *Martin v. Hunter’s Lessee*. Despite occasional institutional bravado about the “finality,” “infallibility,” and “ultimate” nature of Supreme Court decisions that one may find in the writings of some justices, these expressions of judicial supremacy do not reflect theory or reality. None of those words, or similar characterizations appear in *Marbury* or other cases before the 20th century. There is a practical comity and respect that Congress and the President grant to Supreme Court opinions, to go along with the not-infrequent politically useful blame-shifting with controversial issues. It is also true that, under the theory of separation of powers among the three co-equal branches of the general government, the political branches cannot interfere with the courts’ decisions between particular litigants. However, that same co-equality, in turn, prevents the courts from binding the hands of the other branches in the latter’s political choices. As President Abraham Lincoln declared in his First Inaugural Address on March 4, 1861, about the *Dred Scott Case*:

I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration, in all parallel cases, by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.

President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in S. EXEC. DOC. NO. 1, at 6-7 (1861); *Scott v. Sandford*, 60 U.S. 393 (1857). As a practical matter, as well, the political branches have numerous ways to ignore or avoid the constitutional reasoning of a court. Among the most direct are Congress’s ability to pass a different law, with minor adjustments, to indicate its political will; the President’s power to appoint new justices sympathetic to his view and get the precedent reversed (The Legal Tender Cases: *Hepburn v. Griswold*, 75 U.S. 603 (1870), overruled by *Knox v. Lee*, and *Parker v. Davis*, 79 U.S. 457 (1871)), or the adoption of an amendment to the Constitution, one example being the Eleventh Amendment to overturn *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

60. An exception to that rule has been found if the earlier legislative act has resulted in vested rights in property, which cannot then be undone. See, for example, *Fletcher v. Peck*, 10 U.S. 87 (1810), in which the Supreme Court rejected an attempt by the Georgia legislature to repeal an earlier land grant, when the rights of the earlier purchasers and their successors had vested.

61. The expression appears in President George Washington’s Farewell Address and refers to the act of amending the Constitution. See DAVID E. KYVIG, EXPLICIT & AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995, at 1 (1996).

reflected in the Constitution cannot bind a future generation.<sup>62</sup> In all cases, such earlier action may be reversed by the successor.

In *Planned Parenthood v. Casey*,<sup>63</sup> the joint opinion explained the prudential considerations the Court weighs to determine whether or not to overrule a precedent:

[W]hether the rule has proven to be intolerable simply in defying practical workability[;] whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation[;] whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine[;] or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification[.]<sup>64</sup>

Most prominent in the Court's calculus, one suspects, is the concern about institutional legitimacy and survival:

There is, first, a point beyond which frequent overruling would overtax the country's belief in the Court's good faith . . . . There is a limit to the amount of error that can plausibly be imputed to prior Courts . . . . The legitimacy of the Court would fade with the frequency of its vacillation.<sup>65</sup>

The Court has also declared at various times that the persuasive nature of one of its precedents is weaker in constitutional law cases.<sup>66</sup> Yet the Court has also been willing to overturn precedents expressly and in short order on what seems to be merely a political distaste by the later majority for the earlier decision, sometimes only because a single justice has changed his mind.<sup>67</sup>

62. However, Article V of the Constitution purports to make inviolate certain provisions of the Constitution, only one of which is still operative, "that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." It is not clear, however, why this exception to the amendment process could not itself be repealed by a properly adopted amendment.

63. 505 U.S. 833 (1992).

64. *Id.* at 854-55.

65. *Id.* at 866.

66. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting):

But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. In cases involving the Federal Constitution the position of this court is unlike that of the highest court of England, where the policy of *stare decisis* was formulated and is strictly applied to all classes of cases. Parliament is free to correct any judicial error; and the remedy may be promptly invoked.

*Id.* Historically, this, too, was not an issue for English courts, since they had no power to overturn acts of Parliament. Today, that last point is still generally true, although the highest English court can declare certain acts inconsistent with more authoritative enabling acts. They can also make non-binding declarations of incompatibility of any act of Parliament with the European Convention on Human Rights.

67. See, for example, *National League of Cities v. Usery*, 426 U.S. 833 (1976) and, just nine years later, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and the role of Justice Harry Blackmun in first distinguishing – through intervening cases – and then

Even leaving aside the creativity exhibited by justices to distinguish or re-interpret unfavorable precedents in what appear to be similar cases, it is clear that they do not consider prior precedent as strictly binding in subsequent matters of constitutional law as in other legal disputes.

#### FACT-SPECIFIC INCREMENTALIST RULE-MAKING OR A SEARCH FOR GENERAL PRINCIPLES AS RULES

One fault of Argentinian judges that Professor Garay finds disturbing, particularly in constitutional law cases, is the tendency to decide cases at a high level of abstraction in the rule applied. He cites to that end the Argentine right of privacy cases, *Bazterrica*, *Montalvo*, and *Arriola*, which dealt with possession of narcotics.<sup>68</sup> The courts do this, he charges, though it is unnecessary to resolve the particular dispute. For that shortcoming he blames another unfortunate inheritance from the civil law tradition, that of academic jurists looking for general principles rather than employing the narrowly-reasoned, fact-focused, case-by-case incrementalism of the common-law tradition, a habit that is passed along to embryonic lawyers during their gestation in the law schools. Perhaps one should not be too harsh on the judges in those cases, if they were influenced by Article 19 of the Argentine Constitution: “This Article also provides that private actions that neither offend public morality nor harm third persons are exempt from the magistrate’s judgment and reserved only to God.”<sup>69</sup> The nebulosity and vacuity of this type of posturing as a workable rule of law is what American opponents of a bill of rights decried in the 1780s. Alexander Hamilton described these declarations as “volumes of those aphorisms . . . , which would sound much better in a treatise of ethics, than in a constitution of government.”<sup>70</sup>

Judging by more than a few examples, I suggest that Professor Garay is too laudatory of the U.S. Supreme Court. It is a frequent rhetorical device for a concurring or dissenting opinion to castigate the majority in a constitutional law case of having ventured in its holding well beyond what

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overruling the decision he had earlier joined. This was followed just seven years later by a resurrection of the principle of *National League of Cities* and a rejection (though not a formal overruling) of *Garcia* in *New York v. United States*, 505 U.S. 144 (1992) and, once more, in *Printz v. United States*, 521 U.S. 898 (1997). For another example, albeit one less influenced by the vacillations of a single justice, see *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923), overruled just fourteen years later in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

68. Garay, *supra* note 1, at 295-97, 310.

69. *Id.* at 267.

70. THE FEDERALIST No. 84 (Alexander Hamilton); Publius, *supra* note 10.

was necessary to decide the case. The inclination to resort to sweeping declarations was criticized by Justice Felix Frankfurter in his concurrence in the important separation of powers case *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>71</sup> Frankfurter was critical of Justice Hugo Black's opinion for the Court that sought to define and fix categorically presidential powers relating to his office as chief executive and as commander-in-chief. Frankfurter reminded his brethren of the "humble" role of the Court:

Rigorous adherence to the narrow scope of the judicial function is especially demanded in controversies that arouse appeals to the Constitution . . . . So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle--preferably forever--a specific problem on the basis of the broadest possible constitutional pronouncement may not unfairly be called one of our minor national traits . . . . The path of duty for this Court, it bears repetition, lies in the opposite direction . . . . The issue before us can be met, and therefore should be without attempting to define the President's powers comprehensively.<sup>72</sup>

Curiously, in the very area of constitutional law that Professor Garay critiques, the right of privacy, members of the U.S. Supreme Court have relieved themselves of sometimes mind-bogglingly broad holdings. The seminal case, *Griswold v. Connecticut*,<sup>73</sup> saw the Court announce a constitutional "right to privacy" beyond the specific aspects protected in various Bill of Rights provisions. As with the Argentine Supreme Court, the members of the majority in that case either did not provide guidance as to what aspects of privacy would be protected or resorted to extra-constitutional considerations of a protean nature. Thus, Justice William Douglas talked about a right of privacy older than the Bill of Rights, even while he purported to base his opinion on "penumbras and emanations" arising out of that very same Bill of Rights. The concurring opinions of Justices Arthur Goldberg

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71. 343 U.S. 579 (1952).

72. *Id.* at 594 (Frankfurter, J., concurring). Of course, the exact opposite problem arises when cases are decided without a clear principle of sufficient scope being supplied. This creates inconstancy and a lack of predictability. Indeed, in the very area addressed by Frankfurter, that of the interplay of presidential and congressional powers, the quintessentially political issues of separation of powers has led courts to emphasize fine factual distinctions at the expense of clear legal principles. Writing for three justices in his dissent in *Youngstown*, Chief Justice Fred Vinson listed the problems that arise from ad hoc, principle-free judicial decision-making:

The diversity of views expressed in the six opinions of the majority, the lack of reference to authoritative precedent, the repeated reliance upon prior dissenting opinions, the complete disregard of the uncontroverted facts showing the gravity of the emergency and the temporary nature of the taking all serve to demonstrate how far afield one must go to affirm the order of the District Court.

*Id.* at 708 (Vinson, C.J., dissenting). A review of the Court's novel *habeas corpus* jurisprudence involving the detention of enemy combatants in the decade of the 2000s reveals more examples of Vinson's critique.

73. 381 U.S. 479 (1965).

and John Marshall Harlan II tried to limit the right of privacy to the circumstances of that case, a married couple's decision to use contraceptives--a limitation soon forgotten or ignored in subsequent cases that involved much narrower restrictions on access to contraceptives or that regulated abortion.<sup>74</sup>

Since not all private actions are constitutionally immunized from government control, the Court did not really mean what it said--that the case was decided on the basis of the broad right announced. It was not clear from the opinions which actions would receive such favored status. Recreational use of drugs generally? Some drugs? Animal cruelty? Spousal violence? Liberty of contract? If not, why not? Goldberg would look to the collective conscience of the people and to legal customs and traditions; Harlan would look to principles of ordered liberty that inhere in a free society. Whatever those were.

At least Goldberg and Harlan would seek guidance by reviewing American legal history for evidence of concrete laws (or their absence) to help define their "collective conscience" and "ordered liberty."<sup>75</sup> An even more stunningly broad definition of the operative constitutional principle in a case was announced by Justice Harry Blackmun in dissent in *Bowers v. Hardwick*,<sup>76</sup> a case that upheld the constitutionality of an anti-sodomy law. The majority had described the principle at issue very narrowly as the "right of homosexuals to engage in sodomy," and considered whether or not that right was recognized under the Constitution. Blackmun countered that the true right at issue was the "right to be left alone," an assertion that would undermine the very function of law as a means of social control that typically

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74. Compare the narrow formulation of the operative principle in *Griswold* with *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (finding a law that prohibited *distribution* of contraceptives to *unmarried* persons, except when done by a licensed pharmacist, unconstitutional under the *equal protection* clause), *Roe v. Wade*, 410 U.S. 113 (1973) (Supreme Court finding unconstitutional various restrictions on a woman's right to obtain an abortion, based simply on the assertion that this involved a constitutionally protected liberty as part of the right of privacy), and *Carey v. Population Services*, 431 U.S. 678 (1977) (finding unconstitutional a law that--mostly--prohibited distribution of contraceptives to *minors under 16*) (emphasis added).

75. The Connecticut law at issue in *Griswold* appears to have been a rogue law in its sweep. It seems never to have been enforced, according to Justice Felix Frankfurter in the opinion for the Court in the predecessor case to *Griswold*, *Poe v. Ullman*, 367 U.S. 497, 501-02 (1961). The law's intrusion into the marital bedroom by prohibiting "use" of contraceptives by "married couples" may not have had any counterpart in the laws of other states that regulated "sale" of contraceptives. When it came time to apply the right of privacy to abortion, Justice Harry Blackmun's opinion for the Court in *Roe v. Wade* determined that the liberty protected in *Griswold* extended to abortion. However, the fact that abortion prohibitions were of old pedigree and widespread, unlike the Connecticut law, was ignored or distorted.

76. 478 U.S. 186 (1986).

acts *against* the individual's desire to be left alone to do as he sees fit. At the very least, if the Court followed its traditional constitutional jurisprudence regarding fundamental rights (always an uncertain proposition, as current Second Amendment law shows), every criminal law and many civil laws would now be subject to strict judicial scrutiny as a direct and substantial burden on one's right to be left alone.

A similarly unbounded "right" was announced by the joint opinion in the abortion law case *Planned Parenthood v. Casey*.<sup>77</sup> The issue was whether the act of terminating a pregnancy by abortion was a constitutionally "protected liberty" or one that did not enjoy that status and was, thus, subject to restriction through the usual majoritarian political process. In a phrase attributed to Justice Anthony Kennedy, the opinion stated the operative principle as, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>78</sup> If this was meant to convey more than a right to belief and speech, which would be protected under the First Amendment, and, instead, extended to the right to act on those beliefs, it was, as Justice Antonin Scalia sarcastically charged in *Lawrence v. Texas*, "the passage that ate the rule of law."<sup>79</sup> Moreover, since the Pennsylvania abortion law was about "action," not just "definition," Kennedy's vacuous "principle" was inapposite. Presumably, Kennedy did not intend his principle to allow me to shoot my obnoxious neighbor because I defined my own concept of existence and the mystery of human life to be incompatible with my neighbor's continued existence.

Such bombastic, New-Age affirmations presumably could be (and, subsequently, were) limited case-by-case in true common-law fashion, often long on assertions and dubious analogies. But that seems to have been the case as well in the Argentine decisions discussed by Professor Garay. Moreover, such *post hoc* trimming does not change the fact that common-law courts are not at all immune to referencing grand principles.

Another way that the U.S. Supreme Court departs from the common-law ideal is through the "facial invalidity" mode of constitutional review. The orthodox manner of deciding about the constitutionality of a law is to determine whether or not the law is unconstitutional as applied to the challenger's actions. That suitably meets the constitutional case-or-controversy requirement and its derivative doctrines, such as the claimant's proper standing to sue. It also avoids unnecessarily chastising the people or their elected representatives for acting unconstitutionally, and thereby limits the affront to the *Grundnorm* of self-government in a republican system that

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77. 505 U.S. 833 (1992).

78. *Id.* at 851.

79. 539 U.S. 558, 588 (2003) (Scalia, J., dissenting).

occurs when an unelected body overturns the political choices made by the people's elected representatives.<sup>80</sup> As well, such an approach reflects the cautious incrementalism of case-by-case evolution of the common-law that Professor Garay admires.

Yet, there are numerous cases in which the Court has decided, under various doctrines, that a law under constitutional review must be struck down as written, without regard to the circumstances of its application in that case. Some of these doctrines are readily defensible. For example, if a federal law is simply beyond Congress's power to enact, in that the law regulates purely internal state commerce, the law as written is unconstitutional because it can never be constitutionally applied, in the claimant's case or any other.<sup>81</sup> Also, if the wording in a law is so vague as to be incomprehensible to a typical person after allowing for the unavoidable marginal ambiguity of language and the practical imprecision of statutes, the law as written violates the basic due process protection of notice.<sup>82</sup> However, the Court's use of the "overbreadth" doctrine is a different juridical proposition altogether. In free speech doctrine, the Court may strike down a law, even if the defendant engaged in speech that the government constitutionally may proscribe, simply because the law is inartfully drafted and reaches substantially more constitutionally protected speech than unprotected speech.<sup>83</sup> For pure judicial policy reasons, the Court in an overbreadth case does not wait to bring the statute within its constitutional limits incrementally through a series of properly adjudicated cases in which the state has used the law to punish speakers unconstitutionally.

The method of legal analysis and judicial decision-making in Argentina that Professor Garay critiques in his article portrays the residual effects of the long tradition of continental civil law, a top-down, code-centered, scholar-driven approach that begins with a universe of prescribed legal principles that are deductively applied by the lawyer or judge to the facts of a particular case. Identifying the principle matters; the facts are secondary. The problem, according to Professor Garay, is the educational system. It is too intellectual,

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80. For a brief overview of some other self-imposed limitations in constitutional adjudication in federal courts, see Justice Louis Brandeis's concurring opinion in *Ashwander v. TVA*, 297 U.S. 288, 341, 346-49 (1936).

81. *United States v. Salerno*, 481 U.S. 739 (1987).

82. See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

83. See *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *New York v. Ferber*, 458 U.S. 747 (1982) (clearly applying the *Broadrick* test even to pure speech cases).

with too much rote learning of general principles, and not enough emphasis on fact analysis. The first thing we do, let's kill all the law professors.<sup>84</sup>

My response here does not necessarily disagree with this critique. Professor Garay is the expert on Argentina. I would maintain, however, that more is in play than changing legal education to focus more on Socratic discussion of cases to emphasize the importance of factual nuances among them. The same criticisms that Professor Garay makes have often been aimed at American legal education.<sup>85</sup> Perhaps the difference in education in the countries' respective law schools, or at least in the resulting product, is one of degree, not of kind.<sup>86</sup>

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84. Borrowed from Dick the Butcher in WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* pt. 2, act 4, sc. 2. While there is some controversy about Shakespeare's purpose for this line, I have a selfish bias against the suggestion made by Dick, and even more so against this modification. I assure my colleagues that I am using it ironically here.

85. Professor Garay derides the Argentine legal education "centered in scholarly works found in articles, manuals (hornbooks) and treatises annotating codes or statutes, general works that – apart from their intrinsic value as theoretical works – are written with abstraction to the case-law. If cases are occasionally used, it is just to exemplify a specific situation." Garay, *supra* note 1, at 289. For a contrary view about the virtues of case study in law school, see for example, the work of Judge Jerome Frank, one of the leading lights among the skeptics who became known as the "Legal Realists," the more down-to-earth predecessors of the Critical Legal Studies adherents. In Chapter XVI, "Legal Education," of *Courts on Trial*, Frank appears as a "reactionary reformer." FRANK, *supra* note 31. He dismisses case study as "myopic" and far too lengthy. Too much time in law school is spent "analyzing upper court opinions, 'distinguishing cases,' constructing, modifying or criticizing legal doctrines," in other words, what law professors like to dangle in front of law students as the magical "learning to think like a lawyer." Students are unprepared for legal practice, as a result. He would return to the reading of textbooks for basic substantive knowledge and writes favorably of the history of law office training. *Id.* at 237.

86. For an interesting perspective that accords with some of my earlier discussion about the similarities between the jurisprudence of the early English common law and its continental Roman law contemporary, Judge Jerome Frank quotes Professor Max Rheinstein of the University of Chicago about the case study method of American legal education:

In Rome, 'legal' activities were divided up among three groups of men; the jurisconsults, the orators, and practical politicians . . . . The jurisconsults busied themselves exclusively with the rules of law; the practical administration of justice remained outside of their field. Yet, their work has become the foundation of all legal science ever since, not only in the countries of the so-called Civil but also in the Common Law orbit. The style of Common Law legal science was determined when Bracton started out to collect, arrange, and expound the rules of the Common Law of his time in the very style of the Roman classics and the *corpus juris*. All the law books since his time...have adhered to the pattern thus determined. Legal education built upon these books has been equally limited; from Pavia and Bologna to Harvard, law schools have regarded it as their task to impart to their students a knowledge of the rules of law and hardly anything else. Of course, for practical work in the administration of justice such a training is far from being complete.

FRANK, *supra* note 31, at 244-45. This critique may be a bit of an overstatement and not do justice to the training traditionally done in England at the Inns of Court or in the early American law office training. But it does describe the essence of modern American legal education, even when a case study approach is used. Not that there is anything wrong with that current method as a first step to understanding how to "discover" the operative legal principles in a common law jurisdiction and to lay a foundation in the substance of those principles.

In the early United States, as for centuries in England, control over legal training was in the hands of the legal guild, and the lawyers and judges selected therefrom, not in the hands of the legal profession, and the law professors and jurists selected therefrom. Abandoning “reading the law” in a law office in favor of lectures in proprietary law schools and, later, university-affiliated law schools, and, later still, in favor of the “textbook method,” gradually removed law study from law practice. Legal training at Harvard at that time resembled more what Professor Garay describes: “[T]he students are assigned a specified portion of a regulation text-book to study, and for the most part to memorize; this is then explained by the teacher and recited on at the next period.”<sup>87</sup>

The introduction of the case method of study by Dean Christopher Columbus Langdell at the Harvard Law School was a reaction against textbook memorization. The fly in the ointment here was that Langdell, like many of his German-influenced contemporaries, believed in a rigorous “science” of the law, whereas the old law-office approach had always seemed to be more art or craft than science. The case method focused on the internal logic of the common law, and how the—relatively few—fundamental legal doctrines developed, all of which would be revealed through a Socratic journey through carefully selected cases. The journey would be guided by professional academics, not practitioners or judges. To demonstrate symbolically the essence of this curriculum to outsiders and to follow the model of the German universities, Harvard changed the law degree from Bachelor of Laws (LL.B.) to Juris Doctor (J.D.). Critics complained that this education bred professors, not practitioners, and that graduating students “would enter a law office feeling ‘helpless,’ at least ‘on the practical side.’”<sup>88</sup>

Langdell’s methodology is still with us, with some modification to account for the slow process of Socratic dialogue that is the ideal in the case study method. While many law schools try to round off the “university-style” education with clinical courses, courses in “practical” skills, and intern- or externships in law offices, there are limits to what this can achieve. Professors in classroom settings do a good job in efficiently getting across to

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87. For a good overview of the evolution of American legal education in the 19th century, see “The Rise of the Law School,” FRIEDMAN, *supra* note 38, in Chapter XI, *The Legal Profession: The Training and Literature of Law*, at 610.

88. *Id.* at 616 (quoting Harvard College Dean of Faculty Ephraim Gurney). As a humorous side note, at least for me, Langdell did not consider constitutional law to be suited to his approach because it was too connected to enacted rules through the Constitution’s text, akin to what happens in a code-type system. As a consequence, constitutional law was banned from the Harvard Law School curriculum for a brief time. Fortunately, unlike the rest of Langdell’s reforms, this step did not catch on with the other law schools.

their students the foundations of legal doctrines. Practical skills are most effectively learnt outside the school. The current American system awkwardly tries to do too much and spends too much time doing it. But introducing some of the methods of American law studies to Argentina might nudge that educational model in a direction more to Professor Garay's liking.

The bigger problem that I see from his article is that it takes time to change a judicial culture. It took the English system centuries to evolve fully from the continental, Roman-law approach to the modern system in regard to clear judicial hierarchy and the use and effect of precedent. That was true, even though that evolution received an early boost from the practical necessity of the Norman invaders to solidify their hold over the English masses, and their use of the judges and the "common law of the courts" to help in that endeavor. It appears that the American system entered the modern phase sooner than the English, once again due to a boost from the practical necessity to solidify a central administration's hold over a fractious people. This time the tool was to use the federal courts to begin spreading the "national common law" represented in the Constitution.<sup>89</sup>

Argentina has tried to emulate the form of the American system for more than a century, with at best limited success, in the judgment of Professor Garay. His narrative reminds one of the remark made by Alexis de Tocqueville about the Mexican Constitution of 1824:

The Mexicans were desirous of establishing a federal system, and they took the Federal Constitution of their neighbors, the Anglo-Americans, as their model and copied it almost entirely[.] But although they had borrowed the letter of the law, they could not carry over the spirit that gives it life . . . . [A]nd to the present day Mexico is alternately the victim of anarchy and the slave of military despotism.<sup>90</sup>

The ingrained effects of custom are difficult to overcome.

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89. I use "common law" in a very colloquial meaning here, in the sense that the Constitution represented a unifying force for what, as a political reality, was little more than a confederation of states for several decades. There was no federal common law of crimes, because that was seen as giving the general government too much power to legislate, just as Parliament could legislate regarding the content of the English common law. See *United States v. Hudson & Goodwin*, 11 U.S. 32 (1812). There remained the possibility of at least a federal commercial common law through *Swift v. Tyson*, 41 U.S. 1 (1842). That, too, was negated in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), although Congress and the federal courts have achieved the same result through broad federal securities and commercial statutes that allow the courts much room for interstitial discretion and interpretive creativity. The history of the federal judges in educating the people about the Constitution and helping to bind the union is well-recognized. This process was facilitated by the requirement of circuit-riding and by the practice of often long lectures as part of charges to juries, typically in criminal trials. There is also a common law of the Constitution, a manifold topic that deserves major investigation, but one that is well beyond the scope of this article.

90. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, I, 101 (2009).

At the same time, as I have argued, there are many similarities in the practical operation of the two systems, some of which, such as the need to identify stable legal principles at work in similar situations, are inherent in adjudicating cases. Others, such as the tendency to generalize at too high a level of abstraction, certainly infects not only Argentine judges. The conflicts among courts over the nature of precedent (vertical *stare decisis*) and the degree of discretion a court has to ignore its own precedent horizontal *stare decisis*), especially in constitutional matters, seem to be endemic, due in part at least to the inherently political nature of judges and their desire to maintain or increase personal and institutional influence. Argentina already has in place much of the material that shaped the modern common law approach to precedent and judicial decision-making: Regular publication of reports, a structured judiciary, and a familiarity, however passing and unsettled, with common law adjudication through its attempts over a century and a half to imitate the American tradition. Continued interaction between the different systems, and the efforts of reformers familiar with both, such as Professor Garay, over time likely will yield fruit in bringing the necessary improvements he seeks.

# ARGENTINA’S PATH TO LEGALIZING ABORTION: A COMPARATIVE ANALYSIS OF IRELAND, THE UNITED STATES AND ARGENTINA

Andrea F. Noguera\*

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## INTRODUCTION

Argentina portrays itself as a country that that offers tourists a destination to mate, eat delicious steak, and listen a tango. What the outside observers probably do not know is that despite its carefree reputation, Argentina allows its women, specifically poor women, to die because of clandestine abortions. Abortion is illegal in Argentina and low-income women specifically suffer the consequences from this lack of access to safe abortion services. As a result, low-income women disproportionately die due to botched at-home abortions.<sup>1</sup> As René Favaloro<sup>2</sup> famously stated, “the rich defend illegal abortion to keep it secret and not be ashamed, while poor girls are dying in the slums because they do not have access to the clinics that are making fortunes taking the shame out of the uterus of the rich.”<sup>3</sup>

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1. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 85 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/15000-19999/16546/norma.htm>.

2. Dr. René Favaloro was a famous cardiac surgeon from Argentina who is best remembered for conducting the first planned coronary artery bypass surgery, using a technique he invented himself. He was also the first surgeon in Argentina to perform successful heart-transplant surgery. A highly prominent personality in the Argentine medical fraternity. After spending a long time working in Ohio in the United States, when he returned to Argentina he realized that there was a lack of an institution of similar excellence to the Cleveland Clinic, the place where he had worked. Therefore, with the help of several collaborators, he finally founded the Favaloro Foundation in 1975. Favaloro was deeply concerned about the health of the general public and took many efforts to improve public health. See *Biografía*, FUNDACIÓN FAVALORO, HOSPITAL UNIVERSITARIO, <https://www.fundacionfavaloro.org/biografia/> (last visited Nov. 17, 2018).

3. *Que opinaba Rene Favaloro sobre el aborto*, VILLEGAS NOTICIAS (June 12, 2018), <https://www.villegasnoticias.com/general/que-opinaba-rene-favaloro-sobre-el-aborto/>.

Only two exceptions exist to make abortion legal in Argentina, both articulated in Article 86 of the National Criminal Code. The first exemption applies when a risk to the woman's life or health exists. The second exemption exists for cases in which the rape of an insane woman results in pregnancy.<sup>4</sup> Though the law initially protected only women with developmental disadvantages, the Argentine Supreme Court interpreted Article 86 in the 2012 *F.A.L.* case,<sup>5</sup> to extend the rape exception to include all women, not only to the "insane."

Argentina may put an end to clandestine abortions by passing a law of general application through the National Congress. Although the 1853 Argentine Constitution was modeled after the United States Constitution, and the United States case law contributes significantly to Argentine jurisprudence, a review of Argentine constitutionalism and history shows that Argentina should not follow the United States approach to reproductive rights. Unlike the United States, where the judiciary took the lead in abortion law, this judicial approach has not provided a solution in Argentina. A comparative analysis between the Argentine Supreme Court's ruling in the *F.A.L.* case and United States' ruling in *Roe v. Wade*,<sup>6</sup> demonstrates that the Argentine Supreme Court went beyond the right to privacy, instead recognizing abortion as a human right that must be guaranteed by the State.

Even though the *F.A.L.* decision offers an excellent analysis and makes use of aspects of *Roe*, a legislative path offers a much better strategy for Argentine abortion advocates. In the United States the judicial path to abortion rights faces serious resistance, and in Argentina the courts are comparatively weaker politically than U.S. courts. The lack of compliance

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4. CÓD. PEN. art. 86 (Arg.). Article 86 states:

El aborto practicado por un médico diplomado con el consentimiento de la mujer encinta, no es punible:

1° Si se ha hecho con el fin de evitar un peligro para la vida o la salud de la madre y si este peligro no puede ser evitado por otros medios.

2° Si el embarazo proviene de una violación o de un atentado al pudor cometido sobre una mujer idiota o demente. En este caso, el consentimiento de su representante legal deberá ser requerido para el aborto

(translated as "The abortion performed by a certified doctor with the consent of the pregnant woman is not punishable:

1° If it has been done in order to avoid a danger to the life or health of the mother and if this danger cannot be avoided by other means.

2° If the pregnancy comes from a rape or an attack on modesty committed on an idiot or insane woman. In this case, the consent of your legal representative must be required for the abortion.").

5. *F.A.L.* s/ medida autosatisfactiva, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 13, 2012, Fallos 335:197 (2012) (Arg.).

6. *Roe v. Wade*, 410 U.S. 113 (1973), *overruled in part by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (establishing the "undue burden" test for abortion access).

with the Supreme Court ruling in *F.A.L.* demonstrates that Argentina is a country where the judiciary lacks enforcement power. Only a legislative path adequately focuses on positive obligations of the state to protect women.

The 2018 Congressional abortion debate demonstrated that the legislative path is the superior method for legalizing abortion. The fact that Argentina did not pass the abortion law in 2018, falling seven votes short in the Senate, does not diminish the powerful value of the 2018 Congressional debate. After months of receiving speakers in Congress from all different fields of study, today, the concept of abortion as a human right is no longer taboo, and it has become a common topic at Argentine family and friends' discussions, a practice unheard of before 2018.<sup>7</sup>

While Argentina was unable to pass its abortion bill in May 2018, Ireland offers perhaps the best approach for Argentina to model its legislative approach to abortion rights as the Ireland legislation became an inspiration for the country to move forward in human and women's rights. Given the favorable results of its Constitutional Referendum, Ireland offers an example of how a Catholic-majority country – much like Argentina's faith-driven population – successfully passed legislation that satisfied both sides of the abortion debate.<sup>8</sup> Ireland offers a blueprint for how, in Argentina, a referendum can ensure that democratic forces prevail.

First, section I of this article compares *Roe* with *F.A.L.* and concludes that, although the Argentine Supreme Court recognized abortion as a human right, the Argentine Supreme Court lacks the authority to enforce its precedents across the country. In section II, an explanation of the process that Argentina experienced in 2018 demonstrates that the country has the potential to mobilize society, but that Argentina must still follow a legislative path to establish abortion rights for its women-citizens. Finally, section III will compare Argentina's experience to Ireland's in 2018 to show that Ireland's approach, rather than the U.S. method, offers a workable and successful model for Argentina's legislature to follow.

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7. Marina Franco, *La votación por el aborto en Argentina genera movilizaciones en todo el continente*, N.Y. TIMES (ARG.) (Aug. 7, 2018), <https://www.nytimes.com/es/2018/08/07/argentina-aborto-debate-mundo/>.

8. Yasmeen Serhan, *Pro-Abortion-Rights Activists Won in Ireland, But Not Argentina*, ATLANTIC MAG. (Aug. 10, 2018), <https://www.theatlantic.com/international/archive/2018/08/abortion-vote-argentina-ireland/567200/>.

## I. ABORTION IN THE UNITED STATES AND ARGENTINA

*A. The Extent to Which the United States and Argentine Supreme Court Decisions Recognize a Woman's Right to Abortion*1. The United States: *Roe v. Wade* and its Progeny

The case law approach has not produced a definitive resolution of the abortion issue in the U.S. despite the United States Supreme Court's enormous authority within the U.S. legal system. The Court's abortion decisions are subject to constant challenges to by both state legislatures and lower courts.

In 1973, the U.S. Supreme Court acknowledged a woman's right to obtain an abortion in *Roe v. Wade*.<sup>9</sup> The Court held that the fundamental right of privacy involves the right of a woman to have an abortion free from state interference during the first trimester of pregnancy and with only limited interference during the second.<sup>10</sup> In *Roe*, the Supreme Court concluded that the fetus is not a "person" within the meaning of the Fourteenth Amendment's due process and equal protection guarantees.<sup>11</sup> The Court explained that "person" did not include "the unborn," and, therefore, was not afforded constitutional protections prior to viability.<sup>12</sup> Although women's rights advocates considered the decision a big and early

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9. *Roe*, 410 U.S. at 153 ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

10. *Id.* at 164-65. In the opinion, Justice Blackmun states:

To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

*Id.*

11. *Id.* at 158.

12. *Id.* at 158, 162-64 (explaining that "the unborn have never been recognized in the law as persons in the whole sense.").

win, since its legalization, many states have created hurdles that make abortion more difficult for many women to obtain.

Nineteen years after the *Roe* decision, the Court decided *Planned Parenthood v. Casey*,<sup>13</sup> which represented a turning point in the abortion case law, because it established that states did have the right to regulate abortion and pass “viewpoint” legislation favoring the rights of even a pre-viability fetus as long as the law did not place an undue burden on a woman’s access to abortions.<sup>14</sup> From this decision on, state legislatures began to test the limits of *Casey* and the undue burden test, often intending to undermine the rights recognized in *Roe*.<sup>15</sup>

In 2016, the Supreme Court’s *Whole Woman’s Health v. Hellerstedt*<sup>16</sup> decision established a balancing test that did not totally resolve the problem in *Casey*, but which clarified how the undue burden standard applied to health-justified abortion restrictions. Justice Ginsburg, in a concurring opinion, declared that “[s]o long as this Court adheres to *Roe v. Wade* and *Planned Parenthood v. Casey*, Targeted Regulation of Abortion Providers laws . . . that ‘do little or nothing for health, but rather strew impediments to abortion,’ cannot survive judicial inspection.”<sup>17</sup>

Since *Roe*, all states have passed laws regulating the circumstances and conditions for a woman to obtain an abortion, with sharp differences among them. According to the Guttmacher Institute’s 2018 report on abortion laws, forty-two states require that a licensed doctor perform abortions, and nineteen states demand that a second physician be involved after a certain stage.<sup>18</sup> Regarding public funding, thirty-two states and the District of Columbia prohibit the use of state funds except in specific cases when federal funds are available and the woman’s life is in danger or the pregnancy is the result of rape or incest.<sup>19</sup> Eleven states limit insurance coverage for abortion services to cases where the mother’s health is at risk, and forty-five states permit private insurance providers to refuse to

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13. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality).

14. *Id.* at 852.

15. Linda J. Wharton et al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 *YALE J.L. & FEMINISM* 317, 353 (2006) (“[I]n a significant number of cases, federal courts have repudiated or misapplied the protections of *Casey*, manipulating the undue burden standard in an incremental undermining of *Roe*.”).

16. 136 S.Ct. 2292 (2016).

17. *Id.* at 2321 (Ginsburg, J., concurring) (quoting *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 921 (7th Cir. 2015)).

18. *An Overview of Abortion Laws*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/overview-abortion-law> (last visited Oct. 14, 2018).

19. *Id.*

participate in abortions.<sup>20</sup> Seventeen states mandate that abortion providers give women counseling before an abortion that includes information on at least one of the following: the connection between abortion and breast cancer (five states), the ability of a fetus to feel pain (twelve states), and the long-term mental health consequences for the woman (eight states).<sup>21</sup> Moreover, twenty-seven states require a twenty-four-hour waiting periods between such counseling and the abortion procedure.<sup>22</sup> Regarding parental involvement, thirty-seven states require parental involvement in a minor's decision to access the procedure, twenty-six of which require the consent of one or both parents, while eleven demand that one or both parents be notified.<sup>23</sup>

Today, pro-choice advocates in the U.S. fear for the future of *Roe* given the new, more conservative composition of the Supreme Court.<sup>24</sup> As Professors Erwin Chemerinsky and Michele Goodwin point out, “[a]bortion rights in the United States are in serious jeopardy.”<sup>25</sup> President Trump expressed his position that *Roe* should be overturned.<sup>26</sup> According to Chemerinsky, “Mr. Trump predicts that the Supreme Court will reverse itself on abortion rights . . . some states will ban the procedure and others may allow abortion services. Such a system would undoubtedly caus[e] significant health burdens for women . . . particularly for low-income women.”<sup>27</sup>

Moreover, fear that *Roe* could be overturned with the new composition of the Supreme Court seems likely if cases like *Planned Parenthood of*

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20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. The three justices that composed the plurality in *Casey* whom established the undue burden test – Sandra Day O’Connor, Anthony Kennedy and David Souter – no longer sat on the Court at the end of 2018. Following President Trump’s nomination and appointment of Justice Neil Gorsuch’s, replacing Justice Scalia, and Bret Kavanaugh, replacing Justice Kennedy, has raised questions about whether the Court will continue to follow the abortion case law precedent. Jon O. Shimabukuro, *Abortion, Justice Kennedy, and Judge Kavanaugh*, CONG. RES. SERV. (Aug. 8, 2019), <https://fas.org/sgp/crs/misc/LSB10185.pdf>.

25. Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman’s Private Choice*, 95 TEX. L. REV. 1189, 1189 (2017).

26. See Hannah Smothers, *Trump Said He’d Probably Overturn Roe v. Wade*, COSMOPOLITAN (Oct. 20, 2016), <https://www.yahoo.com/entertainment/trump-said-hed-probably-overturn-155027221.html> (“When asked by debate moderator Chris Wallace if Trump wanted to see the Supreme Court overturn the case that makes abortion legal for American women, Trump replied yes, he would, in fact, want that. ‘If we put another two or perhaps three justices on, that will happen,’ Trump said. ‘And that will happen automatically, in my opinion, because I’m putting pro-life justices on the court.’”).

27. Chemerinsky & Goodwin, *supra* note 25, at 1190.

*Arkansas and Eastern Oklahoma v. Jegley*<sup>28</sup> find their way to the Supreme Court. In *Jegley*, Arkansas claimed that abortions by the use of medication, which uses pills to induce abortions in the first nine weeks of pregnancy, were unsafe and caused women health complications. Arkansas passed a law in 2015 that required contracts between those who provide the medication and the doctors who have privileges at a hospital in the state. Abortion clinics in Arkansas argued that they were not able to find any doctors that wanted to sign such contracts.<sup>29</sup> Their claim was medically unsupported, and the District Court applied the balancing test in *Whole Woman's Health* to decide that the requirements imposed an undue burden on women seeking abortions. However, on appeal the Eighth Circuit replaced the balancing test and asked the plaintiffs to specify how many women would be affected, even though the Supreme Court in *Whole Woman's Health* had determined that specific fact-finding was not required. In this Supreme Court precedent, Justice Ginsburg wrote in her concurrence opinion that, given the relative safety of modern abortions, state laws that “do little or nothing for health, but rather strew impediments to abortion,” cannot survive judicial inspection.”<sup>30</sup>

The decision in the *Jegley* case not only shows that changes in the Supreme Court rulings regarding abortion may be imminent, but also demonstrates that circuit courts may not follow the Supreme Court precedent. Thus, the United States is facing a crucial moment for women's rights and activists must continue to defend reproductive rights.

## 2. Argentina: *F.A.L. s/ medida autosatisfactiva*

While the Argentine Supreme Court has produced a comparatively progressive abortion decision in the *F.A.L.* case, it has since faced even greater challenges by the lower courts than the U.S. Supreme Court, even though its position enjoys substantial public support. In 2012, the Argentine Supreme Court decided *F.A.L.*, which authorized an abortion for a minor that was a victim of rape, establishing an historic precedent. This decision suggested that Argentine judges had begun to consider the institutional perspective of abortion rights. The *F.A.L.* ruling puts forth the

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28. *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953 (8th Cir. 2017), *certiorari denied* 138 S. Ct. 2573 (2018).

29. Adam Liptak, *Supreme Court Allows Arkansas Abortion Restrictions to Stand*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/us/politics/supreme-court-wont-hear-challenge-to-restrictive-arkansas-abortion-law.html>.

30. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Ginsburg, J., concurring) (quoting *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 921 (7th Cir. 2015)).

idea that, in order to undermine informal practices, it is necessary to determine and to regulate the conditions that are required to make abortion, via public services, accessible.<sup>31</sup>

On December 3, 2009, A.F., on behalf of her fifteen-year-old daughter, A.G., reported to the Prosecutor of the Province of Chubut, Argentina, that her daughter had been raped by A.F.'s husband. On January 14, 2010, A.F. requested authorization from the Chubut's Court for her daughter to have a voluntary termination of pregnancy at eleven weeks.<sup>32</sup> The claim was made under Article 86 of the Criminal Code,<sup>33</sup> which provides that

an abortion performed by a certified doctor with the consent of the pregnant woman is not punishable . . . [i]f the pregnancy is the result of a rape or indecent assault against an idiot<sup>34</sup> or demented woman. In this case, her legal guardian's consent shall be required for the abortion.<sup>35</sup>

Despite the fact that the record showed the pregnancy would endanger the minor's life, the trial court denied the request.

On March 8, 2010, the Superior Court of the Province of Chubut overturned the decision and held that a) the case fell within the definition of non-punishable abortion of Article 86 of the Criminal Code; and b) that this approach towards the interruption of the pregnancy was in accordance with constitutional law and international human rights.<sup>36</sup> On March 11, 2010, A.G. was finally authorized to obtain a legal abortion in safe conditions.<sup>37</sup> However, an official of the Public Prosecutor's office appealed the Superior Court's decision, in representation of the fetus.<sup>38</sup> He argued that Argentina protects life from conception, and that the situation of A.G. was not considered among the exceptions that are allowed under the National Criminal Code because the minor was not an "idiotic rape victim."<sup>39</sup> On

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31. Paolo Bergallo, *The Struggle Against Informal Rules on Abortion in Argentina*, in ABORTION LAW IN TRANSNATIONAL PERSPECTIVE 143, 154 (Rebecca J. Cook, Joanna N. Erdman, & Bernard M. Dickens eds., 2014).

32. *Argentina, High Court of Justice F.A. L. s/ self-executing measure – Gavel Award 2012 Nominee: Why it Matters*, WOMEN'S LINK WORLDWIDE (Mar. 13, 2012), <https://www.womenslinkworldwide.org/en/gender-justice-observatory/court-rulings-database/f-a-l-s-self-executing-measure>.

33. F.A.L. s/ medida autosatisfactiva, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 13, 2012, Fallos 335:197, ¶ 1 (2012) (Arg.).

34. The word "idiot" currently appears in the Argentina Criminal Code that dates from 1921.

35. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 86 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/15000-19999/16546/norma.htm>.

36. Fallos 335:197, ¶ 2.

37. *Id.*

38. *Id.* ¶ 3.

39. *Id.*

March 13, 2012, the Supreme Court of Argentina<sup>40</sup> unanimously upheld the Provincial Court's decision.<sup>41</sup>

The Supreme Court in the *F.A.L.* ruling cited *Roe* to explain why the case was not moot, even though the minor had already exercised her right to an abortion and was no longer pregnant.<sup>42</sup> The judges established that it was necessary to decide this case in order to generate precedents for similar future cases, even though the minor had already exercised her right to a legal abortion.<sup>43</sup> Under *Roe*, the United States Supreme Court applied an exception to mootness doctrine for cases capable of repetition with respect to the same party yet evading review.<sup>44</sup>

Moreover, after the last amendment to the Argentine Constitution in 1994, several international treaties became part of the Argentine constitutional law, and, in the *F.A.L.* case, the Court stated that the interpretation of Article 86 of the Criminal Code had to harmonize with international obligations. If not, Argentina could be held responsible before international organizations for a lack of compliance.<sup>45</sup>

In the *F.A.L.* case, the Supreme Court also developed new the interpretations of the National Criminal Code, considering principles such as dignity, equality and nondiscrimination. The new Supreme Court guidelines were not only in accordance with the Argentine National Constitution but were also formed in light of international human rights bodies precedents. Since Argentina's 1994 Constitutional reform, these international conventions on human rights are treated as supreme under

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40. *Id.* The *F.A.L.* case found its way to the Supreme Court through an extraordinary appeal by the Defender of the Nation in representation of the fetus, who alleged that the Superior Court of the Province of Chubut's ruling was against the right to life from the conception recognized by the Argentine constitution and international treaties. The Supreme Court decides in cases where there are constitutional discussions or that involve the interpretation of a federal law. The Court is not required to review all cases that reach the highest court. They decided in this case considering the fundamental rights involved and the interpretation of Article 86 of the National Criminal Code.

41. Fallos 335:197, ¶ 32.

42. Fallos 335:197, ¶ 5. The normal day gestation period is so short that pregnancy will come to term before the usual appellate process is complete. Consequently, it becomes necessary to decide the proposed issues even without utility for the case in which the pronouncement falls, in order that the criterion of the Court be expressed and known for the solution of analogous cases that may arise in the future.

43. *Id.*

44. *Roe v. Wade*, 410 U.S. 113, 125 (1973) (first citing *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); and then citing *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *Carroll v. Princess Anne*, 393 U.S. 175, 178-179 (1968); and *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-633 (1953)), *overruled in part* by *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

45. Fallos 335:197, ¶ 6.

Article 75 of the National Constitution, and therefore effectively form a critical part of the Argentine Constitution.<sup>46</sup> These ideas were not envisioned by the drafters of the National Criminal Code in 1921.<sup>47</sup>

On the key issue in the *F.A.L.* case, the Argentine Supreme Court held that under Article 86 of the National Criminal Code, abortion is legal both to prevent danger to the life or health of the mother and if the pregnancy is a result of a rape or an indecent assault on a mentally retarded or insane women. The non-punishable abortions contemplated in Article 86 of the Criminal Code include all cases of pregnancy that are the result of rape, regardless of the mental capacity of the woman.<sup>48</sup> Under principles of equality and nondiscrimination, the Court held that limiting the right to abortion to cases of rape only of mentally disabled women would establish an unjustified distinction in treatment with respect to other women victims of rape and that there is no reasonable justification for allowing this narrow interpretation of Article 86 of the Criminal Code.<sup>49</sup>

However, in deciding the central issue in the case, it was also necessary for the Supreme Court to determine whether the right to choose of the pregnant woman must yield under the absolute protection of the right to life of the fetus. The Court held that a balancing test should be applied, and that no absolute right to prenatal life exists. The Court, rather than relying on case law, relied on international human rights conventions. In particular, the justices established that the right to life recognized in Article 1 of the American Declaration of the Rights and Duties of Man,<sup>50</sup> and in Articles 3

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46. CONSTITUCIÓN NACIONAL [CONST. NAC.] ART. 75, ¶ 22 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm>.

Congress is empowered to . . . approve or reject treaties concluded with other nations and international organizations, and concordats with the Holy See. Treaties and concordats have a higher hierarchy than laws. The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do not repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein. They shall only be denounced, in such event, by the National Executive Power after the approval of two-thirds of all the members of each House. In order to attain constitutional hierarchy, the other treaties and conventions on human rights shall require the vote of two-thirds of all the members of each House, after their approval by Congress.

*Id.* (translated from Spanish).

47. Bergallo, *supra* note 31, at 154.

48. Fallos 335:197, ¶ 18.

49. Fallos 335:197, ¶ 15.

50. American Declaration of the Rights and Duties of Man, 181 L.N.T.S. 443, art. 1 ("Every human being has the right to life, liberty and the security of his person.").

and 4 of the American Convention on Human Rights<sup>51</sup> were “expressly limited in their formulation so that the invalidity of an abortion like the one in this case could not be derived from them.”<sup>52</sup> Therefore, the right to prenatal life is not absolute, and must be interpreted together with of the right to liberty, equality and dignity of every person.

The Supreme Court also mentioned Articles 3 and 6 of the Universal Declaration on Human Rights, which protect the right to life and the right to recognition before the law.<sup>53</sup> The Supreme Court explained that these articles should be read in light of Article 1 of the Universal Declaration on Human Rights, which provides that “all human beings are born free and equal in dignity and rights, they are capable with reason and conscience and should act towards one another in a spirit of brotherhood.”<sup>54</sup>

In the *F.A.L.* case, the justices concluded that no absolute protection of the right to life was established in the international conventions on human rights, and explained that under Article 75 of the National Constitution,<sup>55</sup> the legislators have the duty to promote positive measures to guarantee the protection of women’s rights during and after pregnancy.<sup>56</sup> It affirmed that criminal sanction should be the last alternative for the State because women have a right to human dignity. Human dignity “does not allow the State to require heroic measures by women, such as making a woman who has been raped take the pregnancy to term.”<sup>57</sup> The Supreme Court further held that state governments must take positive measures to provide access to abortion. The Court emphasized that mere decriminalization of abortion in rape cases was not enough and should certainly not require a judicial order.

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51. American Convention on Human Rights, 1144 U.N.T.S. 123, arts. 3, 4 (“Every person has the right to recognition as a person before the law.”) (“Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”).

52. Fallos 335:197, ¶ 10.

53. Universal Declaration on Human Rights 590 U.N.T.S. 71, arts. 3, 6 (“Everyone has the right to life, liberty and security of person.”) (“Everyone has the right to recognition everywhere as a person before the law.”).

54. Fallos 335:197, ¶ 9.

55. CONSTITUCIÓN NACIONAL [CONST. NAC.] ART. 75, ¶ 23 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm> (“Congress is empowered . . . [t]o legislate and promote positive measures guaranteeing true equal opportunities and treatment, the full benefit and exercise of the rights recognized by this Constitution and by the international treaties on human rights in force, particularly referring to children, women, the aged, and disabled persons. To issue a special and integral social security system to protect children from abandonment, since pregnancy up to the end of elementary education, and to protect the mother during pregnancy and the period of lactation.”).

56. Senado Argentina, *A Favor: Aída Kemelmajer De Carlucci Abogada*, YOUTUBE (July 12, 2018), [https://www.youtube.com/watch?v=Dl\\_VHUw1mQM](https://www.youtube.com/watch?v=Dl_VHUw1mQM).

57. Fallos 335:197, ¶ 16.

Instead, it indicated that provincial and national authorities need to implement protocols to remove burdens on the access to abortion and guarantee the effective provision of the practice by public hospitals.<sup>58</sup>

Unfortunately, after the *F.A.L.* decision, legal abortion services remain unavailable in many provinces of Argentina. The broad interpretation by the Supreme Court of Article 86 of the Criminal Code is more like an illusion than a reality. In eight provinces, abortion is unavailable, seven other provinces place unjustified burdens on safe and legal abortions, and only nine jurisdictions have adopted the hospital protocols that the Supreme Court mandated in *F.A.L.*<sup>59</sup> The absence of political determination to comply with the Supreme Court ruling became clear within hours of the publication of the *F.A.L.* decision, when the National Ministry of Justice informed that the government had no plans to discuss abortion reform.<sup>60</sup> And, as recently as March 2019, doctors who performed a legal abortion on an eleven-year-old rape victim were prosecuted for homicide in the north of Argentina.<sup>61</sup>

Although the *F.A.L.* decision led to legislative deliberations and to public discussions regarding abortion between scholars from diverse disciplines, the decision and subsequent events illustrates the need for stronger political steps to decriminalize abortion in Argentina. Conservative groups, especially members of the Catholic Church with strong political influence, have frustrated many of the initiatives the *F.A.L.* decision mandated.<sup>62</sup> The Supreme Court's enforcement power has also been limited in other cases. Ten years after the Supreme Court ordered to clean up the Riachuelo river, there has been no compliance with the decision.<sup>63</sup> The lack of enforcement power the Supreme Court, the deficiencies of the *F.A.L.* decision implementation, together with its unworkability in practice, reinforce the normative claims for the decriminalization of abortion. Apparently, however, the Supreme Court's enforcement power and public image still remains weak.

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58. Fallos 335:197, ¶ 29.

59. *Qué provincias cuentan con un protocolo no punible para abortar?*, TÉLAM SOCIEDAD (Mar. 21, 2018), <http://www.telam.com.ar/notas/201803/262182-protocolo-aborto-no-punible-provincias.html>.

60. Bergallo, *supra* note 31, at 162.

61. *Denunciaron por homicidio a los médicos tucumanos que le hicieron una cesárea a la niña que había sido violada*, INFOBAE (Mar. 12, 2019), <https://www.infobae.com/sociedad/2019/03/12/denunciaron-por-homicidio-a-los-medicos-tucumanos-que-le-hicieron-una-cesarea-a-la-nina-que-habia-sido-violada/>.

62. Bergallo, *supra* note 31, at 156.

63. María Belén Etchenique, *Riachuelo: a diez años del fallo que obliga a limpiarlo, aun no saben ni cuándo lo podrán cumplir*, CLARÍN (Mar. 14, 2018, 8:41 PM), [https://www.clarin.com/ciudades/riachuelo-anos-fallo-obliga-limpiarlo-saben-podran-cumplir\\_0\\_ryAopzwFz.html](https://www.clarin.com/ciudades/riachuelo-anos-fallo-obliga-limpiarlo-saben-podran-cumplir_0_ryAopzwFz.html).

*B. The Argentine Supreme Court's approach, unlike the United States, recognizes an obligation of the State to assist women in obtaining an abortion*

While United States constitutional law is almost always expressed in terms of individual rights that must not be interfered with by the State, Argentine Constitutional law often places obligations on the states, modeling itself after international human rights law. The abortion context is not an exception. While the *F.A.L.* decision does not protect a woman's right to choose an abortion outside of the rape context and other limited situations, because it is also phrased in terms of positive obligations of the State it has the potential to protect women in some situations that *Roe* does not, and this protection necessarily involves the legislative process.

Argentina adopted much of the United State Constitution in 1853, but, especially since 1994, has looked much more towards international human rights case law. In 1877, the Argentine Supreme Court offered its most explicit statement regarding the importance of the constitutional law, including case law, asserting that "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 best advantaged of this adoption has been to find a vast body of doctrine, practice and case law which illustrate and complete its fundamental principles, and which we can and should use in everything which we have not decided to change with specific constitutional provisions."<sup>64</sup> Today the use of United States case law is much weaker, particularly as the United States Supreme Court has grown more conservative. Since the 1994 Argentine Constitutional reform, citations to the Inter-American Court and the Inter-American Commission are much more common than citations to U.S. Supreme Court decisions.<sup>65</sup>

While *Roe* recognized the right to privacy, in the *F.A.L.* ruling the justices considered the institutional dimension of abortion rights and recognized that abortion rights require government regulations of access to services in order to undermine informal obstructive practices.<sup>66</sup> *Roe* guaranteed the right to choose abortion by conceiving it as a private choice included in the constitutional and fundamental right to privacy. In *Roe*, the right to privacy was found broad enough to encompass a woman's decision whether or not to terminate her pregnancy.<sup>67</sup>

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64. Fallos 231, 236 (1877) de la Torre, 19.

65. Fallos 335:197, ¶ 14.

66. Bergallo, *supra* note 31, at 154.

67. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

The central case where the Supreme Court clarified the scope of *Roe*'s right to privacy as the non-intervention of the government in women's decisions is *Harris v. McRae* in 1981.<sup>68</sup> The Justices explained that this right to privacy did not mean that federal Medicaid programs had to fund medically necessary abortions. In *Harris*, an action was brought to challenge the constitutionality of the Hyde Amendment, a legislative provision which completely bans the use of federal funds to refund the cost of abortions under Medicaid program unless the woman's life or health was endangered.<sup>69</sup> The Court, in an opinion written by Justice Stewart, stated that:

[A] State that participates in the Medicaid program is not obligated under Title XIX to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment. We further hold that the funding restrictions of the Hyde Amendment violate neither the Fifth Amendment nor the Establishment Clause of the First Amendment. It is also our view that the appellees lack standing to raise a challenge to the Hyde Amendment under the Free Exercise Clause of the First Amendment. Accordingly, the judgment of the District Court is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.<sup>70</sup>

Justice White, in a concurring opinion, remarked that the constitutional right recognized in *Roe* was the right to choose and decide to take an abortion without the interference of the government. He stated, "As the Court points out, *Roe* did not purport to adjudicate a right to have abortions funded by the government, but only to be free from unreasonable official interference with private choice."<sup>71</sup>

In *Harris*, the Supreme Court ultimately held that women's abortion rights are not considered a public right to have access to abortion practices funded by the government. Women only have the right not to have government interfere with their private choice. However, according to Catherine MacKinnon, in an essay analyzing case law in the U.S., women in *Harris* were claiming something more than just the right to decide without government intrusion. Women "needed something else to make their privacy effective."<sup>72</sup>

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68. *Harris v. McRae*, 448 U.S. 297, 327-28 (1981).

69. Cora McRae, a pregnant Medicaid recipient, challenged the amendment, and took action against Patricia R. Harris, Secretary of Health and Human Services.

70. *Harris*, 448 U.S. at 326-27.

71. *Id.* at 63 (White, J., concurring).

72. CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond Roe v. Wade*, in *FEMINISM UNMODIFIED* 93, 101 (1988).

A strong argument that pro-choice supporters bring to this discussion is that, in fact, the right to privacy is in-existent for those women with limited resources. If the right to privacy is only recognized as a negative right against government intervention without positive support, only wealthy women will be able to have access to a legal and safe procedure.<sup>73</sup> In contrast with *Harris*, the Argentine *F.A.L.* decision held that abortion rights must be guaranteed and provided by the government, removing the barriers to real access to abortion practices, at least in the context of rape, the issue the case dealt with.

In the United States, there is also a lack of compliance with the Supreme Court decisions. In *Casey*, the Supreme Court allowed the states to enact regulations that restrict abortion rights before fetal viability. The Court established a new framework different than the *Roe*'s trimester period. The *Casey* Court also established limits on the right of women to choose an abortion only to the stage of pregnancy before the fetus is considered viable. The Supreme Court further held in *Casey* that the states have legitimacy to protect the life of the woman and the fetus during the pregnancy.<sup>74</sup>

Moreover, in the last United States Supreme Court decision regarding abortion rights, *Whole Woman's Health*, the justices provided a new standard that courts must control the regulations allowed to the states in *Casey*. Cathren Cohen explained that, "Where empirical evidence does not support the health justification, courts must strike down the law as violating the undue burden standard."<sup>75</sup> In other words, the State cannot pass a law that purports to protect women, but which actually imposes an unjustified and undue burden on a woman's access to abortion procedures, thereby making obtaining such procedures more dangerous and complicated for a woman.<sup>76</sup> Justice Ginsburg, in a concurring opinion, remarked that "when a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, *faute de mieux*, at great risk to their health and safety."<sup>77</sup>

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73. Rebecca L. Rausch, *Reframing Roe: Property Over Privacy*, 27 BERKELEY J. GENDER, L. & JUST. 46-47 (Seattle Univ. Sch. of Law Research Paper No. 12-21, 2012), <https://ssrn.com/abstract=1911452>.

74. Cathren Cohen, "Beyond Rational Belief": *Evaluating Abortion Restrictions After Whole Woman's Health*, 42 N.Y.U. REV. L. & SOC. CHANGE 177 (2018) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992)).

75. *Id.* at 220

76. *Id.*

77. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Ginsburg, J., concurring).

Despite the case law precedent established by the Supreme Court, “anti-women’s health state legislators” continue to test the efficacy of the undue burden standard by passing seemingly benign regulations that nonetheless aim to restrict access to abortion procedures.<sup>78</sup> It seems, then, that in the United States something similar has occurred in the case of *Roe* and its progeny as occurred with Argentine compliance, or lack compliance, with the *F.A.L.* decision, and in both instances the failure to implement Supreme Court case law occurred when state legislators remained free to interpret and implement the Supreme Court decisions.

*C. Rights and Remedies as Two Sides of the Same Coin: Positive and Negative Duties*

The *F.A.L.* decision recognized the right of women to seek an abortion and stated that the State was required to provide this right. As women rights activists sustained during the 2018 abortion Congressional debate, the government must not only adopt an attitude of respect towards the decisions that each person makes (in other words, the right to privacy), but must also,

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78. Chemerinsky & Goodwin, *supra* note 25, at 1193-94. Numerous examples exist of State legislation that is designed in effect to ban abortion, though not clearly prohibiting abortions by the text alone. In *Whole Woman's Health*, for example, the Texas legislature passed a bill that contained two provisions the Supreme Court ultimately struck down as unduly burdensome. The first provision, the “admitting-privileges requirement” required that a physician performing an abortion must have “active admitting privileges at a hospital within thirty miles of the abortion facility. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016). The second provision, the “surgical-center requirement” required that abortion facilities meet the standards required of ambulatory surgical centers. These standards included, among other requirements, “detailed specifications” regarding the size, availability, and training of the nursing staff, as well as specific room and hallway dimensions, and advanced piping, heating and ventilation systems. *Id.* at 2314 (agreeing with the District Court that the seven or eight facilities that could meet these specifications “could not possibly meet the demand of the entire State.”). See *Stenberg v. Carhart*, 530 U.S. 914 (2000) (concluding that a Nebraska law criminalizing all partial-birth abortions “unless such procedure is *necessary* to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury . . . *caused by or arising from* the pregnancy itself” unconstitutional because the law lacked a health exemption as required by *Casey*) (emphasis added); *Hodgson v. Minn.*, 497 U.S. 417 (1990) (striking down a Minnesota law requiring minors to give notice to two parents by certified mail or personal delivery, unless the minor successfully obtained a court order, and which contained no exceptions to the two parent requirement for divorced parents, non-custodial parents, or absent parents); *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905 (9th Cir. 2014) (concluding that Arizona’s law requiring women undergo surgical abortion procedures rather than medication induced procedures after seven weeks of pregnancy effectively banned medication abortions altogether and imposed an undue burden because the added cost, transportation and clinic time, and physical invasiveness of surgical abortions).

as part of its public health policy, provide the necessary access to abortion.<sup>79</sup>

*Roe*'s recognition of a woman's right to privacy is already contemplated in the Argentine Constitution in Article 19, which protects the private actions of people from state intervention when they do not affect third parties.<sup>80</sup> The main reason why the Argentine Supreme Court went beyond than recognizing the right to privacy is that the Court recognized both the negative and positive duties of the government regarding women's abortion rights. Paola Bergallo, a leading Argentine legal sociologist argued that, "The second part of the majority's opinion showed a Court aware of the practical and institutional obstacles hindering access to Article 86 abortions. The Court demonstrated its understanding of the close relationship between rights and remedies, as just two sides of the same coin."<sup>81</sup> According to Bergallo, the negative duties of the state include: 1) the exclusion of demanding prior judicial authorization; 2) the prohibition of requiring more than a simple affidavit of the rape victim with respect to the rape; and 3) the duty not to impose any further conditions by committees with the purpose of delaying or diminishing the safety of the abortion.<sup>82</sup>

However, according to Bergallo the Argentine Court's decision can also be read to include positive duties on the state, in particular: 1) the duty to provide health care services for legal and safe abortions; 2) the responsibility "to make available all the medical and sanitary requirements necessary to carry out the abortions in a rapid, accessible, and safe way" without disproportionately burdening women;<sup>83</sup> and 3) and obligation to regulate the right to conscientious objection of physicians to prevent and protect women's health, so that their abortion rights not be at risk. In contrast, the United States Supreme Court in *Harris v. McRae* clarified the scope of *Roe* and held that women's abortion rights do not include a

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79. Telephone interview with Casas Laura, Professor of Constitutional Law, Gender and Diversity, National University of Tucumán (Oct. 2018) (on file with the author). Casas Laura is a specialist in criminal law at Universidad del Litoral, Argentina, and a specialist in forced child pregnancy at Universidad de Uruguay y el Comité de América Latina y El Caribe para la Defensa de los Derechos de la Mujer (CLADEM). She was one of the speakers invited to present her position at the Argentine National Congress during the abortion debate in 2018.

80. CONSTITUCIÓN NACIONAL [CONST. NAC.] ART. 19 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm> ("The private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempted from the authority of judges. No inhabitant of the Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit.").

81. Bergallo, *supra* note 31, at 161.

82. *Id.*

83. *Id.* at 162.

positive right to have access to abortion practices funded by the government.

However, although the broad scope of the Argentine Supreme Court ruling in the *F.A.L.*, the lack of compliance with the decision is one of the reasons why Argentina is still fighting towards the recognition of abortion rights through the legislative branch.

## II. ARGENTINA'S 2018 CONGRESSIONAL DEBATE: THE POINT OF NO RETURN

The Congressional abortion debate show how legislative debate is the superior method for legalizing abortion. The National Campaign for the Right to Legal, Safe and Free Abortion in Argentina (“*Campaña Nacional por el Derecho al Aborto Legal, Seguro y Gratuito*”) gained a special momentum in 2018, since it was the first time in the history of the country that the topic was discussed in the National Congress. The social mobilization around it, makes the Congressional debate a point of no return, and the legislative path the best strategy for abortion rights in the country.

The green and blue scarfs divided the Argentine society into pro and against abortion rights movements. However, after the debate a variety of new common terminologies and ideas, such as: The proportionality test, abortion as an issue of public health, and physician's conscientious objection are installed in most spaces of society, either blue or green tide, creating a promise of conciliation to positions that were formerly staged as deeply antagonistic. This proves the importance of public deliberation and the value of installing a topic that is *per se* controversial in the social and political arena.

### *A. The Effect of the Language Used in the Slogans of Opposing Sides: “Pro-Choice” Versus “Pro-Life”*

Throughout the 2018 Argentina's public and Congressional abortion debate, the terminology used by the blue and the green scarfs movements became an important strategy. Being pro-choice in opposition to being pro-life seems to have an implicit statement against life, one important device that Argentina's pro-life groups used.<sup>84</sup> Although in the United States young abortion rights activists have noticed this and shifted the pro-choice

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84. Analia Llorente, *Los que están en contra del aborto dicen que son 'provida' y dejan a todos los que están a favor en el lugar de la muerte o del asesinato*, BBC NEWS (June 5, 2018), <https://www.bbc.com/mundo/noticias-44116636>.

language into a reproductive justice approach, the expression pro-life still seems to have a more powerful effect.<sup>85</sup>

In Argentina, the anti-rights groups that were against the proposed bill, tried to take title of the word “life” and their slogan was “to protect the two lives” referring to the life of the pregnant woman, and the fetus. However, Argentine feminist movements were able to fight against this terminology born in the United States, and those who are in favor of the legalization of abortion proved that they are also interested in protecting “life.” During the Congressional debate, feminist movements were able to expose the idea that being “pro-two-lives” was in fact being in favor of clandestine abortions and its terrible consequence in the country, which is the death of women with fewer resources.<sup>86</sup> Soledad Deza, a leader feminist activist, said during her presentation in the Argentine Congress that “those who are against the legalization of abortion are not in favor of the protection of life, they are supporting clandestine abortions.”<sup>87</sup>

### 1. The Main Arguments Discussed During the 2018 Debate

In the 2018 Congressional abortion debate, the proposed bill did not pass the Senate, and one of the reasons was the pressure of conservative groups. However, the debate was an enormous step forward that allowed full discussion of the abortion issue in Argentina for the first time. The process that the Argentine society went through constituted a great victory for those who fight towards the recognition of human rights, especially women’s rights. Months of public debate inserted the term abortion as a human right into many Argentine dinner conversations, yet abortion as a human right was unimaginable before 2018.

During 2018, Argentina went through months of public debate regarding abortion rights before the bill was voted for in Congress. The parliamentary sessions were preceded by 730 citizens from different fields of study who had the opportunity to address parliamentary commissions, and raise points of all sort, for and against the bill.<sup>88</sup> Carlos Nino explained

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85. Kate Pickert, *What Choice?*, TIME (Jan. 14, 2013), <http://content.time.com/time/magazine/article/0,9171,2132761-7,00.html>.

86. Daniel Politti, *Entre polémicas y controversias, Argentina debate sobre el aborto*, N.Y. TIMES: ARGENTINA (Apr. 16, 2018), <https://www.nytimes.com/es/2018/04/16/aborto-argentina-macri/>.

87. Soledad Deza, *Debate por Aborto Legal en la Cámara de Diputado (Argentine Congressional Debate)*, YOUTUBE (Apr. 27, 2018), <https://www.youtube.com/watch?v=XkiV5jfwH3Y>.

88. This section places particular emphasis on the province of Tucumán, where the author was born. Tucumán is a small province in the north of Argentina where the Argentine declaration was signed. It is a highly conservative community.

that “rights are one of the greatest inventions of humanity, they are our creation. Therefore, we have a duty to discuss rights.”<sup>89</sup>

The recent Congressional debate is a crucial stage of the process that Argentinians went through concerning the recognition of abortion rights because it engaged the Argentine public in a much wider series of arguments than mere commentary on a judicial decision. The main arguments presented during the 2018 Congressional debate were a) the right to abortion as a human right; b) the proportionality test that explains why the right to life is not absolute whereas the right to seek an abortion is constitutional and in accordance with international conventions on human rights; c) abortion as a central issue of public health; and d) whether a physician or an institution can object to perform an abortion.

The importance of the topics discussed is another reason that explains why the best path to legalize abortion in Argentina is through Congress. The Argentinian 2018 process was a victory in the fight towards the recognition of reproductive rights, becoming the first time that the Argentine society speaks openly about the topics exposed below.

#### *a. The Right to Abortion as a Human Right*

The Congressional debate was framed in the terms “abortion as a human right.” The discussion was regarding the right to abortion in relation to the right of women autonomy, the right of equality and non-discrimination, the right to health, the right to privacy, and the right to dignity. It is a human right of women and girls because they have the right to choose. The Committees in charge of monitoring human rights instruments, for example, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) committee and the Committee on the Rights of the Child, recommended to the Argentine State that it decriminalize abortion in order to guarantee the rights of women and to prevent deaths that result from clandestine practices.<sup>90</sup>

Although the Argentine Congress did not pass the abortion bill, after months of public deliberations there is a social agreement that women who

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89. Roberto Gargarella, *Presentación sobre el aborto en el Congreso*, SEMINARIO DE TEORÍA CONSTITUCIONAL Y FILOSOFÍA POLÍTICA (Apr. 12, 2018, 2:05 PM), <http://seminario.gargarella.blogspot.com/2018/04/presentacion-sobre-el-aborto-en-el.html>.

90. Dubravka Šimonović (Special Rapporteur on Violence Against Women), *Report on Violence Against Women, its Causes and Consequences*, ¶ 85, U.N. Doc. A/HRC/35/30/Add.3 (Apr. 12, 2017); see, *NI UNA Menos Movement is Ahead of the Problem: The State Must Catch Up and Intensify Efforts to Prevent Femicide and Other Forms of Gender Based Violence Against Women and Girls*, U.N. OFFICE OF THE HIGH COMM’R ON HUM. RIGHTS (OHCHR) (Nov. 21, 2016), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20901&LangID=E>.

abort do not have to go to prison. Even some people that are against the State providing the service understood that abortion is an action that should not be penalized, there was a “social decriminalization of abortion.”<sup>91</sup> In this sense, if the State does not criminally prosecute women who abort, it must also guarantee their right to safe abortion.<sup>92</sup>

Abortion proponents emphasized the many women prosecuted for abortion. Soledad Deza expressed during her presentation at Congress debate that “women are still being imprisoned if found guilty of an abortion, in the province of Tucumán, since the year 2000, 534 women have been prosecuted, and the state criminally prosecutes cases where abortion is legal since 1921.”<sup>93</sup>

*Belén*, a recent case from the Supreme Court of Tucumán, shows that, before the Congress debate, women were still being imprisoned if found guilty of homicide aggravated by the relationship. According to the Argentina’s National Criminal Code, a woman who abort was considered guilty of homicide and subject to life imprisonment based on their parental relationship with the fetus.<sup>94</sup> This was the *Belén*’s case. In 2014, Belén went to a Tucumán public hospital because of a serious vaginal hemorrhage. However, she ended up accused of having thrown a fetus in the hospital washroom. Though the treating doctor determined Belén had suffered a spontaneous miscarriage, she was nonetheless sentenced to eight years in prison for aggravated homicide. In August 2016, the Tucumán Supreme Court overturned the Criminal Chamber decision and acquitted Belén because a lack of evidence of the crime charged, though the decision came after Belén had spent more than two years in prison and following a massive social campaign across the country.<sup>95</sup>

This is just one of the many recent incidents that pregnant women experienced in Argentina that reinforces the idea discussed during Congress debate: that abortion is a human right which must be recognized by the

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91. Agustina Ramón Michel, *Tras el rechazo en el Senado el aborto ya está despenalizado socialmente*, CLARÍN (Aug. 10, 2018), [https://www.clarin.com/sociedad/aborto-despenalizado-socialmente\\_0\\_SJ2ObVeSQ.html](https://www.clarin.com/sociedad/aborto-despenalizado-socialmente_0_SJ2ObVeSQ.html).

92. Juliet Roffo, *Un informe que menciona a la Argentina. La ONU recomendó garantizar la práctica segura del aborto para las menores*, CLARÍN (June 6, 2018), [https://www.clarin.com/sociedad/onu-recomendo-garantizar-practica-segura-aborto-menores\\_0\\_HkhZBlxQ.html](https://www.clarin.com/sociedad/onu-recomendo-garantizar-practica-segura-aborto-menores_0_HkhZBlxQ.html).

93. Deza, *supra* note 87.

94. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 80 (Arg.) (“life imprisonment will be imposed . . . to those who kill his ascendant [or] descendant.”), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/15000-19999/16546/norma.htm>.

95. Safe Abortion, *Argentina: “Belén” Acquitted: Tucumán Provincial Supreme Court Overturns Sentence for Aggravated Homicid[e]*, ABORTION-NEWS.INFO (Mar. 31, 2017), <http://abortion-news.info/argentina-belen-acquitted-tucuman-provincial-supreme-court-overturns-sentence-for-aggravated-homicid/>.

states. Several recent cases in Argentina, which denied victims of rape access to abortion procedures, further proves the urgency of an abortion law overhaul in the Argentina. In January 2019, for example, a twelve-year-old rape survivor who was twenty-four weeks pregnant, was denied her legal right to abortion and instead underwent an emergency caesarean in Jujuy, a province in the north of Argentina. Unfortunately, although rape is already contemplated by the Criminal Code and case law as exceptions when abortion is legal, this was not an isolated case.<sup>96</sup> In March 2019, an eleven-year-old girl from Tucumán was admitted into hospital with a nineteen-week pregnancy that resulted from rape perpetrated by her grandmother's partner. Although the girl and her mother requested an abortion, the authorities refused the practice by delay tactics for almost five weeks trying to force her into carrying the pregnancy to term.<sup>97</sup>

*b. The Proportionality Test*

Another issue deliberated during the Argentine Congressional debate was the proportionality test and the inexistence of absolute rights. According to the jurist, Aida Kemelmajer de Carlucci, the proportionality test can be explained as the need to balance rights in dispute between the interest in protecting unborn life and the various women's rights that could clash with it based on considerations of equality, autonomy and dignity.<sup>98</sup>

"Ponderation," a term first used by Kemelmajer de Carlucci, is a principle that governs the Argentine case law where there are no absolute rights. This means that whenever there are two rights to be respected, the rights have to be weighed and harmonized according to the circumstances of that particular case. There are situations in which certain rights carry more weight than others, and the question of prevalence is resolved by answering which one prevails in that particular circumstance under reasonable grounds. For example, the right to life of the fetus in the first weeks loses weight when it collides with the right of the woman or girl to her health, her autonomy, her privacy and her physical integrity. In the case of abortions, Kemelmajer de Carlucci considers that the right to intrauterine life is gradual and incremental, which, as it advances, acquires greater value

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96. Erika Guevara-Rosas, *Latin America Must Stop Forcing Pregnant Girls into Deadly Situations*, AMNESTY INT'L (ARG.) (Mar. 5, 2019, 3:17 PM), <https://www.amnesty.org/en/latest/news/2019/03/latin-america-must-stop-forcing-pregnant-girls-into-deadly-situations/>.

97. Daniel Politi, *An Eleven-Year-Old in Argentina Was Raped. A Hospital Denied Her an Abortion*, N.Y. TIMES (Mar. 1, 2019), <https://www.nytimes.com/2019/03/01/world/americas/11-year-old-argentina-rape-abortion.html>.

98. *Aborto: Kemelmajer defendió la progresividad del derecho y se cruzó con Elías de Pérez*, PARLAMENTARIO.COM (July 11, 2018), <http://www.parlamentario.com/noticia-111273.html>.

in relation to the rights of the pregnant woman. The fetus has a moral status different from a child, and this is also revealed in the treatment that the Argentine criminal law gives to the figure of abortion in relation to that of infanticide that is more severely punished.<sup>99</sup>

This way of interpreting the right to intrauterine life was reflected in the regional human rights system, where the Inter-American Court of Human Rights, in *Artavia Murillo v. Costa Rica*,<sup>100</sup> concluded that there is no absolute right to intrauterine life but that this right is gradual and incremental.<sup>101</sup> Article 4 of the American Convention on Human Rights establishes that the right to life “shall be protected by law and, in general, from the moment of conception.”<sup>102</sup> According to the Court, the drafters of the American Convention added the clause “in general,” when referring to the right to life from the moment of conception, evidencing that the right to life was not meant to be absolute, providing a gradual or incremental protection to prenatal life, depending on the unborn child’s physical stage of development.<sup>103</sup> *Artavia Murillo* confirms that an embryo cannot enjoy the same rights as a person, and that the right to life protected by Article 4 of the American Convention on Human Rights is not absolute. The Court also read the American Convention as giving only gradual or incremental protection to prenatal life, depending on the unborn child’s physical stage of development. The *Artavia Murillo* decision was constantly cited during Argentina’s Congressional debate.<sup>104</sup>

This interpretation was included in the 2018 abortion proposed bill that was discussed at the Argentinian Congress. The proposed bill contemplated the possibility of voluntarily interrupting pregnancy until fourteen weeks of gestation in the understanding that, until that time, the right of women to choose was considered as more valuable.<sup>105</sup>

The European Court of Human Rights has shown some reluctance to impose a single European-wide standard to many aspects of abortion rights

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99. *Id.*

100. *Artavia Murillo et al. (Fertilization in Vitro) v. Costa Rica*, Preliminary Exceptions, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 257 (Nov. 28, 2012).

101. *Id.* ¶ 256.

102. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (“Every person has the right to have his life respected. This right shall be protected by law and, in general, *from the moment of conception*. No one shall be arbitrarily deprived of his life.”) (emphasis added).

103. *Artavia Murillo*, (ser. C) No. 257, ¶ 188.

104. Roberto Gargarella, *Por qué votar a favor del aborto legal*. *Revista*, ANFIBIA, <http://revis-taanfibia.com/ensayo/votar-favor-del-aborto-legal/> (last visited Oct. 22, 2018).

105. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] (2018) (proposed modifications) (Arg.), [https://www.senado.gov.ar/bundles/senadomicrositios/pdf/despenalizacion-aborto/CD22\\_18PL.pdf](https://www.senado.gov.ar/bundles/senadomicrositios/pdf/despenalizacion-aborto/CD22_18PL.pdf).

using the approach “at a margin of appreciation” for the member State’s interests when it considers the issue. While the concern of the “margin of appreciation”<sup>106</sup> is not to unduly restrain the member states in their own understanding of the right and societal needs, the discussion does not bear a relationship to the Inter-American Court’s proportionality approach. Thus, in *A, B, & C v. Ireland*, the European Court of Human Rights reasoned that:

The question of when the right to life begins came within the States’ margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life . . . . Since the rights claimed on behalf of the fetus and those of the mother are inextricably interconnected, the margin of appreciation accorded to a State’s protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother.<sup>107</sup>

During the Congressional debate, the discussion of the constitutionality of the proposed bill was to determine if our courts would eventually invalidate an abortion law. It is not expected that the Argentine Court or the Inter-American Court of Human Rights will challenge an abortion law like the one being discussed in Argentina’s 2018 Congressional debate.<sup>108</sup> While the Argentine Supreme Court in the *F.A.L.* case adopted the most liberal reading possible of the Criminal Code,<sup>109</sup> the Inter-American Court in *Artavia Murillo* established that the comparative law does not lead us to consider that the embryo should be treated in the same way as a person born.<sup>110</sup> It is important to underline that the Inter-American Court of Human Rights decides very few cases, trying to enunciate the principles that it commits to continue applying in future cases and that define the rights in the entire region.<sup>111</sup> Argentinians were discussing issues like the

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106. “Margin of appreciation” as used by the European Court of Human Rights refers to a degree of flexibility that states receive when interpreting human rights norms. It refers to a balancing of State interest against a particular understanding of a right.

107. *A, B, & C v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 237 (2010) <https://hudoc.echr.coe.int/eng#%7B%22dmdocnumber%22:%5B%222878721%22%5D,%22itemid%22:%5B%22001-102332%22%5D%7D>.

108. *Id.*

109. *Id.*

110. *Artavia Murillo et al. v. Costa Rica*, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 244 (Nov. 28, 2012).

The Court concludes that the Constitutional Chamber based its decision on Article 4 of the American Convention, Article 3 of the Universal Declaration, article 6 of the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the 1959 Declaration on the Rights of the Child. However, it is not possible to use any of these articles or treaties to substantiate that the embryo can be considered a person in the terms of Article 4 of the Convention. Similarly, it is not possible to reach this conclusion from the preparatory work or from the systematic interpretation of the rights recognized in the American Convention or in the American Declaration.

*Id.*

111. Gargarella, *supra* note 89.

constitutionality of the proposed abortion bill during months, and this is extremely valuable for our society as participants of our own history.

*c. Abortion as a Central Issue of Public Health*

The Congressional debate also worked to bring out the alarming number of women who die as a consequence of unsafe abortion practices because they cannot afford a clinic for a safe abortion. The debate showed that abortion rights are a matter of equality and public health for women, not just a right to control their own bodies.<sup>112</sup> Non-governmental organizations and human rights groups estimate that around 500,000 clandestine abortions are carried out every year in Argentina.<sup>113</sup> According to official health ministry statistics, more than seventeen percent of the 245 recorded deaths of pregnant women and girls in 2016 were due to unsafe abortions.

Women with fewer resources are the main victims of illegal and clandestine abortions. Most abortions are unsafe in places with restrictive abortion laws, and abortion rates are higher. The more restrictive the legal setting, the higher the proportion of clandestine, unsafe abortions. Consequently, the riskiest abortions, those self-induced or performed by untrained providers, are higher among poor and rural women than among nonpoor and urban women.<sup>114</sup> In Argentina, abortion does not affect all women in the same way. Abortion is conditioned by social, cultural, educational and economic burdens. This is the real problem of abortion in Argentina and the danger of its criminalization: The illegality results in differentiated practices according to the economic condition of women, and the terrible consequences of deaths due to self-induced clandestine abortions.<sup>115</sup>

Under this backdrop, in 2005 a group of feminists, activists, and non-governmental organizations founded the National Campaign for the Right to Legal, Safe, and Free Abortion with the slogan “sexual education to decide, birth control not to abort, and legal abortion not to die.” In 2015, a new feminist movement named “Not One Woman Less” (Ni una Menos in

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112. Silvia Gabriela Lospenatto, *Encendido discurso de Silvia Lospennato aplaudido por oficialistas y oposición*, YOUTUBE (June 15, 2018) (Congressional debate), <https://www.youtube.com/watch?v=kD5uacur3Lk>.

113. Megan Specia, *What to Know About Argentina's Vote on Abortion*, N.Y. TIMES (Aug. 8, 2018), <https://www.nytimes.com/2018/08/08/world/americas/argentina-abortion-explainer.html>.

114. SUSHEELA SINGH ET AL., ABORTION WORLDWIDE 2017: UNEVEN PROGRESS AND UNEQUAL ACCESS, GUTTMACHER INST. (2017), [https://www.guttmacher.org/sites/default/files/report\\_pdf/abortion-worldwide-2017.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/abortion-worldwide-2017.pdf).

115. Interview with Casas Laura, *supra* note 79.

Spanish) was founded and supported since then the National Campaign. The 2018 Congressional debate gave these groups a nationwide forum to be heard and offered an opportunity they likely would not have had otherwise to emphasize points on a national scale.

*d. Individual Versus Institutional Conscientious Objection*

Argentina's 2018 Congressional debate also allowed discussion of the problem of conscientious objection, understood as the right not to be obliged to perform actions that contradict ethical or religious beliefs of "a person." This right has its basis in the constitutional protection of freedom of religion recognized in Article 14 of the Argentine Constitution.<sup>116</sup>

The argument of those who opposed the bill was that it should also include the right to institutional conscientious objection. Nonetheless, as Professor Marcelo Alegre, who also made his presentation during the Congressional debate, repeatedly stated, "conscientious objection is indissolubly linked to a mind, to a person of blood and flesh. Hospitals and pharmacies do not possess consciences and therefore cannot object."<sup>117</sup> In other words, this right can only be exercised by a person.

The proposed abortion bill was consistent with the Supreme Court ruling in the *F.A.L.* case. The Supreme Court established that an adequate system should allow health personnel to exercise their right of conscientious objection without delays that could compromise the effective practice of the abortion. For this purpose, health professionals must be required to express their objection at the time that they start to work in the corresponding health establishment so that every institution has sufficient human resources to guarantee the exercise of the rights that the law confers on victims of sexual violence.<sup>118</sup> In the hypothetical case that all the professionals of an institution object to perform abortions, the proposed bill determined that the institution needed to have a pre-agreement with another health establishment to be able to refer women.<sup>119</sup> However, physicians have the obligation to assist in cases of emergency or when a timely referral is not possible. The proposed bill also indicates that those physicians who

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116. Marcelo Alegre, *Conscious Oppression: Conscientious Objection in the Sphere of Sexual and Reproductive Health* 65 (Yale L. Sch. Legal Scholarship Repository SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers, 2009), [https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1064&context=yls\\_sela](https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1064&context=yls_sela).

117. *Id.*

118. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] (2018) (proposed modifications) (Arg.), [https://www.senado.gov.ar/bundles/senadomicrositios/pdf/despenalizacion-aborto/CD22\\_18PL.pdf](https://www.senado.gov.ar/bundles/senadomicrositios/pdf/despenalizacion-aborto/CD22_18PL.pdf).

119. *Id.*

object should maintain this attitude in both, the public and the private health services where they work.<sup>120</sup> This provision seeks to eliminate the possibility that physicians performing abortions in private clinics but rejecting women in a public hospital, where women who seek an abortion are, in many cases, in a state of poverty.

There were two contrary positions during the Congress debate regarding conscientious objection. On the one hand, those who defend personal and institutional objection without any limitation. On the other hand, those who reject institutional objection and demand that at least one physician in each institution must be a non-objector to guarantee access to the practice without delay. They considered “time” as a crucial factor when there is an emergency and a referral to another institution would put the pregnant woman at risk. In Soledad Deza’s words, “approving the institutional conscientious objection would mean to legislate without a gender focus. If this happens, our representatives will be promoting discrimination in access to public health.”<sup>121</sup>

### III. UNDERSTANDING WHY ARGENTINA DID NOT PASS THE LAW: WHAT IS THE MAIN OBSTACLE TO LEGALIZING ABORTION?

The main reasons why Argentina did not pass the proposed bill are the active role of the Catholic Church, and the pressure of conservative groups. A comparative analysis between Argentina and Ireland shows how Ireland offered a model for Argentina to move forward. The basis to face the recognition of abortion rights in Argentina in the short term, are clearly framed. A referendum might show the social agreement that abortion is not a crime and would help to pressure the legislature to pass the law in the next intent. Moreover, the “apostacy” movement that was born after the Senate did not pass the law, shows how the Catholic Church is facing a new stage after the abortion debate.

#### *A. The Power and Role of the Catholic Church: Pressure From Conservative Groups*

The Congressional debate forced the parties involved to draw clear lines and made much more manifest the limits and political costs of the Catholic Church position. Nevertheless, in many conservative provinces social pressure still presents an obstacle, considering in Argentina the

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120. *Id.*

121. Soledad Vallejo, *Objeción a la objeción*, PÁGINA12 (July 26, 2018), <https://www.pagina12.com.ar/130851-objecion-a-la-objecion>.

Catholic Church represents the ninety-two percent of the population. Conservative sectors also created a lot of confusion. Some senators could not get away from their religious beliefs when voting and were persuaded by the slogan “save the two lives.” They transferred their personal religious beliefs to the public scene, and legislated in accordance, without taking into account the secular state that is Argentina.<sup>122</sup> The Catholic leader, Pope Francis, who is Argentinian, publicly stated that “Last century, the whole world was scandalized by what the Nazis did to purify the race. Today, we do the same thing but with white gloves.”<sup>123</sup> He compared abortion rights with the Nazi-era eugenics program.<sup>124</sup>

In the province of Tucumán, after the abortion debate, the legislature passed a resolution declaring Tucumán a “pro-life province.”<sup>125</sup> Moreover, some legislators intended to pass a law to prohibit abortions in all cases, including rape, an exception that is contemplated in the National Criminal Code since 1921. Under *González v. Provincia de Santiago del Estero*,<sup>126</sup> a bill like the one proposed in Tucumán would be held unconstitutional by the Supreme Court. That is a case using the Civil Code, but there is not much doubt that it is up to the Federal Government to write national codes in the area of both criminal and civil law.

The power of the Catholic Church and the pressure of conservative groups bring social and political costs. As Soledad Deza said in her presentation during the 2018 Congressional debate, “Tucumán is the only province in Argentina that still refuses to adhere to the National Law on Sexual Health and Responsible Reproduction. Moreover, Tucumán is a province where our children still have religious education at public schools, but they do not receive education according to the integral sexual education law.”<sup>127</sup>

The Argentine debate revealed “how closely some sectors of the governing party agree with the position of the hierarchy of the Catholic

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122. Interview with Casas Laura, *supra* note 79.

123. Associated Press, *Pope Calls Abortion ‘White Glove’ Equivalent of Nazi Crimes*, N.Y. TIMES (EUR.) (June 16, 2018) (quoting Pope Francis), <https://www.nytimes.com/2018/06/16/world/europe/pope-abortion-nazi-crimes.html>.

124. Serhan, *supra* note 8.

125. See Fabián López, *Tucumán se declaró como provincia “provida” mediante una resolución de la Legislatura*, LA NACION (Aug. 2, 2018, 11:35 PM), <https://www.lanacion.com.ar/politica/tucuman-se-declaro-como-provincia-provida-mediante-una-resolucion-de-la-legislatura-nid2158832>.

126. *González v. Provincia de Santiago del Estero*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 29, 2007, Fallos 159:326 (Arg.). In this case, the Argentine Supreme Court analyses the constitutionality of a section of the Constitution of the province of Santiago del Estero, a north east state in Argentina.

127. Deza, *supra* note 87.

Church.”<sup>128</sup> The results show the enduring power of the Catholic Church and how this institution was the key player that managed to stop the law.<sup>129</sup> This has a clear negative effect for the Catholic Church. After the proposed bill was rejected, thousands of Argentinians, most of them women, have started formal proceedings to abandon the Catholic Church through a proceeding called the “apostasy movement” in protest of the church’s campaign against efforts to legalize abortion in the country.

*B. The Next Step Moving Forward: The Irish Referendum as a Model for Argentina*

After the Irish experience, it seems that a referendum could be the best strategy in Argentina to move forward. After a full debate, democratic forces can prevail through an abortion law. A referendum, according to the Ireland successful experience, could serve to focus the debate even more efficiently than a legislative debate. In Argentina, it was a referendum and not a court decision that was necessary to produce changes on such a prominent issue.

The Irish experience also shows that the separation of Church and State could be related with the legalization of abortion. Against Argentina’s backdrop, Ireland became an inspiration for Argentina as a Catholic country that was able to fight against restrictive abortion regulations through a constitutional referendum. In 2018 Argentina and Ireland went through two different processes towards the same objective: To expand the recognition of abortion rights. In Argentina, the proposed bill only passed the House of Representatives and not the Senate; in Ireland, the Constitutional Referendum overruled the Eighth Amendment of the Irish Constitution that banned abortion rights giving the pregnant woman and the unborn “equal right to life.”

Analyzing some similarities and differences between Ireland and Argentina provides some insight into the reasons for the opposing results that the 2018 abortion processes reached in each country and why the Irish referendum became a model for Argentina. The constitutional position of the Catholic Church and the role it played during the abortion debate in each country, show that while in Argentina the Catholic Church was able to pressure the Senate, in Ireland it was not able to influence the people. This

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128. Mariela Belski, *El costo de no aprobar el aborto legal en Argentina*, AMNESTY INT’L (ARG.) (Aug. 3, 2018), <https://www.amnesty.org/en/latest/news/2018/08/the-cost-of-not-approving-legal-abortion-in-argentina/>.

129. Sergio Rubin, *Aborto: la Iglesia, el actor clave que logró frenar la ley*, CLARÍN (Aug. 9, 2018, 3:15 PM), [https://www.clarin.com/sociedad/aborto-iglesia-actor-clave-logro-frenar-ley\\_0\\_rk1CDLuH7.html](https://www.clarin.com/sociedad/aborto-iglesia-actor-clave-logro-frenar-ley_0_rk1CDLuH7.html).

demonstrates that a referendum in Argentina could evidence the social agreement that abortion is not a crime and become the best path to legalize abortion.

### 1. Religion in the Constitution

Argentina and Ireland are both countries with Catholic-majority populations, but this does not necessarily mean active religious practice.<sup>130</sup> In both countries, there are restrictive laws regarding abortion and there is a close relationship between Catholic countries and restrictive abortion laws. The role of the Catholic Church during the 2018 debates was different in each country. In Argentina the role was active, whereas in Ireland it was passive. One first possible explanation is the position of the Catholic Church in each national constitution.

On one hand, the Argentine Constitution, originally written in 1853, and last amended in 1994, invokes God in its preamble and guarantees the free exercise of religious practice and belief.<sup>131</sup> The 1994 reform of the Constitution removed the requirement for Argentina's presidents to be catholic. However, the Constitution states that the Federal Government "sustains the apostolic Roman Catholic faith." The government still funds the Catholic Church to a large extent.

On the other hand, the Irish Constitution ratified in 1937 and last amended in 2018, removed the special position of the Catholic Church. In 1972, the Fifth Amendment of the Irish Constitution "removed Section 44.1.2 which allowed the State to recognize the special position of the Catholic Church."<sup>132</sup>

### 2. The Role of the Catholic Church

The Catholic Church played an active role during the 2018 Congress debate in Argentina, while it showed a passive role during the 2018 Constitutional Referendum in Ireland. In Argentina, during the Congress

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130. See Lucila Espósito, *Creencias, cultura y sociedad en Argentina*, CONICET (Oct. 2, 2012), <https://www.conicet.gov.ar/creencias-cultura-y-sociedad-en-argentina/>.

131. CONSTITUCIÓN NACIONAL [CONST. NAC.] preamble (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm> ("We, the representatives of the people of the Argentine Nation, gathered in General Constituent Assembly by the will and election of the Provinces which compose it, in fulfillment of pre-existing pacts, in order to form a national union, guarantee justice, secure domestic peace, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves, to our posterity, and to all men of the world who wish to dwell on argentine soil: invoking the protection of God, source of all reason and justice: do ordain, decree, and establish this Constitution for the Argentine Nation.").

132. Constitution of Ireland 1937 art. 44.1.2, <https://assets.gov.ie/6523/5d90822b41e94532a63d955ca76fdc72.pdf>.

debate the Church organized a “march for life” at the Buenos Aires Cathedral, and as mentioned above, the Pope compared abortion with Hitler and the Nazi extermination plan.<sup>133</sup> By contrast, in Ireland religion is unpopular among young people because of public scandals that involve clerical child abuse. Consequently, it seems that the strategy of the Catholic Church during the Constitutional Referendum was to stay apart from the public debate. As experts on the field have affirmed: “When Catholic bishops take a strong position on an issue, public opinion tends to move in the opposite direction in this European Country.”<sup>134</sup>

The image of the Catholic Church is losing credibility around western Europe. However, it seems to remain powerful elsewhere in the world, especially in South America.<sup>135</sup> More than 40% of the world’s 1.2 billion Catholics live in Latin America. Whereas in the United States the percentage of Roman Catholic is 20.8%, and in Ireland 78.3%, in Argentina the Catholic Church represents the 92% of the population.<sup>136</sup>

### 3. Constitutional Reform Process

The second constitutional difference between Ireland and Argentina, explains the reason why the decision to legalize abortion in Ireland was by a Constitutional Referendum, whereas in Argentina the vote was in Congress.<sup>137</sup> However, this constitutional dissimilitude does not infringe the Argentine House of Representatives to submit an abortion bill to popular consultation.

The Argentine Constitution in its Article 39 establishes that “bills referring to constitutional reform shall not originate in popular initiatives.”<sup>138</sup> According to Article 30 of the Argentine Constitution can only be amended by a previous law by Congress declaring “the necessity of the reform” with the vote of at least two-thirds of the members; but it shall not be carried out except by a Convention assembled to that effect.”<sup>139</sup> The Irish Constitution, in contrast, requires the consent of the Irish people

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133. Harriet Sherwood, *Argentina Abortion Defeat Shows Enduring Power of Catholic Church*, GUARDIAN (Aug. 9, 2018, 6:30 PM), <https://www.theguardian.com/world/2018/aug/09/argentina-abortion-defeat-shows-enduring-power-of-catholic-church>.

134. *Id.*

135. *Id.*

136. *The World Factbook: Religion*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2122.html> (last visited Aug. 8, 2019).

137. Serhan, *supra* note 8.

138. CONSTITUCIÓN NACIONAL [CONST. NAC.] ART. 39 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm>.

139. *Id.* art. 30 (Arg.).

before the Constitution can be amended. This means that reforms to the Irish Constitution can only be made by way of constitutional referendum.<sup>140</sup>

Nevertheless, the right to abortion in Argentina is contemplated in the National Criminal Code, not in the Constitution. Therefore, a referendum regarding abortion, would be possible under article 40 of the Argentine Constitution which states: “At the initiative of the House of Deputies, Congress may submit a bill to popular consultation. The law calling said consultation shall not be vetoed. With the affirmative vote of the people of the Nation, the bill shall become a law and its promulgation shall be automatic.”<sup>141</sup>

#### 4. Abortion Rights Before 2018

Although women die due to clandestine abortions in Argentina, some people from conservative sectors questioned the need of an abortion law claiming that the 1921 Criminal Code already includes the exceptions in which abortion is legal. This put into evidence that a law that has more than one hundred years became obsolete and needs to be reformed through Congress to give solutions to the real situations that women are facing in Argentina.

While in Argentina the existing law since 1921 allows abortion in cases of rape, incest, and severe situations that put the mother’s life and health at risk, in Ireland abortion was permissible only when the woman’s life was at risk, but not in cases of rape, incest, and fatal unborn abnormality. Ireland had more restrictive abortion regulations than Argentina, and this is also a reason of the different results that the 2018 debates raised. Furthermore, in 1983 the Eighth Amendment to the Irish Constitution was enacted and established that the right to life of the unborn was considered equal to the right to life of the mother. In other words, “it constitutionalized fetal rights.”<sup>142</sup> So far, it seems that the Irish regulation was much more restrictive than the Argentinian.

On May 2018, the Irish people voted through a referendum to repeal the eighth amendment of their constitution. The government proposed to allow women to seek an abortion up to twelve weeks into a pregnancy. In Argentina, the proposed bill that did not pass the Senate in August 2018, intended to legalize abortion during the first fourteen weeks of pregnancy,

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140. Fiona De Londras, *Constitutionalizing Fetal Rights: A Salutory Tale From Ireland*, 22 MICH. J. GENDER & L. 243, 281 (2015) (“[T]he general political consensus is that any reform whatsoever requires constitutional change.”).

141. CONSTITUCIÓN NACIONAL [CONST. NAC.] ART. 40 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm>.

142. Londras, *supra* note 140, at 6.

and decriminalized it after that point in cases of rape, health risks for the woman, and fetal malformation.<sup>143</sup>

It seems that the Irish more restrictive abortion regulations, was determinative to make people totally agree that the country needed a change. In contrast, as Argentina have the exceptions since 1921 in cases of rape and women's health risk, some people, generally from conservative groups questioned that the country already has abortion regulations, and thus, the debate was not necessary. This position did nothing but demonstrate the urgency of an abortion law in the country.

### 5. Social Mobilizations and Geographic Position

Historically, social mobilizations have preceded the conquest of human rights. Unfortunately, in the case of abortion movements, the mobilizations have been stimulated by tragedy.<sup>144</sup> In Ireland, Savita Halappanavar was denied an abortion and died as a result of an infection during an extended miscarriage in 2012.<sup>145</sup> In Argentina, Chiara Paez, a fourteen-year-old girl, was found dead in her boyfriend's backyard in 2015. She was eight weeks pregnant when she was beaten to death and buried by her boyfriend, who confessed to the police that he was trying to abort her fetus through the beatings.<sup>146</sup>

The geographic position of each country shows that Argentina is also probably fighting a more difficult battle, since it lacks neighbors pushing in the same direction. Ireland is part of Europe, a continent where most countries have legalized abortion, whereas Argentina is part of South America, a region that still largely criminalizes abortion. Within Latin America and the Caribbean, the only exceptions are Cuba, Guyana, Mexico City, and Uruguay, which do allow abortions without restriction as to the reason.<sup>147</sup>

In 2010, the European Court of Human Rights held that Ireland restrictions on abortion violated the European Convention on Human Rights. On December 16, 2010, the European Court of Human Rights

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143. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 3 (2018) (proposed modifications) (Arg.), [https://www.senado.gov.ar/bundles/senadomicrositios/pdf/despenalizacion-aborto/CD22\\_18PL.pdf](https://www.senado.gov.ar/bundles/senadomicrositios/pdf/despenalizacion-aborto/CD22_18PL.pdf).

144. *Id.*

145. Londras, *supra* note 140, at 14.

146. *Pregnant 14-Year-Old Girl, Murdered by Boyfriend, Sparks Mass Protests*, ABC 7 NEWS (June 5, 2015), <https://abc7ny.com/society/pregnant-14-year-old-girl-murdered-by-boyfriend-sparks-mass-protests/768382/>.

147. GUTTMACHER INSTITUTE, FACT SHEET: ABORTION IN LATIN AMERICA AND THE CARIBBEAN 2 (2018), [https://www.guttmacher.org/sites/default/files/factsheet/ib\\_aww-latin-america.pdf](https://www.guttmacher.org/sites/default/files/factsheet/ib_aww-latin-america.pdf).

decided *A, B, & C v. Ireland*. In this case, three women challenged the Irish law on abortion after being forced to travel abroad to obtain an abortion. They argued that the Irish law violated, among other rights, their right to private life and their right to be free from inhuman or degrading treatment. The Court held that there were significant limitations in Irish medical practice to protect a woman's life and that the state must legislate for abortion services when a woman's life is in danger.<sup>148</sup>

In *A, B, & C v. Ireland*, the European Court of Human Rights found that Ireland was the country in the European Union with the most restrictive prohibition on abortion. Ireland's abortion law was inconsistent with legal standards for abortion regulations in international human rights law. It is also against most European countries' abortion regulations.<sup>149</sup> The Court found that Ireland had violated the European Convention on Human Rights by failing to provide access to abortion practices to a woman whose life was in danger due to her pregnancy. In its region, Ireland was behind most of the progressive European countries.<sup>150</sup>

In contrast, Argentina is considered a progressive country in its region, and has been admired for its human rights policy.<sup>151</sup> Since the 1980s, the country has passed progressive laws in areas such as same sex marriage (Ireland passed the law five years after Argentina), gender identity, assisted reproduction, parental responsibility and compensation for domestic workers.<sup>152</sup> Nevertheless, abortion is still restrictive in Argentina only to the three cases stipulated in Article 86 of the National Criminal Code.

## 6. Consequences of Illegal Abortion

Moreover, both in Argentina and Ireland, criminalizing abortion was not a solution to stop women from having abortions. Instead, women were forced to undergo clandestine and unsafe abortions. The consequences of the prohibition to access to safe abortions in each country also show a clear difference between the Latin American and European country.

In Ireland, women had to travel to England for abortion services, and this often cause harm to their physical and mental health. Authors have

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148. *A, B, & C v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. (2010).

149. Press Release, Center for Reproductive Rights, European Court of Human Rights Rules that Ireland Abortion Ban Violates Human Rights, But Doesn't Go Far Enough (Dec. 16, 2010), <https://reproductiverights.org/press-room/european-court-of-human-rights-rules-that-ireland-abortion-ban-violates-human-rights-but->.

150. FIONA DE LONDRAS & MÁIRÉAD ENRIGHT, REPEALING THE 8TH: REFORMING IRISH ABORTION LAW 16 (2018).

151. Belski, *supra* note 128.

152. *Id.*

stated that “between 1980 and 2013, 158,252 women with Irish addresses accessed abortion in England, which leaves one to wonder how many women had no option but to attempt abortion by other means or to continue with an unwanted pregnancy.”<sup>153</sup>

In Argentina, women are still dying from lack of access to safe abortion services. In fact, one week after the Senators rejected the bill in Argentina, a woman died due to a botched at-home abortion.<sup>154</sup> President Mauricio Macri’s health minister, Adolfo Rubinstein, estimated that some 47,063 abortions were carried in Argentina in the last five years, and that seventy percent are in unsafe conditions.<sup>155</sup> Clandestine abortion statistics have been publicized by pro-choice groups for years, without achieving media visibility until 2018 Congress debate.

After comparing the similarities and differences between Argentina and Ireland, it seems that pressure and active role of the Catholic Church in Argentina, where priests and bishops spoke against abortion in public, is one of the reasons why the proposed abortion bill did not pass the Senate. However, as previously mentioned, a growing number of apostasy supporter’s express frustration with the Catholic Church over its opposition to the recent legal abortion Congress debate and are abandoning the Catholic Church.<sup>156</sup>

## CONCLUSION

The way to protect women from the terrible consequences of clandestine abortions is by legalizing this practice through Congress. In *F.A.L.*, the Argentine Supreme Court recognized abortion as a human right. However, the deficiencies of compliance with the *F.A.L.* decision proves the lack of enforcement power of the judiciary and the poor institutional quality of the Argentine Supreme Court. This reinforces the normative claims for legalization through Congress, to obtain a law that arises from a democratic body elected by the people.

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153. LONDRAS & ENRIGHT, *supra* note 150.

154. See Amanda Arnold, *Woman Dies From DIY Abortion a Week After Argentina’s Abortion Vote*, CUT (Aug. 15, 2018), <https://www.thecut.com/2018/08/one-woman-has-died-since-argentina-rejected-abortion-bill.html>; Dominique Mosbergen, *Woman Dies From Botched At-Home Abortion Days After Argentina Rejects Abortion Bill*, HUFFINGTON POST (Aug. 16, 2018, 5:39 AM), [https://www.huffingtonpost.com/entry/argentina-abortion-bill-woman-zadies\\_us\\_5b7504ece4b02b415d7548df](https://www.huffingtonpost.com/entry/argentina-abortion-bill-woman-zadies_us_5b7504ece4b02b415d7548df).

155. Adolfo Rubinstein, *Ministro De Salud De La Nación*, YOUTUBE (July 24, 2018), <https://www.youtube.com/watch?v=yJ4Gg6fVhOY>.

156. Uki Goñi, *Argentiniens Formally Leave Catholic Church Over Stance on Abortion*, GUARDIAN (Sept. 9, 2018, 5:00 PM), <https://www.theguardian.com/world/2018/sep/09/argentina-catholic-church-legalize-abortion-apostacy>.

Although the proposed bill did not pass the Senate, the Argentine 2018 Congress debate was a great victory in many significant ways. The abortion debate in Argentina, and the approval of the bill in the House of Representatives after seven previous attempts, gave rise to a significant process through open discussions and broad participation that has shattered the silence on an issue that has long been taboo.

The abortion debate is a public health issue in which the Catholic Church is not supposed to pressure the Senate with its power. After comparing the Argentine and Irish abortion debates in 2018, it seems that the lack of separation between the Catholic Church and the State is an indicia of the power of the Church in Argentina as the key actor that managed to stop the law. However, the apostasy movement took significant steps to show how even Catholics are expressing their rejection with the role the priests played during the abortion debate.

Even though Argentina's Constitution does not allow bills referring to constitutional reform to originate in popular initiatives like the Irish constitutional referendum, as abortion is contemplated in the National Criminal Code, Congress may submit a bill to popular consultation. This might show the social agreement that abortion is not a crime, and, therefore, the promulgation of the abortion law shall be automatic. Congress is the best path for abortion rights in Argentina to be recognized.<sup>157</sup>

The conquest of human rights in the word was generally reached through strong social mobilizations. Argentina is a clear example of this fight, and it is about time that Congress will finally recognize abortion rights. After the Congress debate, the huge number of people present in social mobilizations is a prove that the Argentine society reached at a point of no return. Unfortunately, in the meantime, women are still dying in Argentina because of clandestine abortions. How long should we wait? As René Favalaro argued, "With legal abortion, there would not be more or fewer abortions, there will be fewer dead women. The rest is to educate, not to legislate."<sup>158</sup>

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157. See Belski, *supra* note 128. In a survey conducted by Amnesty International, around 60% of respondents said they supported the legalization of abortion. In addition, more than 63% considered that the Church should stay out of the debate. The percentage of respondents holding this view exceeds 70% in key districts such as the City of Buenos Aires and Buenos Aires Province. *Id.*

158. *Qué opinaba René Favalaro sobre el aborto*, VILLEGAS NOTICIAS (June 12, 2018), <https://www.villegasnoticias.com/general/que-opinaba-rene-favaloro-sobre-el-aborto/>.

# A BUNDLE OF STICKS IN ZERO G: NON-STATE ACTOR MINING RIGHTS FOR CELESTIAL BODIES

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*Alexander Lewis\**

## INTRODUCTION

The Earth stood still the day Sputnik made history as the first man-made artificial satellite to orbit the planet. Humanity shook loose its terrestrial shackles and ventured into a final frontier of possibilities. In reaching the stars, however, humanity also discovered a new world of problems for international law as the Cold War threatened to seep into outer space. The United Nations responded to the new legal vacuum in 1958, and established the Committee on the Peaceful Uses of Outer Space (“COPUOS”),<sup>1</sup> making COPUOS a permanent body the following year.<sup>2</sup> COPUOS created two subcommittees, the Scientific and Technical Subcommittee and the Legal Subcommittee, to help regulate the newly-realized void. These committees have met in Geneva every year since 1962.<sup>3</sup>

In 1963, the U.N. drafted its first edict on space law, the Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space (“Declaration”).<sup>4</sup> The U.N. adopted the primary treaty on space law, the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other

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1. G.A. Res. 1348 (XIII), at 6 (Dec. 13, 1958); *COPUOS History*, U.N. OFF. OUTER SPACE AFF., <http://www.unoosa.org/oosa/en/ourwork/copuos/history.html> (last visited Feb. 7, 2018).

2. G.A. Res. 1472 (XIV), at 5 (Dec. 12, 1959).

3. *COPUOS History*, U.N. OFF. OUTER SPACE AFF., *supra* note 1.

4. G.A. Res. 1962 (XVIII), *Declaration on Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*, at 15 (Dec. 13, 1963) [hereinafter *Declaration*]; see generally *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, U.N. OFF. OUTER SPACE AFF., <http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html> (last visited Feb. 7, 2018).

Celestial Bodies (“Outer Space Treaty”) in 1967.<sup>5</sup> Concerned that the advent of manned space travel would expand the Cold War to the stars, the U.N. used the Outer Space Treaty to prevent the militarization and national appropriation of space and celestial bodies by State members,<sup>6</sup> including the U.S. and the Union of Soviet Socialist Republics (“U.S.S.R.”). The Outer Space Treaty, along with several later agreements, would create the legal framework that governs humanity’s forays off-world.<sup>7</sup>

The Outer Space Treaty lays out several approved uses of outer space in thirteen Articles. In Article I, the member states of the U.N. agree that outer space “shall be the province of all mankind.”<sup>8</sup> Article I further provides that outer space, the moon, and other celestial bodies “shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality, and in accordance with international law, and there shall be free access to all areas of celestial bodies.”<sup>9</sup> Article II establishes that States cannot appropriate outer space, the moon, or any other celestial body for themselves “by claim of sovereignty through use, occupation, or any other means.”<sup>10</sup> The remaining articles change the focus from property in space to property launched into space and include the proscription of military actions in outer space, a ban on the testing of nuclear or other weapons, good Samaritan duties for spacefaring states, and other international obligations designed to “promote international co-operation in the peaceful exploration and use of outer space[.]”<sup>11</sup>

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5. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

6. Article II of the Outer Space Treaty provides “Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.” *Id.* art. II, 18 U.S.T. at 2413, 610 U.N.T.S. at 208. The Outer Space Treaty further states in Article IV that:

States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner. The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military [maneuvers] on celestial bodies shall be forbidden.

*Id.* art. IV, 18 U.S.T. at 2413-14, 610 U.N.T.S. at 208.

7. See Comm. on the Peaceful Uses of Outer Space, Rep. of the Legal Subcomm. on Its Fifty-Sixth Session, U.N. Doc. A/AC.105/C.2/2017/CRP.7 (2017) [hereinafter Status of International Agreements]. Today, 130 countries, all with space-faring capabilities, have signed the Outer Space Treaty, and, of those, 105 have ratified it. *Id.*

8. Outer Space Treaty art. I, *supra* note 5, 18 U.S.T. at 2412-13, 610 U.N.T.S. at 207-08.

9. *Id.*

10. *Id.*

11. See *id.* arts. III-XIII. Article III provides the purpose of the Outer Space Treaty, stating:

When the U.N. adopted Article II of the Outer Space Treaty, barring claims of sovereignty, the idea that a private actor<sup>12</sup> or, in fact, anyone besides the governments of the U.S. or U.S.S.R., could establish moon bases or asteroid mining operations was purely in the realm of science fiction. Because space exploration is no longer as highly prioritized for spacefaring governments following the end of the Cold War, states have largely left future space endeavors in the hands of private enterprises. Though non-state actors are experiencing difficulty getting off of the ground, science fiction is on the verge of becoming science fact, and crossing the Kármán line<sup>13</sup> is no longer exclusive to the governments of the world.<sup>14</sup> As non-state actors progress in their space exploration capabilities, should they be bound by Article II of the Outer Space Treaty as well?

The answer to this question is no—the obligations of the Outer Space Treaty, to which state actors are bound, should not apply to non-state actors in the commercial mining of celestial bodies. Four reasons lead to this conclusion. First, the rules of state responsibility for non-state actors do not apply to mining rights of celestial bodies. Second, no existing treaty binds the U.S. to limit the extraterrestrial activities of non-state actors. Third, in the absence of any legal prohibition, no appeal to policy or custom provide sufficient reasons to expand international law and limit the outer space activities of non-state actors. Fourth, currently enacted practices can be used as a potential framework for the legal oversight of private commercial mining of celestial bodies.

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States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding.

*Id.* art. III, 18 U.S.T. at 2412-13, 610 U.N.T.S. at 207-08. Regarding good Samaritan responsibilities, Article V requires:

States Parties to the Treaty shall regard astronauts as envoys of mankind in outer space and shall render to them all possible assistance in the event of accident, distress, or emergency landing on the territory of another State Party or on the high seas. When astronauts make such a landing, they shall be safely and promptly returned to the State of registry of their space vehicle. In carrying on activities in outer space and on celestial bodies, the astronauts of one State Party shall render all possible assistance to the astronauts of other States Parties.

*Id.* art. V, 18 U.S.T. at 2414, 610 U.N.T.S. at 208.

12. NAT'L INTELLIGENCE COUNCIL, NAT'L INTELLIGENCE OFFICER FOR ECON. & GLOBAL ISSUES, DR-2007-16D, NONSTATE ACTORS: IMPACT ON INTERNATIONAL RELATIONS AND IMPLICATIONS FOR THE UNITED STATES 2 (2007) (“Nonstate actors are non-sovereign entities that exercise significant economic, political, or social power and influence at a national, and in some cases international, level.”).

13. See MATTHEW J. KLEINMAN ET AL., THE LAWS OF SPACEFLIGHT 3 (2012) (stating that the Kármán line is commonly accepted as the divider between Earth's atmosphere and outer space and is at an altitude of approximately 62 miles (100 km) above sea level).

14. See Stephen Clark, *Sweet Success at Last for Falcon 1 Rocket*, SPACEFLIGHT NOW (Sept. 28, 2008), <https://spaceflightnow.com/falcon/004/index.html>.

While the U.S. is obligated to act in accordance with the provisions of the Outer Space Treaty, non-state actors acting within the jurisdiction of the United States are not state actors and should not be bound to the same obligations imposed on state actors, especially when it comes to the commercial exploitation of asteroids. Certain delegations<sup>15</sup> to the fifty-sixth session of the Legal Subcommittee of COPUOS voiced concern that allowing non-state actors to gather resources from asteroids will create the same sovereignty issues that the U.N. has curtailed in the past.<sup>16</sup> However, the concerns of these delegates are incorrect: Non-state actors do not create the same sovereignty concerns as state actors because commercial endeavors by private actors do not implicate or involve state activities. Therefore, non-state actors should not be subject to Article II, particularly with regard to commercial mining of celestial bodies.

Like the Space Race of the Cold War, the U.S. is also at the forefront of non-state actor space endeavors. Today, a variety of private space organizations range across an assortment of fields.<sup>17</sup> Several of these private space companies seek to gather resources from celestial bodies to bring back to Earth, with the majority of the space mining companies located in the United States.<sup>18</sup> The mining efforts of these American non-state actors could benefit the world as a whole, but the U.N. has attempted to hinder these efforts and bind these non-state, private actors to treaties that the U.S. has not signed. Moreover, the U.N. expressly attempted to expand the provisions of Article II of the Outer Space Treaty to include non-state actors in Article XI of the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (“Moon Treaty”).<sup>19</sup> Under Article XI of the Moon Treaty, the extended restrictions on property rights include any “international intergovernmental or non-governmental organization, national organization

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15. See U.N. Committee on the Peaceful Uses of Outer Space, Report of the Legal Subcommittee on its Fifty-Sixth Session, U.N. Doc. A/AC.105/1122, at 7 (2017) [hereinafter Legal Subcommittee Report 56] (“Some delegations expressed the view that the heightened pace of activities in outer space and the increased participation of States, international organizations and the non-governmental sector required continued reflection by the Subcommittee in order to enable further strengthening of the legal regime on outer space, including with respect to the need to review and revise the five United Nations treaties on outer space.”).

16. See *id.* ¶ 226.

17. *Company*, SPACE X, <http://www.spacex.com/about> (last visited Mar. 22, 2018); *Why Asteroids*, PLANETARY RES., <https://www.planetaryresources.com/why-asteroids/> (last visited Mar. 22, 2018); *Who We Are*, VIRGIN GALACTIC, <https://www.virgingalactic.com/who-we-are/> (last visited Mar. 22, 2018) (stating that types of private space companies include space tourism, cargo resupply for the International Space Station, and asteroid mining).

18. The main companies in this field are Planetary Resources and Deep Space Industries. See *Why Asteroids*, PLANETARY RES., <https://www.planetaryresources.com/#home-intro>.

19. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies art. 11, Dec. 5, 1979, 1363 U.N.T.S. 3 [hereinafter Moon Treaty].

or non-governmental entity or any natural person.”<sup>20</sup> However, the U.N. member States did not widely accept the Moon Treaty and only twenty-one members are signatories.<sup>21</sup> None of those signatories, however, are listed among the nations capable of independent-crewed space flight.<sup>22</sup>

In 2015, President Barack Obama signed into law the U.S. Commercial Space Launch Competitiveness Act.<sup>23</sup> Title IV under the Act, the Space Resource Exploration and Utilization Act of 2015 (“Space Resource Act”), authorizes U.S. citizens engaged in the commercial recovery of asteroid and space resources to “possess, own, transport, use, and sell the . . . resource.”<sup>24</sup> The Space Resource Act creates the legal framework for non-state actors based in the U.S. to gather resources from outer space and take another small step for man into the next level of species development.<sup>25</sup> Opponents of private space ventures argue that an issue arises because of the last line of the Act, which states that a U.S. citizen engaged in commercial recovery must act “in accordance with applicable law, including the international obligations of the United States,”<sup>26</sup> and Article II of the Outer Space Treaty.<sup>27</sup> However, America’s commitment to its international obligations in the Space Resources Act does not extend to its non-state actors because the U.S. is not a party to any international agreements limiting non-state actors’ activities in space.

## I. STATE RESPONSIBILITY FOR NON-STATE ACTORS

Non-state actors are not always bound by the same obligations as their state of origin.<sup>28</sup> The continued shift away from the state-centric international

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20. *Id.*

21. Status of International Agreements, *supra* note 7.

22. Will Gray, *Building off US law to Create an International Registry of Extraterrestrial Mining Claims*, SPACE REV. (Aug. 14, 2017), <http://www.thespacereview.com/article/3304/1>; Michael Listner, *The Moon Treaty: Failed International Law or Waiting in the Shadows?*, SPACE REV. (Oct. 24, 2011), <http://www.thespacereview.com/article/1954/1>.

23. U.S. Commercial Space Launch Competitiveness Act of 2015, Pub. L. No. 114-90, 129 Stat. 704 (codified at 51 U.S.C. § 10101); see *President Obama Signs Bill Recognizing Asteroid Resource Property Rights into Law*, PLANETARY RES. (Nov. 25, 2015), <https://www.planetaryresources.com/2015/11/president-obama-signs-bill-recognizing-asteroid-resource-property-rights-into-law/>.

24. Space Resource Act of 2015, Pub. L. No. 114-90, 129 Stat. 704 (codified at 51 U.S.C. § 51302).

25. Jolene Creighton, *The Kardashev Scale: Type I, II, III, IV, & V Civilization*, FUTURISM (July 19, 2014), <https://futurism.com/the-kardashev-scale-type-i-ii-iii-iv-v-civilization/>.

26. National and Commercial Space Programs, 51 U.S.C. §51303 (Supp. V 2017).

27. Outer Space Treaty art. II, *supra* note 5, 18 U.S.T. at 2413, 610 U.N.T.S. at 208.

28. Jean d’Aspremont et al., *Sharing Responsibility Between Non-State Actors and States in International Law: Introduction*, 62 NETH. INT’L L. REV. 49, 53-54 (2015).

legal order and the growing importance of non-state actors has highlighted the need to address the role of state responsibility for non-state actors.<sup>29</sup> Legal scholars have applied the due diligence principle and its contextual approach to help determine the appropriate response by states for the acts of their non-state actors.<sup>30</sup> The due diligence principle comes from the need to have an adaptable set of legal principles that are as varied as they are fundamental to international law.<sup>31</sup>

The four primary principles of responsibility<sup>32</sup> range across the intent spectrum, from requiring mens rea to strict liability.<sup>33</sup> States cannot directly engage in the exploitation of celestial minerals due to Article II's prohibition on national appropriation; therefore, the first principle of fault-based responsibility would not apply to non-state actors engaged in private commercial mining activities.<sup>34</sup> The second and third principles instead focus on the international obligation of the state, equating it to strict liability for the actions of an agent of the state while still distinguishing between relative and absolute responsibility.<sup>35</sup> The last principle differs in not requiring an unlawful act but only the establishment of a causal connection to the damages suffered.<sup>36</sup> The fourth principle of state responsibility is also not at issue here because there is a definitive act by non-state actors.<sup>37</sup>

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29. Robert P. Barnidge, Jr., *The Due Diligence Principle Under International Law*, 8 INT'L COMM. L. REV. 81, 82 (2006).

30. *See id.* at 81-82. For a more expansive discussion of the due diligence principle in international law, see *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*, Judgment, 2015 I.C.J. Rep. 665 (Dec. 16) (separate opinion by Donoghue, J.) ("under customary international law, a State of origin has a right to engage in activities within its own territory, as well as an obligation to exercise due diligence in preventing significant transboundary environmental harm."); 1 JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 572-73 (1898) (defining due diligence as "a diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it; a diligence which shall, by the use of active vigilance[.]"), *quoted in* Int'l Law Comm'n, Rep. on the Work of Its Forty-Sixth Session, U.N. Doc. A/49/10, at 103, n.229 (1994); and Eric de Brabandere, *Host States' Due Diligence Obligations in International Investment Law*, 42 SYRACUSE J. INT'L L. & COM. 319 (2015) (due diligence requires States to exercise due diligence only in relation to certain specific conduct that is required from States under a set rule of international law. If a State is found in breach of its obligation to exercise due diligence, State responsibility may then ensue if the act in question is attributable to the State.").

31. Barnidge, *supra* note 29, at 82.

32. *See id.* at 82, 83-84.

33. *Id.* at 82-83.

34. Outer Space Treaty art. II, *supra* note 5, 18 U.S.T. at 2413, 610 U.N.T.S. at 208; Barnidge, *supra* note 29, at 82-83.

35. Barnidge, *supra* note 29, at 83.

36. *Id.* at 84.

37. *Id.* at 84-85 ("Which responsibility regime applies, whether subjective or objective responsibility . . . serves particular policy ends and in large part determines the extent to which a party can be held accountable for its acts or omissions.").

With these principles in mind, the context and particularized facts of the situation have an important bearing on the state's responsibility. The Outer Space Treaty does not prohibit non-state actors from engaging in commercial activities. Article II of the Outer Space Treaty states, "The States Parties to this Treaty . . . have agreed on the following . . . : Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."<sup>38</sup> This article places the emphasis on state action to assert sovereignty. Moreover, legal analysis of the Outer Space Treaty at the time of signing concluded that "the Treaty in its present form appears to contain no prohibition regarding individual appropriation or acquisition by a private association or an international organization, even if other than the United Nations."<sup>39</sup> Article VI states:

States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty.<sup>40</sup>

Importantly, the Outer Space Treaty applies only to non-state actors when they are acting on behalf of a State. The language of the Treaty and preceding Declaration was carefully chosen to ensure agreement among the parties. States are only bound to obligations to which the State has agreed to be bound.<sup>41</sup> Some delegates to the Legal Subcommittee believe that Article VI extends the obligations of the U.S. under to the treaty to non-governmental actors operating within the State's jurisdiction.<sup>42</sup>

However, as it is written, Article VI only requires that non-governmental actors carry out their actions in conformity with the provisions of the Outer Space Treaty when they are engaged in "national activities."<sup>43</sup> The objective assessment of state responsibility requires that the non-state actor act as an

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38. Outer Space Treaty art. II, *supra* note 5, 18 U.S.T. at 2413, 610 U.N.T.S. at 208.

39. Stephen Gorove, *Interpreting Article II of the Outer Space Treaty*, 37 *FORDHAM L. REV.* 349, 351 (1969).

40. Outer Space Treaty art. VI, *supra* note 5, 18 U.S.T. at 2415, 610 U.N.T.S. at 209.

41. *See* Vienna Convention on the Law of Treaties art. 11-16, May 23, 1969, 1155 U.N.T.S. 331 (outlining means by which a state can express its consent to be bound to international law obligations).

42. Legal Subcommittee Report 56, *supra* note 15, ¶ 245.

43. Outer Space Treaty art. VI, *supra* note 5, 18 U.S.T. at 2415, 610 U.N.T.S. at 209.

agent of the state,<sup>44</sup> and the fact that a non-state actor operates in outer space itself can hardly in turn the private actor into an agent of the State. The activities of non-governmental entities not engaged in national activities only require the authorization and “continuing supervision by the appropriate State Party to the Treaty.”<sup>45</sup>

The text of the treaty provides no further explanation of the terms “authorization” and “continuing supervision,” leaving them open to interpretation. In 2004 and 2009, the board of the directors of the International Institute of Space Law (“IISL”), an independent non-government agency focused on the development of space law,<sup>46</sup> released statements in non-professional capacities interpreting “authorization” and “supervision” to establish all non-governmental actions in outer space as “national activities.”<sup>47</sup> However, while all national activities are activities, not all activities are national. For example, a motorist requires a driver’s license (i.e., authorization) and is monitored by the police and traffic cameras (i.e., continuing supervision) as part of the process of traveling on the roadways, but these two factors alone neither make the motorist’s driving (activity) one that is done on behalf of the government (a national activity) nor make that motorist an agent of the state.<sup>48</sup> More is required. Applied to the space setting, NASA using a SpaceX rocket for a resupply mission is a national activity because it is done on behalf of the U.S. government, but SpaceX conducting a rocket test is not a national activity because the test is only done on behalf of SpaceX.

Additionally, for the mining activities of non-state actors to be prohibited under the Outer Space Treaty, the mining activity must amount to “national appropriation.” The term “appropriation” arises most frequently when there is a sense of permanence in the taking or exclusive use of property.<sup>49</sup> The actions of non-state actors engaged in commercial

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44. Barnidge, *supra* note 29, at 83, n.15.

45. Outer Space Treaty art. VI, *supra* note 5, 18 U.S.T. at 2415, 610 U.N.T.S. at 209.

46. *Introduction*, INT’L INST. SPACE L., <https://iislweb.org/about-the-iisl/introduction/> (last visited Feb. 3, 2019).

47. *2015 Position Paper on Space Resources Mining*, INT’L INST. SPACE L., <http://www.iislweb.org/docs/SpaceResourceMining.pdf> (last visited Feb. 3, 2019); *2009 Statement of the Board of Directors of the International Institute of Space Law*, INT’L INST. SPACE L. (Mar. 22, 2009), <http://www.iislweb.org/docs/Statement%20BoD.pdf>; *2004 Statement of the Board of Directors of the International Institute of Space Law on Claims to Property Rights Regarding the Moon and Other Celestial Bodies*, INT’L INST. SPACE L., [http://www.iislweb.org/docs/IISL\\_Outer\\_Space\\_Treaty\\_Statement.pdf](http://www.iislweb.org/docs/IISL_Outer_Space_Treaty_Statement.pdf) (last visited Feb. 3, 2019).

48. *See The United States: Traffic Regulations*, INTERNATIONS, <https://www.internations.org/usa-expats/guide/driving-in-the-united-states-15646/the-united-states-traffic-regulations-2> (last visited Feb. 3, 2019).

49. Gorove, *supra* note 39, at 352.

enterprises may constitute appropriation<sup>50</sup> and may occasionally even rise to national appropriation.<sup>51</sup> However, for national appropriation to occur, the non-state actors must be acting under the exclusive authority or jurisdiction of the responsible State.<sup>52</sup> If the controlling State lacks authority over the area in question, then it is unlikely that any appropriation by non-state actors is national in nature.<sup>53</sup> Currently, the U.S. has no agency with jurisdiction over activities conducted in low earth orbit and beyond,<sup>54</sup> making it unlikely that any appropriation by non-state actors in that region would be national in nature.

Dr. Stephen Gorove, a well-known scholar in the field of space law,<sup>55</sup> concluded that appropriation of outer space as a whole is also an unfeasible endeavor.<sup>56</sup> While it may be possible to appropriate the moon or an asteroid as a whole, any prohibition against commercial resource-gathering would be better served to focus on the appropriation instead.<sup>57</sup> However, an issue of scope arises under this interpretation. That is, when an object is traveling through space, such as a satellite, it will collect various traces of space dust, cosmic rays, gases, and solar energy, all of which are considered part of outer space.<sup>58</sup> At some point, the orbiting object will collect enough space dust and solar energy that it will violate Article II prohibition on national appropriation of “outer space.” It follows, then, that most objects launched into space will violate the Outer Space Treaty given enough time in orbit. This illustrates that the language that the Legal Subcommittee uses to restrict non-state actors is overbroad.

Thus, the need for particularized facts to find state responsibility makes it difficult to find state responsibility under a fault-based approach and also to find a state has failed to meet its obligations under the due diligence principle.<sup>59</sup> The requirement for authorization and supervision of an activity does not make a non-state actor engaging in a private activity an agent of the

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50. *Id.* (“[A]ny use involving consumption or taking with intention of keeping for one’s own exclusive use would amount to appropriation.”).

51. *Id.*

52. *Id.* at 352.

53. *Id.*

54. Jeff Foust, *FAA Review a Small Step for Lunar Commercialization Efforts*, SPACE NEWS (Feb. 6, 2015), <http://spacenews.com/faa-review-a-small-step-for-lunar-commercialization-efforts/>.

55. See Wolfgang Saxon, *Stephen Gorove, 83, Leader in Field of Space Law*, N.Y. TIMES (Sept. 1, 2001), <http://www.nytimes.com/2001/09/01/us/stephen-gorove-83-leader-in-field-of-space-law.html>.

56. Gorove, *supra* note 39, at 350.

57. *Id.*

58. *Id.*

59. Barnidge, *supra* note 29, at 85.

state. Further, employing an appropriation paradigm results in an unworkable and self-defeating standard.

## II. U.S. NON-ACCESSION TO UNITED NATIONS TREATY

The language of the agreements ratified by the U.S. do not restrict celestial body mining rights for its non-state actors. With regard to international space law, the U.S. has only ratified four of the U.N. treaties<sup>60</sup> and five of what the U.N. refers to as the “other agreements.”<sup>61</sup> Of the four treaties ratified by the U.S., only the Outer Space Treaty addresses property rights and Article II only concerns the actions of State actors.<sup>62</sup> While the language “by other means” in the phrase “by claims of sovereignty” may be interpreted to include the use of non-state actors to assert a state’s interests, non-state actors would still be required to act as agents of the State for any activities. Without a more express legal regime establishing inherent state responsibility for non-state actors, it cannot be maintained that the U.S. is responsible for ensuring that its non-state actors are bound by its obligations under Article II of the Outer Space Treaty.

To help determine the intent of the drafters when they prepared the Outer Space Treaty, the prior history and meeting records discussed below may be of use. Looking to the prior history of the Outer Space Treaty, the first appearance of the “national appropriation” provision in an international agreement is in the 1963 Declaration.<sup>63</sup> The draft proposals for the Declaration show a wide range of intentions by the participating States on

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60. See Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, Apr. 22, 1968, 19.6 U.S.T. 7570, 672 U.N.T.S. 119; Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24.2 U.S.T. 2389, 961 U.N.T.S. 187; Registration of Objects Launched into Outer Space, Jan. 14, 1975, 28.1 U.S.T. 695, 1023 U.N.T.S. 15; Outer Space Treaty, *supra* note 5; Status of International Agreements, *supra* note 7.

61. The other agreements include: Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14.2 U.S.T. 1313, 480 U.N.T.S. 43; Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, May 21, 1974, TIAS 11078, 13 I.L.M. 1444; Agreement Relating to the International Telecommunication Satellite Organization, Aug. 20, 1971, 23 U.S.T. 4091, 10 I.L.M. 946; Convention on the International Maritime Satellite Organization, Sept. 3 1976, 31.1 U.S.T. 1, 15 I.L.M. 1051; and Constitution and Convention of the International Telecommunication Union (ITU), Dec. 22, 1992, S. TREATY DOC. 104-34, 1825 U.N.T.S. 3.

62. Outer Space Treaty art. II, *supra* note 5, 18 U.S.T. at 2413, 610 U.N.T.S. at 208.

63. *Declaration*, *supra* note 4 (“Outer Space and celestial bodies are not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means”). The first appearance of “national appropriation” of outer space was in G.A. Res. 1702 (XVI) where the State Members unanimously adopted “Outer space and celestial bodies . . . are not subject to national appropriation.” G.A. Res. 1702 (XVI), International Co-operation in the Peaceful Uses of Outer Space, (Dec. 20, 1961).

the subject of national appropriation. In the 1962 Report of the Legal Subcommittee on its First Session, the Soviets drafted the provision “no State may claim sovereignty over outer space and celestial bodies.”<sup>64</sup> The Soviet’s first draft also included the proposal that “[a]ll activities of any kind pertaining to the exploration and use of outer space shall be carried out solely and exclusively by States.”<sup>65</sup> The Soviet’s limitation matched the U.S.S.R. air code of the time<sup>66</sup> and did not make it into the final text of the Declaration.<sup>67</sup> The Soviet’s second draft, submitted the following year, simplified the provision to “sovereignty over outer space or celestial bodies cannot be acquired by use or occupation or in any other way,” while keeping the same restriction on non-governmental actors in space.<sup>68</sup>

The U.K. submitted a draft for the Second Session that outlined the national appropriation provision as “[o]uter space and celestial bodies are not capable of appropriation or *exclusive use* by any State. Accordingly, no State may claim sovereignty over outer space or over any other celestial body, nor can sovereignty be acquired by means of use or occupation in any other way.”<sup>69</sup> The British submission did not include the restriction of space exploration to State actors and clearly contemplates the sort of non-exclusive use involved in deep space mining.<sup>70</sup> Finally, the U.S. submitted the simple “[o]uter space and celestial bodies are not subject to national appropriation.”<sup>71</sup> The variation in proposals shows that, first, initially there was no consensus on the scope of the appropriation provision, and, second, that the wording of the finalized version was deliberately broad.

The overarching notion of the finalized Declaration is not that non-state actors are bound to the same obligations as State actors, but instead that non-state actors only require authorization and supervision by their State actor when engaging in non-national activities. The deliberate choice of wording shows that the Declaration prohibits appropriation by State actors rather than appropriation of any kind. Therefore, leading up to the Outer Space Treaty, the U.N.’s intention to restrict appropriation did not extend to non-state actors acting on their own initiatives.

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64. Report of the Legal Subcomm. on its First Session, ¶ 2, U.N. Doc. A/AC.105/6 (1962) [hereinafter Legal Subcommittee Report 1].

65. *Id.* ¶ 7.

66. DENIS A. COOPER, THE AIR CODE OF THE U.S.S.R. 47 n.1 (1966).

67. See *Declaration*, *supra* note 4; Legal Subcommittee Report 1, *supra* note 64.

68. Report of the Legal Subcomm. on its Second Session, annex I ¶ 1-2, U.N. Doc. A/AC.105/12 (1963) [hereinafter Legal Subcommittee Report 2].

69. *Id.*

70. *Id.*

71. *Id.*

Further, the U.N.'s only substantive change to the wording of the national appropriation provision from the Declaration to the Outer Space Treaty was to include the moon on the list of what is not subject to national appropriation.<sup>72</sup> The fact that the U.N. added the moon to the list shows that the drafters were willing to change the provision for the sake of clarity. At the same time, the lack of additional changes to the provision indicates the intentions behind it remained the same. Therefore, non-state actors are not bound by the same obligations as State actors under Article II of the Outer Space Treaty since the drafters were deliberate in their word choice, otherwise the U.N. would not have attempted to expressly extend the prohibition on appropriation to non-state actors as well in the 1979 Moon Treaty.

In response to the rapidly growing commercial spaceflight sector, the U.S. enacted the Space Resources Act in 2015 as part of the larger U.S. Commercial Space Launch Competitiveness Act of 2015.<sup>73</sup> Similar to the conduct Congress had authorized previously for deep seabed mining,<sup>74</sup> the Space Resources Act granted non-state actors the right to exploit space resources, including water and minerals. Within the Act, Congress specifically stated that the Space Act of 2015 is conditioned on the U.S.'s international obligations. However, as stated above, the U.S.'s international obligations do not extend to its non-state actors that are acting of their own accord. Congress is, perhaps, saying here that the activities of non-state actors from the U.S. shall not be understood as an assertion of sovereignty.

The Space Resource Act conflicts with the Moon Treaty, which curtails the use of the moon and any other celestial body within our solar system for anything other than peaceful scientific research.<sup>75</sup> However, neither the U.S. nor any other nation capable of independent crewed-spaceflight is a party to the Moon Treaty.<sup>76</sup> With only seventeen countries ratifying the treaty, and with only four additional signatories,<sup>77</sup> some scholars assert that the Moon Treaty is binding to the rest of the world as customary international law by

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72. *Id.*; cf. *Declaration*, *supra* note 4, ¶ 3, with Outer Space Treaty art. II, *supra* note 5, 18 U.S.T. at 2413, 610 U.N.T.S. at 208 (changing the provision from “[o]uter space and celestial bodies are not subject to national appropriation . . . [to] [o]uter space, including the moon and other celestial bodies, is not subject to national appropriation[.]”).

73. U.S. Commercial Space Launch Competitiveness Act, ch. 513, § 51301-03, Pub. L. No. 114-90 (codified as amended at 51 U.S.C. §51301-51303 (2015)).

74. Deep Seabed Hard Mineral Resources, 30 U.S.C. § 1412(a)-(b) (2012).

75. *See* Gray, *supra* note 22.

76. *Id.* Australia is the only nation capable of independent un-crewed spaceflight to have ratified the Moon Treaty, with Austria, Belgium, and the Netherlands being members of the European Space Agency. France and India are the only un-crewed spacefaring nations to have signed it. Listner, *supra* note 22.

77. Status of International Agreements, *supra* note 7.

virtue of its existence.<sup>78</sup> However, the standard practices of customary international law do not support this position because the Statute of the International Court of Justice require “evidence of a general practice accepted as law” before a rule of customary international law can be found.<sup>79</sup>

Other legal scholars do not support this position, reasoning that the existence of a treaty itself is not evidence of general practice and acceptance as law and certainly not when major nations of the world have not joined the treaty.<sup>80</sup> Even within the Legal Subcommittee, the use of the Moon Treaty as customary international law is divisive due to the treaty’s limited ratification.<sup>81</sup> The Convention on the Law of the Sea, with its much smaller scope of influence, did not come into force until after the sixtieth nation ratified it,<sup>82</sup> while the Moon Treaty only required ratification by five nations, without any need for the ratifying nations to be capable of spaceflight.<sup>83</sup> It is difficult to see how a treaty ratified by none of the major state actors in space can establish state practice. As of late 2017, non-state actors have yet to mine any celestial bodies<sup>84</sup> and without the recurring act of asteroid mining, it cannot be said that a general practice of acting in accordance with Article 11 of the Moon Treaty has been accepted as law at this point.

If the provisions of Articles II and VI of the Outer Space Treaty were sufficient to bind non-state actors to the same obligations as State actors, then there would have been no purpose in adopting Article 11 of the Moon Treaty. Since Article II of the Outer Space Treaty was specifically tailored for State actors, and since the Moon Treaty does not bind the U.S., there are no international obligations that would prohibit non-state actors from commercial asteroid mining under the Space Resources Act.

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78. Gbenga Oduntan, *Who Owns Space? US Asteroid-Mining Act is Dangerous and Potentially Illegal*, CONVERSATION (Nov. 25, 2015, 6:34 AM), <https://theconversation.com/who-owns-space-us-asteroid-mining-act-is-dangerous-and-potentially-illegal-51073>.

79. Statute of the International Court of Justice art. 38, ¶ 1(b) (“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . international custom, as evidence of a general practice accepted as law[.]”).

80. See Thomas Gangale, *The Legality of Mining Celestial Bodies*, 40 J. SPACE L. 187, 190 (2016); 2015 IISL Position Paper on Space Resource Mining, *supra* note 47.

81. Legal Subcommittee Report 56, *supra* note 15, ¶ 227.

82. Convention of the Law of the Sea art. 308, Dec. 10, 1982, 1833 U.N.T.S. 3.

83. Moon Treaty art. 19, *supra* note 19, 1363 U.N.T.S. at 27. Article 19 states:

This Agreement shall be open for signature by all States at United Nations Headquarters in New York. This Agreement shall be subject to ratification by signatory States . . . . This Agreement shall enter into force on the thirtieth day following the date of deposit of the fifth instrument of ratification.

*Id.*

84. See *About the Exploration Program*, PLANETARY RES., <https://www.planetaryresources.com/missions/arkyd-301/> (last visited Mar. 22, 2018).

### III. (IN)EQUALITY OF ACCESS

The explicit language, legislative intent, and ratification history show that Article II of the Outer Space Treaty only involves state actors and agents and that the Moon Treaty is not binding upon private entities as customary international law. In the alternative, if Article II of the Outer Space Treaty applies to non-state actors or if the Moon Treaty is binding customary international law, then the U.N.'s reasoning behind the enforcement of Articles II and XI defeats the purpose of the articles themselves, which is to ensure that all people have free and equal access to outer space. Opponents of commercial asteroid mining are concerned that any current use of celestial resources would prevent future generations and developing countries from reaping the benefits of their use later. However, their insistence that non-state actors are not permitted to engage in mining activities in outer space is at odds with their reasoning, that space is the domain of all people. By basing their exclusion of asteroid miners on the principle that everyone must be able to use outer space, the opposition is denying use to anyone in the name of equality for all.

The primary legal opposition to non-state actors' endeavors comes from members of the Legal Subcommittee, which quotes the Moon Treaty in stating that these natural resources are the "common heritage of mankind."<sup>85</sup> The delegates base their opposition on the moral concern that non-state actors' use of these resources will exclude developing countries from the benefits of space exploration and that this exclusion is contrary to the equality of access principle laid out in Article I of the Outer Space Treaty.<sup>86</sup> However, by trying to protect equal access to space, and by not allowing non-state actors to gather resources from celestial bodies, the U.N. disregards the spirit of the law by blocking exploitation of space by non-state actors. The U.N. sends the message that outer space is not actually the province of all mankind, as is stated in Article I of the Outer Space Treaty, but only of those that the U.N. deems worthy.

The opposition's argument boils down to the desire for everyone to wait until the whole world is ready to take to the stars to ensure equality of access. Their argument is akin to insisting that guests that have already arrived at a dinner party must wait to begin until everyone else arrives, even though it is highly likely that many of the guests will not be attending. Their concern

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85. Legal Subcommittee Report 56, *supra* note 15, ¶ 226; Moon Treaty art. 11, *supra* note 19, 1363 U.N.T.S. at 25.

86. Legal Subcommittee Report 56, *supra* note 15; Outer Space Treaty art. I, *supra* note 5, 18 U.S.T. at 2412-13, 610 U.N.T.S. at 207-08, ("Outer space . . . shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality . . . , and there shall be free access to all areas of celestial bodies.").

assumes that by allowing private use now, today's non-state actors will create a form of neo-colonialism and future generations will not have a chance to enjoy the benefits of its use. However, use today would not lessen the enjoyment of future generations, but instead broaden the scope of who may enjoy the benefits. Starting the development of the requisite technology today ensures wider spread use in the future.<sup>87</sup> Non-state actors' commercial endeavors will not create the national appropriation of outer space that the opposition fears since non-state actors are not agents of the State and therefore cannot nationally appropriate.

Enforcement of Article II violations by the U.N. against non-state actors would be contrary to customary international law. Most violations of Article II go unchecked, as evidenced by the 1993 auction of Soviet moon rocks.<sup>88</sup> The collection of moon rocks by Apollo missions violated the strict interpretation of Article II.<sup>89</sup> The U.S. only circumvented the issue by trading some of the Apollo rocks with moon rocks collected by the Soviets.<sup>90</sup> The U.N. then sanctioned the collection of moon rocks by the two space powers since it was done in the name of scientific investigation, even though these actions constituted an authorized use under Article I of the Outer Space Treaty.<sup>91</sup> The U.S.-Soviet trade showed that the U.N. is willing to set aside Article II of the Outer Space Treaty in favor of Article I, despite the "any other means" language of the second article.<sup>92</sup> By allowing appropriation, national or otherwise, to occur in some cases but not others, the U.N. is not protecting the equality of access to all mankind, but rather creating a most favored nations situation.

The opposition has good intentions, however, as its current view on the matter creates the exact situation it tries to prevent. Attempting to protect everyone's equality of access to outer space by prohibiting non-state actor

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87. See Ulrich Arlt, *Trickle Down Technology can be Disruptive – In a Good Way!*, ROCKWELL AUTOMATION (Nov. 14, 2016), [https://www.rockwellautomation.com/global/news/blog/detail.page?pagetitle=Trickle-Down-Technology-Can-be-Disruptive-In-a-Good-Way-%7C-Blog&content\\_type=blog&docid=ca83ed705b6a821c9693bebac1ed3b19](https://www.rockwellautomation.com/global/news/blog/detail.page?pagetitle=Trickle-Down-Technology-Can-be-Disruptive-In-a-Good-Way-%7C-Blog&content_type=blog&docid=ca83ed705b6a821c9693bebac1ed3b19).

88. See Douglas Martin, *Space Artifacts of Soviets Soar at \$7 Million Auction*, N.Y. TIMES (Dec. 12, 1993), <http://www.nytimes.com/1993/12/12/nyregion/space-artifacts-of-soviets-soar-at-a-7-million-auction.html>.

89. Amir Siraj, *Why Congress Must Act Quickly to Reform U.S. Space Law*, HARV. POL'Y REV. (Sept. 28, 2017), <http://harvardpolitics.com/united-states/the-dangers-of-stagnancy-and-the-need-for-norms-in-u-s-space-law/>.

90. Berin Szoka & James Dunstan, *How the U.S. can Lead the Way to Extraterrestrial Land Deals*, WIRED (Apr. 9, 2012, 1:59 PM), <https://www.wired.com/2012/04/opinion-space-property-rights/>.

91. *Id.*; Outer Space Treaty art. II, *supra* note 5, 18 U.S.T. at 2412-13, 610 U.N.T.S. at 208.

92. Outer Space Treaty arts. I & II, *supra* note 5, 18 U.S.T. at 2412-13, 610 U.N.T.S. at 207-08.

resource gathering infringes on the non-state actors' access to outer space. Non-state actors' "equality of access" then becomes not equal to those who may or may not come later.

From a further policy-based standpoint, the search for rare commodities has always spurred human innovation.<sup>93</sup> Non-state actors engaging in the commercial mining of celestial bodies would be beneficial to the world because it furthers the development of scientific progress and eases the strain on Earth's natural resources, such as water, platinum, nickel, gold, and other rare earth elements.<sup>94</sup> It also helps to realize the U.N.'s dream of equality of access to outer space for all through the development of more economical methods of space travel. History shows that if there is a profit to be made, then people will develop the technology necessary to make it.<sup>95</sup> Non-state actors bearing the burden of development costs for the new technology take the burden off of national budgets and reallocate the cost to the private sector. History also shows that innovation spurs once the masses discover the feasibility of new technologies and begin exploiting such technologies for themselves.<sup>96</sup>

Based on samples gathered from near-Earth asteroids, these celestial bodies have much higher concentrations of platinum group metals and even a smaller-sized one could contain tens of billions of dollars worth of materials.<sup>97</sup> Ninety-five percent of the world's rare earth minerals come from China, which has scaled back exportation in order to meet its own industrial demands.<sup>98</sup> Certain metal groups, like platinum, do not occur naturally on Earth, but are the result of prior meteorite impacts.<sup>99</sup> By extracting these resources directly from the source, the entire world has much greater access to materials needed for humanity's continued development. Further, by using off-world resources, such as rare earth elements used in green technologies, non-state actors increase the lifespan of the human race on Earth by decreasing the rate at which Earth's resources are consumed.

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93. Stephen Shaw, *Asteroid Mining*, ASTRONOMY SOURCE (Aug. 21, 2012), <http://www.astro.nomysource.com/tag/rare-earth-metals-from-asteroids/>.

94. Molly Wood, *Asteroid Mining and the New Economics of Outer Space*, MARKETPLACE (Sept. 18, 2017, 5:58 AM), <https://www.marketplace.org/2017/09/18/tech/economics-outer-space-marketplace-tech>.

95. Arlt, *supra* note 87.

96. See Martin Griswold, *Are Invention Inevitable? Simultaneous Invention and the Incremental Nature of Discovery*, LONG NOSE: TECH. & ECON. (Nov. 25, 2012), <https://mgriz.wordpress.com/2012/11/25/are-inventions-inevitable-simultaneous-invention-and-the-incremental-nature-of-discovery/>.

97. GHANIM ALOTAIBI ET AL., ASTEROID MINING, TECHNOLOGIES ROADMAP, AND APPLICATIONS FINAL REPORT 46 (2010); Wood, *supra* note 94.

98. Shaw, *supra* note 93.

99. *Id.*

The use of asteroids for commercial mining also increases humanity's ability to venture further into the void. The resources available within asteroids allow space explorers to use them as celestial pit stops to refuel and restock on necessities like water.<sup>100</sup> The intimate relationship between humans and water needs no explanation and water can even be converted into fuel for space-faring vessels. However, some of the current hindrances in space travel are the weight and space requirements of carrying enough water to ensure the astronauts' survival.<sup>101</sup> Without sources of water available off-planet, humanity will be unable to establish bases on the Moon or other planets, like Mars.<sup>102</sup>

The expansion of space exploration and exploitation into the private sector has markedly increased the efforts put into normalizing space travel. After the retirement of the space shuttle, a non-state actor, SpaceX, took over the U.S.'s responsibility for deliveries to the International Space Station.<sup>103</sup> Richard Branson and Virgin Galactic are getting closer every day to making outer space a tourist destination.<sup>104</sup> With each non-state actor and commercial field that expands into outer space, humankind takes one step closer to making extraterrestrial travel a daily occurrence. Allowing non-state actors to commercially mine asteroids gives them the impetus to develop the technologies needed to do so. Patents do not last forever and once they expire these new technologies will benefit those the opposition is looking to protect because everyone will be able to exploit the new technologies developed by the non-state actors.

With each small step that humankind takes into the void, the greater the chance humanity has to survive as a species once Earth's natural resources are no longer sustainable. The more private actors that are able to achieve lift off, the greater the likelihood the U.N. will realize its goal of equality of use of space by all. The commonplace use of certain technologies, like GPS, show trickle-down technology can raise the standard of living.<sup>105</sup>

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100. Wood, *supra* note 94.

101. *Water: The Key Resource in Space*, PLANETARY RES., <https://www.planetaryresources.com/products/> (last visited Mar. 22, 2018).

102. *Id.*

103. See Robin Seemangal, *SpaceX Launches its Twelfth Resupply Mission to the ISS*, WIRED (Aug. 14, 2017, 7:00 AM), <https://www.wired.com/story/spacex-launches-its-12th-resupply-mission-to-the-iss/>.

104. The VSS Unity completed another successful test flight in August of 2017. *Update from Mojave: VSS Unity Flies with Propulsion Systems Installed and Live*, VIRGIN GALACTIC (Aug. 4, 2017), <https://www.virgingalactic.com/update-from-mojave-vss-unity-flies-with-propulsion-systems-installed-and-live/>.

105. See Arlt, *supra* note 87.

#### IV. CURRENT PRACTICE AS A LEGAL FRAMEWORK TO OVERSEE COMMERCIAL MINING OF CELESTIAL BODIES

While the Legal Subcommittee's current approach is overreaching, there does need to be a legal framework to ensure that this legal vacuum does not turn into an extraterrestrial wild west. But the overbroad scope of Article II, which makes all travel through space a violation, is proof of the need for an updated framework. Acquiring space dust is simply a by-product of space travel and, as it is written, amounts to a violation of Article II<sup>106</sup> because such acquisition would be appropriation of the space dust by a State. However, the U.N. does not consider resources like space dust a subject of the non-appropriation provision, further exemplifying the subjective nature of the provision. If acquiring space dust is not a violation as national appropriation, but acquiring asteroids is, and space dusts and asteroids are made of much of the same substances, then there must be a point of distinction between the two. Further framework would either, one, resolve the concern in determining at what point does the resource become too large to be considered space dust and has entered the realm of celestial body, or, two, provide a middle ground between the two categories.<sup>107</sup>

Another issue in need of legal clarification is the exploitation of transitory resources. Currently, no U.S. agency claims jurisdiction over activities in Low Earth Orbit and beyond, besides those of communication and remote sensing,<sup>108</sup> though some non-state actors have proposed that the U.S. Federal Aviation Administration ("FAA") Office of Commercial Space Transportation should have jurisdiction over these activities.<sup>109</sup> Internationally, the intent of the outer space agreements preventing appropriation of extraterrestrial resources is to preserve them for future use. However, what happens if future use is not possible? Transitory resources, such as interstellar visitor asteroids, are those that through their nature or location are only available to humanity for a brief window of time. In other words, interstellar visitor asteroids are asteroids that have come from outside of the solar system to "visit" for a brief time before continuing on their journey.<sup>110</sup> Use of such asteroids in the present would not prohibit any future generations from exploiting those asteroids since future generations statistically would never encounter the celestial body again.

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106. See Gorove, *supra* note 39, at 349-50.

107. *Id.* at 350.

108. Foust, *supra* note 54.

109. See *id.*

110. *Small Asteroid or Comet "Visits" from Beyond the Solar System*, NASA, <https://www.nasa.gov/feature/jpl/small-asteroid-or-comet-visits-from-beyond-the-solar-system> (last updated Nov. 15, 2017, 9:15 PM).

Several members of the Legal Subcommittee have expressed the need and interest in the establishment of a codified set of legislation for governing commercial space ventures.<sup>111</sup> A middle ground can be found between extraterrestrial ecologists and non-state commercial actors by designating certain locations as off-limits to commercial exploitation. For example, the moon should be treated as a “space nature reserve” due to its proximity and the important role it has played in human history. While an inordinate amount of mining would be required for an effect on the earth, since the moon plays such an integral part to life on earth through its effect on tidal cycles, it is best that humanity abstain from interfering with the moon’s integrity.

Spacefaring States can apply a similar approach to mineral claims on celestial bodies as they did to those on the seabed.<sup>112</sup> One theory that would reach a compromise between the needs of humanity and the U.N.’s fears would be to grant exclusive mineral rights to commercial space miners, but only for limited durations.<sup>113</sup> By limiting the duration of a non-state actor’s exclusive right to mine, the concerns of appropriation are mitigated, if not eliminated, by the actor’s inability to maintain the right for perpetuity. The U.N. has successfully used this method before with the International Seabed Authority (“ISA”), which has approved twenty-six contracts over fifteen years.<sup>114</sup>

The Law of the Sea and the Moon Treaty were developed in parallel directions, based on the premise that both the seabed and space were the “common heritage of mankind,” and that both required U.N. approval for any commercial exploitation.<sup>115</sup> The U.S. referred to the Law of the Sea as “socialism” and reacted to the treaty by granting prospectors exclusive seabed mining rights.<sup>116</sup> After the U.S. enacted its legislation, other developed nations also granted seabed mining claims, and together they created a “framework of interlocking national laws recognizing each other’s licenses.”<sup>117</sup> The licenses did not grant permanent claims, which would be contradictory to the Law of the Sea Treaty, instead granting only the exclusive right to mine, limited in time and area.<sup>118</sup> Commercial enterprises

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111. Legal Subcommittee Report 56, *supra* note 15, at 5.

112. Szoka & Dunstan, *supra* note 90.

113. *See id.*

114. Rachel Mills, *Why are Countries Laying Claim to the Deep-Sea Floor?*, BBC NEWS (June 21, 2017), <http://www.bbc.com/news/world-40248866>; *Deep Seabed Mineral Contractors: Overview*, INT’L SEABED AUTH., <https://www.isa.org.jm/deep-seabed-minerals-contractors> (last visited Dec. 20, 2017).

115. Mills, *supra* note 114; Szoka & Dunstan, *supra* note 90.

116. Szoka & Dunstan, *supra* note 90.

117. *Id.*

118. *Id.*

in an international territory do not constitute “national appropriation” of said territory “any more than commercial activity in international waters implies a claim to ownership of the oceans.”<sup>119</sup> A similar approach could be taken to establish the legal framework for multilateral commercial space mining treaties.<sup>120</sup>

#### V. CONCLUSION

Non-state actors in the U.S. should be free to mine celestial bodies and should not be bound by the same restrictions as state actors. The U.S. is not a party to any agreements that prevent non-state actors from mining celestial bodies. Forcing non-state actors to wait until the entire world is space-bound before they may begin exploitation of space-based resources is contrary to the equality of use principle. Allowing off-world mining and similar pursuits furthers the rate of technological development. While there is the need for a regulatory framework to facilitate these endeavors, it is needlessly detrimental to the advancement of human civilization to capriciously deter progress. The future of humanity is in the stars, and the sooner we begin our expansion outwards from Earth, the sooner we ensure our survival as a species.

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119. Peter B. de Selding, *New U.S. Space Mining Law's Treaty Compliance May Depend on Implementation*, SPACE NEWS (Dec. 9, 2015), <http://spacenews.com/u-s-commercial-space-acts-treaty-compliance-may-depend-on-implementation/>.

120. See generally Wayne N. White, *Proposal for a Multilateral Treaty Regarding Jurisdiction and Real Property Rights in Outer Space*, SPACE FUTURE (2001), [http://www.spacefuture.com/archive/proposal\\_for\\_a\\_multilateral\\_treaty\\_regarding\\_jurisdiction\\_and\\_real\\_property\\_rights\\_in\\_outer\\_space.shtml](http://www.spacefuture.com/archive/proposal_for_a_multilateral_treaty_regarding_jurisdiction_and_real_property_rights_in_outer_space.shtml).

# THAT SHOULD NOT BE PROTECTED: RETHINKING THE UNITED STATES POSITION ON HATE SPEECH IN LIGHT OF THE INTERPOL REPOSITORY

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Joseph Lorant\*

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## I. INTRODUCTION

Nearly 1,094 bias-related incidents or attacks occurred in the United States of America in the month following President Donald J. Trump’s election.<sup>1</sup> These incidents included race-biased demonstrations, swastikas or other drawn and graffitied imagery expressing messages of “hate and

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1. Hatewatch, *Update: 1,094 Bias-Related Incidents in the Month Following the Election*, S. POVERTY L. CTR. (Dec. 16, 2016), <https://www.splcenter.org/hatewatch/2016/12/16/update-1094-bias-related-incidents-month-following-election>.

intolerance,” as well as physical attacks and other hate-inspired crimes.<sup>2</sup> Such overt expressions of intolerance and hate have since diminished to a degree, but the underlying sentiments and behaviors persist.<sup>3</sup> Further, the hate speech President Trump supplied during the election continues to unleash accompanying overt acts of violence and harassment both in the United States and abroad.<sup>4</sup> Although the federal government and a majority of state governments protect individuals from hate crimes,<sup>5</sup> the U.S. offers broad constitutional protections for hate speech and the promotion of hateful ideas.<sup>6</sup>

American history is riddled with problems regarding how both the government and its citizens have treated minority racial and religious groups. Stemming from the institution of slavery, racism has been pervasive among citizens and the government in the U.S.<sup>7</sup> After the Civil War, attempts to

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2. *Ten Days After: Harassment and Intimidation in the Aftermath of the Election*, S. POVERTY L. CTR. (Nov. 29, 2016), <https://www.splcenter.org/20161129/ten-days-after-harassment-and-intimidation-aftermath-election>.

3. The U.S. Federal Bureau of Investigation documented that hate crime offenses increased from 6,885 offenses in 2015, to 8,437 offenses in 2017. UNIFORM CRIME REPORT: 2015 HATE CRIME STATISTICS, U.S. DEP'T JUST. (2015) (reporting 5,850 hate crime incidents involving 6,885 offenses in 2015), [https://ucr.fbi.gov/hate-crime/2015/topic-pages/incidentsandoffenses\\_final.pdf](https://ucr.fbi.gov/hate-crime/2015/topic-pages/incidentsandoffenses_final.pdf); UNIFORM CRIME REPORT: 2016 HATE CRIME STATISTICS, U.S. DEP'T JUST. (2016) (reporting 6,121 hate crime incidents involving 7,321 offenses), <https://ucr.fbi.gov/hate-crime/2016/topic-pages/incidentsandoffenses.pdf>; UNIFORM CRIME REPORT: 2017 HATE CRIME STATISTICS, U.S. DEP'T JUST. (2017) (reporting 7,175 hate crime incidents involving 8,437 offenses), <https://ucr.fbi.gov/hate-crime/2017/topic-pages/incidents-and-offenses.pdf>. See generally *Hate in America*, SLATE (Aug. 14, 2017, 6:05 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2016/12/hate\\_in\\_america\\_a\\_list\\_of\\_racism\\_bigotry\\_and\\_abuse\\_since\\_the\\_election.html](http://www.slate.com/articles/news_and_politics/politics/2016/12/hate_in_america_a_list_of_racism_bigotry_and_abuse_since_the_election.html).

4. Ayal Feinberg et al., *Counties that Hosted a 2016 Trump Rally Saw a 226 Percent Increase in Hate Crimes*, WASH. POST (Mar. 22, 2019), <https://www.washingtonpost.com/politics/2019/03/22/trumps-rhetoric-does-inspire-more-hate-crimes/?noredirect=on#click=https://t.co/bYXsN60xzH>; John Sides & Michael Tesler, *Donald Trump is a Symbol of White Identity Politics in Europe, Too*, WASH. POST (June 21, 2018), [https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/21/donald-trump-is-a-symbol-of-white-identity-politics-in-europe-too/?utm\\_term=.cb735dd1690d](https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/21/donald-trump-is-a-symbol-of-white-identity-politics-in-europe-too/?utm_term=.cb735dd1690d).

5. See *Hate Crime Laws*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/hate-crime-laws> (last updated Dec. 20, 2017) (detailing specific federal statutes that protect against hate crimes); *Hate Crimes: Laws and Policies*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/hatecrimes/laws-and-policies> (last visited Dec. 20, 2017) (indicating that only five U.S. states – Arkansas, Georgia, Indiana, South Carolina, and Wyoming – do not have hate crimes laws).

6. To clarify, hate speech is considered to be merely words targeting another group of people based on their ethnicity, religion, etc., whereas hate crimes can be any number of ordinary crimes which were committed with “hateful” intent or animus towards a particular group of individuals. See Hate Crimes Act, 18 U.S.C. § 249 (2012) (taking already existing crimes and enhancing them due to intent involving actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability).

7. See Glenn C. Loury, *An American Tragedy: The Legacy of Slavery Lingers in our Cities' Ghettos*, BROOKINGS (Mar. 1, 1998) (describing the effect of institutional slavery on future



amount which has nearly doubled since 1999.<sup>12</sup> These hate groups engage in numerous activities to attract a wider following, such as publishing hate material in the form of articles, music and other internet publications, as well as conducting marches and rallies to promote their racist agenda.<sup>13</sup>

The critical issue for this paper is that the non-violent activities of these hate groups are a form of hate speech that adversely affect the groups they target. The effects of hate speech fall into two categories. The first category is the constitutive harms directly caused by hate speech, such as psychological or self-esteem damage.<sup>14</sup> Restrictions to freedom of movement and association can also directly result from hate speech by (1) direct messages or actions causing victims to leave a situation; or (2) the general presence of hate speech causing victims to be more cautious with their decisions.<sup>15</sup>

The second type is the consequential harms occurring through indirect effects of hate speech. These effects include (1) persuading others to believe false discriminatory information, which causes them to engage in other harmful conduct; (2) conditioning listeners to be more receptive to negative stereotypes in general; and (3) conditioning the environment to make such speech and behavior normal.<sup>16</sup> These indirect issues can cause a multitude of harms to the targeted groups, such as creating feelings of inferiority, silencing targets, harming the target's dignity, and maintaining power

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12. *Hate Map*, S. POVERTY L. CTR., <https://www.splcenter.org/hate-map> (last visited Dec. 20, 2017).

13. ANTI-DEFAMATION LEAGUE, *THE SOUNDS OF HATE: THE WHITE POWER MUSIC SCENE IN THE UNITED STATES IN 2012* (2012), <https://www.adl.org/sites/default/files/documents/assets/pdf/combating-hate/Sounds-of-Hate-White-Power-Music-Scene-2012.pdf> (“[W]hite power music can play an indirect role in making violence—especially certain types of violence, such as hate crimes—more likely because it helps make it more acceptable within the movement . . . . Even leaving aside the issue of violence, the role that white power music can have in spreading hate within a community is also a genuine issue of concern—it is perhaps the most frequently expressed concern about hate music, usually described as ‘recruitment.’”); Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), [https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm\\_term=.c2552c55d018](https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm_term=.c2552c55d018) (describing a rally of white nationalists and white supremacists at the University of Virginia in 2017); John Herrman, *How Hate Groups Forced Online Platforms to Reveal Their True Nature*, N.Y. TIMES (Aug. 21, 2017), <https://www.nytimes.com/2017/08/21/magazine/how-hate-groups-forced-online-platforms-to-reveal-their-true-nature.html> (describing how online platforms are used to organize hate groups, like the “Unite the Right” Facebook page that helped to organize a white supremacist rally in Charlottesville, and the steps internet service providers take to remove such content).

14. Katharine Gelber & Luke J. McNamara, *Evidencing the Harms of Hate Speech*, 22 SOC. IDENTITIES 324, 325-26 (2016); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (discussing how hate speech can prevent the freedom of movement or association).

15. Gelber & McNamara, *supra* note 14, at 325.

16. *Id.*

imbalances through racial hierarchies.<sup>17</sup> It is important to note that children are highly susceptible to both of these types of harms and also can quickly learn to copy and question these behaviors if not on the receiving end.<sup>18</sup>

One serious problem is the fact that discriminatory views have expanded into, and are legitimately entertained within, U.S. courts, government and politics. As stated above, there have been multiple political parties in which politicians have promoted racism and white nationalism in America,<sup>19</sup> not to mention the discriminatory views that the major political parties held early on in U.S. history.<sup>20</sup>

More recently, various white supremacist groups utilize the internet to connect with others who agree with their views to promote white nationalist and racist ideologies and policies.<sup>21</sup> Hate groups, old and new, also utilize charisma, leading to the open discussion of their ideas and concerns as politically legitimate. When members of the U.S. government and coalitions of alt-right organizations present racist values to the public, it no longer matters that these ideologies are falsely held.<sup>22</sup> The presentation of an idea with good rhetoric does not make it any more truthful, but it does make an idea more believable, and thus spreads the follower-base. Various politicians and representatives have also promoted xenophobic or homophobic values,<sup>23</sup> and President Trump has fanned the flames on issues of hate speech and racism by protecting racist views and spreading them himself.<sup>24</sup>

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17. *Id.*

18. See *How Hate Speech Affects Children*, EQUAL JUST. SOC., <http://talktokids.net/how-hate-speech-affects-children> (last visited Dec. 20, 2017) (“Young children internalize this behavior and learn very quickly who ‘belongs’ and who doesn’t. We must remember that young children, and even teenagers, still have very impressionable brains.”).

19. See generally Alan Greenblatt, *As Hate Speech Pervades Politics, Many Politicians Escape Consequence*, GOVERNING (Mar. 13, 2019, 4:00 AM), <https://www.governing.com/topics/politics/gov-racist-homophobic-statements-state-politicians.html> (detailing instances of state and federal politicians engaging in hate speech and the consequences, or lack thereof, for such speech); Ryan Lenz & Booth Gunter, *One Hundred Days in Trump’s America*, S. POVERTY L. CTR. (Apr. 27, 2017), [https://www.splcenter.org/sites/default/files/com\\_trump\\_100\\_days\\_report\\_final\\_web.pdf](https://www.splcenter.org/sites/default/files/com_trump_100_days_report_final_web.pdf) (giving examples of hate speech by members of the Trump administration).

20. See *supra* texts accompanying notes 7-9.

21. See *Alt-Right*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/alt-right> (last visited Dec. 20, 2017).

22. See Nicole Hemmer, “*Scientific Racism*” is on the Rise on the Right. But it’s Been Lurking There for Years, VOX (Mar. 28, 2017, 10:01 AM), <https://www.vox.com/the-big-idea/2017/3/28/15078400/scientific-racism-murray-alt-right-black-muslim-culture-trump>.

23. See Tatyana Lewis, *The Most Anti-Gay U.S. Politicians*, RANKER, <https://www.ranker.com/list/the-most-anti-gay-us-politicians/ballerina-tatyana> (last visited Dec. 20, 2017).

24. See, e.g., Charles M. Blow, *Is Trump a White Supremacist?*, N.Y. TIMES (Sept. 18, 2017), <https://www.nytimes.com/2017/09/18/opinion/trump-white-supremacist.html>; Paige Lavender & Daniel Marans, *Donald Trump Blames ‘Many Sides’ for White Supremacist Clashes in Charlottesville*, HUFFPOST (Aug. 12, 2017, 1:21 PM), <https://www.huffingtonpost.com/entry/dona>

The effectiveness of hate groups and politicians in spreading white supremacist ideology is clearly seen in numerous statistics. The Anti-Defamation League has recorded a major increase in anti-Semitic activities in recent years, with an increase in racist speech and attacks by about thirty percent between 2015 and 2016, with an increase of eighty-six percent between 2016 and 2017.<sup>25</sup> As stated above, many news outlets reported upon numerous racist remarks and attacks just after the most recent presidential election.<sup>26</sup> Racial and ethnic attacks, as well as attacks provoked by homophobia and Islamophobia,<sup>27</sup> indicate the trend that permeating hate speech can cause.

The connection between hate speech and hate crimes is clear, but the efforts in stopping such problems have been slow. The U.S. protections against hate speech apply in limited circumstances, and, in general, hate speech regulations are subject to the constitutional scrutiny afforded to protected expressions. When looking internationally, however, laws being implemented by European nations, among others, state that hate speech is against public safety, order, and morals.<sup>28</sup> Under this premise, it is necessary in a democratic society to have hate speech and other discriminatory views be unprotected.<sup>29</sup>

The approach this author recommends, however, is to follow the International Criminal Police Organization's ("Interpol") Repository of Practice in light of Article 3 of its Constitution.<sup>30</sup> The Repository lays out a

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ld-trump-charlottesville\_us\_598f29c2e4b0909642973a6c; Michelangelo Signorile, *Trump's Cabinet: A Who's Who of Homophobia*, BOS. GLOBE (Dec. 15, 2016), <https://www.bostonglobe.com/opinion/2016/12/15/trump-cabinet-who-who-homophobia/9UDr8MnXIQAxjO369qzT0J/story.html>.

25. *U.S. Anti-Semitic Incidents Spike Eighty-Six Percent So Far in 2017 After Surging Last Year*, ADL Finds, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/news/press-releases/us-anti-semitic-incidents-spike-86-percent-so-far-in-2017> (last visited Dec. 20, 2017); *ADL Data Shows Anti-Semitic Incidents Continue Surge in 2017 Compared to 2016*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/news/press-releases/adl-data-shows-anti-semitic-incidents-continue-surge-in-2017-compared-to-2016> (last visited Dec. 20, 2017).

26. See Alia E. Dastagir, *The State of Hate in America*, USA TODAY (July 9, 2017, 3:24 PM), <https://www.usatoday.com/story/news/2017/07/09/kkk-racist-rants-religious-vandalism-us-vs-them-mentality-escalates-leaving-dark-corners-interne/418100001/>; *Hate in America*, SLATE (Aug. 14, 2017, 6:05 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2016/12/hate\\_in\\_america\\_a\\_list\\_of\\_racism\\_bigotry\\_and\\_abuse\\_since\\_the\\_election.html](http://www.slate.com/articles/news_and_politics/politics/2016/12/hate_in_america_a_list_of_racism_bigotry_and_abuse_since_the_election.html).

27. See GHANEABASSIRI, *supra* note 10.

28. See *infra* Part III.

29. *Id.*

30. INTERPOL, REPOSITORY OF PRACTICE: APPLICATION OF ARTICLE 3 OF INTERPOL'S CONSTITUTION IN THE CONTEXT OF THE PROCESSING OF INFORMATION VIA INTERPOL'S CHANNELS (2d ed. 2013) [hereinafter REPOSITORY OF PRACTICE]. Although this repository is specifically geared toward data gathering, the principles can be applied to enforcement action as well.

balancing test of both the law a nation uses to prohibit speech and the targeted speech itself. If the established law does not fall within Interpol's limitations stated in Article 3 of its Constitution, and the speech is not protected by any rights established by the United Nations' Universal Declaration of Human Rights, then the speech is properly targetable. The reason for looking toward Interpol's approach is threefold: First, a change in U.S. law is required if the rising trend of hate speech is to be effectively countered; second, Interpol's predominant test for determining what speech is targetable is highly flexible and effective, as well as in adherence with international views; and third, the U.S. already has a policy of harmonizing with international law, and the law regarding hate speech should be consistent as well since the U.S. is involved in international organizations working against discrimination.

## II. THE HISTORY AND NARROWING OF HATE SPEECH LAW IN THE UNITED STATES: *BEAUHARN AIS*, *BRANDENBURG* AND *R.A.V.*

Hate speech is protected speech in the U.S. and the Supreme Court has consistently prevented states and municipalities from prohibiting it.<sup>31</sup> In *Beauharnais v. Illinois*, however, the Supreme Court's outlier ruling allowed Illinois to prohibit hate speech as a form of group libel (i.e., hate speech).<sup>32</sup> In *Beauharnais*, the appellant violated a state libel statute prohibiting advertising, selling, publishing, or exhibiting material "which . . . portray[ed] depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed, or religion."<sup>33</sup> *Beauharnais*, President of the White Circle League of America, violated the law when he distributed leaflets stating that people must act to "prevent the white race from becoming mongrelized by the negro," specifically stating "the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro."<sup>34</sup>

The Court first determined that the law was neither overly broad nor vague, and then analyzed the law under the rational basis standard because, according to the majority, "group libel" was not protected by the First

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31. See, e.g., *infra* note 72.

32. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

33. *Beauharnais*, 343 U.S. at 251. *Beauharnais* challenged his conviction under an Illinois statute that criminalized the manufacture, sale, or public presentation of any material portraying "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which . . . expose[d] the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which [was] productive of breach of the peace or riots[.]" The Supreme Court upheld the conviction and the validity of the statute because libelous statements were not protected by the First Amendment. *Id.*

34. *Beauharnais*, 343 U.S. at 252.

Amendment. The Court determined that, under this standard, the government sufficiently demonstrated a rational basis for the law.

Chicago had a longstanding history of “willful purveyors of falsehood concerning racial and religious groups [who would] promote strife and . . . obstruct . . . free, ordered life in a metropolitan, polyglot community.”<sup>35</sup> Also, the law was passed sometime after a number of race riots, one just a month before the legislation was enacted, in which the “utterances of the character here in question . . . played a significant part.”<sup>36</sup> Furthermore, the Court noted that the “job . . . , educational opportunities and the dignity accorded” to individuals can be tied to the reputation of the group one belongs to.<sup>37</sup> The law aimed to prevent such violence, which is a legitimate state interest, and the law was rationally related to achieving this aim because of the recent history of racial tension and violence due in part to speech like *Beauharnais*.<sup>38</sup> Given the history of hate crimes and race riots in Chicago at the time, it makes sense that the Court was willing to allow the state to protect its citizens especially under the low rational basis standard.

Roughly ten years after *Beauharnais*, the Court cut back on the ability of the states to prohibit speech that had only a tendency to cause a breach of the peace. Traditionally, criminal libel statutes were established for “punishing . . . ‘tendencies’ to cause breach of the peace.”<sup>39</sup> The Court made clear in *Brandenburg v. Ohio*, however, that more than a mere tendency to incite violence was necessary for the speech to lose its First Amendment protection. In *Brandenburg*, a television broadcast of a Ku Klux Klan rally aired in which participants targeted blacks and Jews, and the appellant stated, “there might have to be some revengeance [sic] taken” against the government if it “continues to suppress the white . . . race.”<sup>40</sup>

Unlike in *Beauharnais*, in *Brandenburg* the Court held that hate speech could not be prohibited by the government “except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>41</sup> Since there was no evidence of the speech inciting imminent action or lawless action, the government could not prohibit the speech.<sup>42</sup> Thus, the *Brandenburg* decision narrowed the category of speech removed from First Amendment protections to actual incitement of a

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35. *Id.* at 259.

36. *Id.* at 259-60.

37. *Id.* at 263.

38. *Id.* at 261.

39. *Id.* at 254 (citing *People v. Spielman*, 149 N.E. 466, 469 (Ill. 1925)).

40. *Brandenburg v. Ohio*, 395 U.S. 444, 446 (1969) (per curiam).

41. *Id.* at 447.

42. *Id.* at 448-49.

breach of peace, rather than *Beauharnais*'s tendency to cause a breach of peace standard, effectively eliminating group libel as a justification for suppressing speech.<sup>43</sup>

The limitations that *Brandenburg* imposed upon hate speech prevention by states were further emphasized by the Court in *R.A.V. v. City of St. Paul*.<sup>44</sup> In *R.A.V.*, the petitioner and several others burned a cross on a black family's lawn.<sup>45</sup> The City chose to prosecute under the Bias-Motivated Crime Ordinance, which stated:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.<sup>46</sup>

The Court found the ordinance unconstitutional because it prohibited speech that was merely discomfiting, but otherwise permitted.<sup>47</sup>

Although some speech, such as obscenity or intimidation, may be prohibited for being ““of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality,””<sup>48</sup> the Court required a narrow approach towards how the government could limit such unprotected speech. First, the Court stated that proscriptions against the unprotected categories of speech are allowed since they go against certain speech that, when in any context, are always unprotected.<sup>49</sup> In other words, speech can only be prevented by the government if it had no aspect of presenting any ideas of value.<sup>50</sup> Second, the Court repeated its precedent's holding that expressions could be prohibited via time, place, and manner restrictions, even if the content of the speech itself was protected.<sup>51</sup> The Court explained this point by providing that a law prohibiting flag burning to protest laws for honoring the flag was not allowed, while prohibiting flag burning in the form of a fire safety law was constitutionally sound.<sup>52</sup>

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43. See *Collin v. Smith*, 578 F.2d 1197, 1204-05 (7th Cir. 1978).

44. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

45. *Id.* at 379.

46. *Id.* at 380.

47. *Id.* at 381.

48. *Id.* at 383 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

49. *Id.* at 383-84.

50. *Id.* at 385.

51. *Id.* at 385-86.

52. *Id.* at 385.

However, the Court re-emphasized its reluctance to allow content-based restrictions on speech.<sup>53</sup> The reason for this reluctance, according to the Court, is to ensure that the government was not a “specter that . . . may effectively drive certain ideas or viewpoints from the marketplace.”<sup>54</sup> Therefore, speech suppressed on the basis or content of its message, no matter how offensive the message may be, is subject to strict scrutiny – that is, the government bears the burden of showing that a content-based restriction is necessary to achieving a compelling government interest – unless the speech in question is unprotected speech.<sup>55</sup> Since, in *R.A.V.*, the City’s restriction was clearly content-based – that is, it prohibited speech “which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct” regardless of when or where it occurred – rather than a restriction based on the time, manner, or place of the speech, the ordinance was unconstitutional for directly targeting protected speech purely on its political content without a sufficient compelling government interest as required under strict scrutiny.<sup>56</sup>

Another example of the extent of hate speech protection is seen in *Snyder v. Phelps*, in which the Court found that the father of a deceased service member was not able to recover for the damages caused by a group choosing to protest against homosexuals outside the service member’s funeral because the speech was to be protected as “public concern.”<sup>57</sup> This opinion, combined with the *Brandenburg* analysis and the Court’s condemnation of context distinctions in *R.A.V.*, leaves many types of hate speech constitutionally protected.

Although the problem of hate speech and its direct and indirect harms have been identified, the strong protections of such speech under U.S. law acts like a catalyst for hateful action. In *Beauharnais*, the Supreme Court upheld a state law prohibiting hate speech. *Beauharnais* is, however, an outlier, and the validity of its holding is subject to debate. Since *Beauharnais*, the Court has further limited a state’s ability to prohibit hate speech in cases like *Brandenburg* and *R.A.V.* Ultimately, speech that would not be protected under *Beauharnais* for the mere tendency to bring about violence is unprotected under *Brandenburg* unless it raises to the level of incitement to imminent violence. Further, according to the Court in *R.A.V.*,

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53. *Id.* at 386-88.

54. *Id.* at 387 (quoting *Simon & Schuster, Inc. v. Members of N.Y. St. Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

55. *Id.*

56. *Id.* at 391-92, 395-96.

57. *Snyder v. Phelps*, 562 U.S. 443, 448-49, 453-59 (2011).

laws which target hate speech for its hateful content is subject to strict scrutiny as a content-based. Thus, a state regulation of hate speech likely will not stand under Supreme Court review despite the *Beauharnais* decision.

### III. THE STRENGTHS OF INTERPOL'S REPOSITORY AND ITS CONSISTENCY WITH INTERNATIONAL LAW

It is time for the U.S. to consider alternative legal standards, and Interpol's standard based upon its Repository on Article 3 of its Constitution offers an attractive model. This standard comports with international law and follows the policies the Supreme Court emphasized in *Beauharnais*.

#### *A. How the Repository Would Assess Hate Speech Incidents*

Interpol was created as an independent organization where nations came together to fight ordinary crime. Over time, Interpol included other issues of human rights, terrorism, organized crime, human trafficking, and international financial crimes.<sup>58</sup> To maintain its international legitimacy, Interpol utilizes enforcement standards that adhere to international law.<sup>59</sup> But what sets Interpol apart as a politically independent organization is Article 3 of Interpol's Constitution, which states that "[i]t is strictly forbidden . . . to undertake any intervention or activities of a political, military, religious or racial character."<sup>60</sup>

With the purposes of ensuring "a) the Organisation's independence and neutrality . . . , b) to reflect international extradition law, and c) to protect individuals from persecution,"<sup>61</sup> Article 3 strictly defines Interpol's authority and jurisdiction. While Interpol's initial roots as an ordinary crime-fighting organization made adhering to Article 3 relatively easy, the evolution of Interpol's reach into multiple human rights issues rendered Article 3 difficult to apply.<sup>62</sup> Due to Interpol's expansion and Article 3's limitations, Interpol's member states tasked Secretary General with creating guidelines for future operations.<sup>63</sup>

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58. *Crime Areas*, INTERPOL, <https://www.interpol.int/Crime-areas> (last visited Feb. 1, 2019).

59. REPOSITORY OF PRACTICE, *supra* note 30, at 6-7.

60. Int'l Criminal Police Org.-INTERPOL [INTERPOL] Constitution art. 3 ICPO-INTERPOL Doc. I/CONS/GA/195 (2017) (June 13, 1956) [hereinafter ICPO-INTERPOL Constitution].

61. *Neutrality (Article 3 of the Constitution)*, INTERPOL, <https://www.interpol.int/About-INTERPOL/Legal-materials/Neutrality-Article-3-of-the-Constitution> (last visited Feb. 1, 2019) [hereinafter *Neutrality*].

62. *Id.*

63. REPOSITORY OF PRACTICE, *supra* note 30, at 3.

The Repository of Practice is based upon a 1951 resolution that required the application of Interpol's practice at the time to be analyzed under a predominance test, whereby the nature of an offense (among other factors) is reviewed to see if Interpol targeting said offense goes against its principles laid out in Article 3.<sup>64</sup> Although not directly mentioned in Article 3, this predominance test has not been challenged.<sup>65</sup> Therefore, when interpreting the Constitution under the Vienna Convention on the Law of Treaties, as required by the Repository, this rule is carried into Constitutional analysis.<sup>66</sup>

The Repository states that offenses can fall under one of two categories: (1) pure offenses, which are only offensive in a political, military, racial, or religious manner, and thus not applicable to Interpol's jurisdiction; or (2) relative offenses, which contain ordinary-law elements and are thus analyzed under the predominance test.<sup>67</sup> If a law criminalizes a clearly pure offense, then the analysis into the issue stops at that point since Interpol is barred from acting upon that nation's crime. For example, if a law made it illegal to criticize a president, then violations of said law would be a pure offense due to its political nature, preventing Interpol from acting. If the crime instead appears to hold ordinary-law elements, meaning that it pertains to the regular and expected goals of crime prevention and legal prohibition, then a case-by-case analysis of the facts at hand is conducted to determine if the crime in question has any political, military, racial, or religious issues which predominate the ordinary-law aspects.<sup>68</sup> Interpol cannot act if the pure offense aspects predominate, but Interpol can act if the ordinary-law elements predominate.<sup>69</sup> During a case analysis, seven factors are assessed to determine if it is the ordinary-law aspects or the pure offense aspects which predominate:

- (a) the nature of the offence, namely the charges and the underlying facts;
- (b) the status of the persons concerned; (c) the identity of the source of the

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64. *Id.* at 5.

65. *Id.*

66. *Id.* at 7 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objects and purpose.”) (quoting Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980)).

67. *Id.* Given that it would be difficult to update any exhaustive list, these two definitions are tested on a case-by-case basis where the facts and context must always be analyzed. *Id.* at 7 n.17.

68. To clarify, Interpol looks to see if a nation's laws hold a military or political purpose, or if the laws make being a certain race or religion illegal or of a lower class. Laws targeting hate group activities can have political, religious, or racial issues at their core, but may not fall under the Article 3 prohibition because the laws targeting hate groups and hate speech is for the protection of others and of public morals rather than promoting any political, racial, or religious bias. *Neutrality*, *supra* note 61.

69. REPOSITORY OF PRACTICE, *supra* note 30, at 7.

data; (d) the position expressed by another National Central Bureau or another international entity; (e) the obligations under international law; (f) the implications for the neutrality of the Organization; and (g) the general context of the case.<sup>70</sup>

After laying out the test, the Repository then gives thirteen categories with various hypotheticals to see when action may be considered.<sup>71</sup> Of these, there are three categories which are primarily applicable to this paper: (1) issues involving free expression; (2) issues involving free association or assembly; and (3) issues involving current or former politicians. It is important to note that for all of the categories mentioned, the application of Article 3 is dependent upon a nation's capabilities and willingness to target the speech. This ensures that Interpol remains as an independent organization that will not interfere with the laws or politics of its member nations. Therefore, Interpol can only target hate speech if the speech was prohibited in the nation to begin with. This aspect is particularly attractive for the U.S. since it protects a state's right to choose which issues it deems should be targeted without being overly burdened by the federal government.<sup>72</sup>

For freedom of speech, the Repository calls for consideration of Article 2 of the Interpol Constitution, which requires looking to "the spirit of the 'Universal Declaration of Human Rights.'"<sup>73</sup> The Repository also points to Article 19 of the International Covenant on Civil and Political Rights,<sup>74</sup> which provides for the freedom of expression unless it disrupts the rights or reputation of others, or if such expression interferes with "the protection of

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70. *Id.* at 8.

71. *Id.*

72. To see how the Supreme Court case law overly restricts the ability of a state to legislate against certain speech, compare *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (holding that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."), and *R.A.V. v. City of St. Paul*, 505 U.S. 377, 427-28 (1992) (Stevens, J., concurring) ("While we once declared that 'libelous utterances [are] not . . . within the area of constitutionally protected speech,' our rulings in, have substantially qualified this broad claim. Similarly, we have consistently construed the 'fighting words' exception set forth in *Chaplinsky* narrowly.") (first citing *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952), and then citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)), with *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (upholding a state's ability to enact criminal libel laws).

73. ICPO-INTERPOL Constitution art. 2, *supra* note 60; REPOSITORY OF PRACTICE, *supra* note 30, at 17.

74. REPOSITORY OF PRACTICE, *supra* note 30, at 14.

national security or of public order . . . , or of public health or morals.”<sup>75</sup> This guidance allows Interpol to target hate speech or discriminatory propaganda, even if the speaker wishes to claim it as mere political speech, since the protection of public safety, order, and morals are allowed by ordinary-law elements.

The Repository states that one of the key factors for free speech issues is who or what is the object of the targeted speech.<sup>76</sup> If the targeted speech is directed towards a state, a governmental official, or a body of government, then generally Article 3 grants protection and blocks extradition since laws against political speech would be a pure offense.<sup>77</sup> Yet, if speech targets apolitical entities or individuals, then Interpol can act since laws preventing such speech would typically fall under ordinary-law (e.g., defamation).<sup>78</sup> Of course, this is just one factor, and the predominance test could still prevent speech targeting a government official if the facts and other factors show that the speech falls under more of an ordinary-law issue.

As with free expression, Article 2 is also considered for offenses concerning the freedom of assembly or association.<sup>79</sup> For Interpol to act against either right, a *prima facie* case must be made showing that national law limits the freedom, or if limitation is “necessary in a democratic society” by looking again to the International Covenant on Civil and Political Rights (“ICCPR”).<sup>80</sup> Assembly is a temporary gathering to express an idea, and the main factor considers whether the assembly is violent or peaceful.<sup>81</sup> Analysis of assembly is taken together with freedom of expression since an assembly is meant to express an idea.<sup>82</sup> Association, on the other hand, is when individuals join together to pursue a common interest.<sup>83</sup> For a nation to limit or prohibit the right of assembly or association, the law must be “consistent with the principles of democracy,” and any limitations “should be reasonable and proportional.”<sup>84</sup>

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75. International Covenant on Civil and Political Rights (ICCPR) art. 19, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

76. REPOSITORY OF PRACTICE, *supra* note 30, at 14.

77. *Id.* at 14-15.

78. *Id.* See *Beauharnais v. Illinois*, 343 U.S. 250, 254 (1952) (citing *People v. Spielman*, 149 N.E. 466, 469 (Ill. 1925)), in which the Supreme Court discussed the ordinary-law element in the context of criminal libel laws and the purpose of preventing breaches of the peace.

79. REPOSITORY OF PRACTICE, *supra* note 30, at 17.

80. *Id.* at 17 n.35 (relating to the idea that Interpol can only act if national law is the first to restrict); *see also id.* at 13.

81. *Id.* at 17-18.

82. *Id.* at 18.

83. *Id.*

84. *Id.* at 17.

Applying Article 3 to issues of assembly and association creates an avenue by which Interpol can counteract hate group activity. Laws can be enacted to protect public safety, order, and morals by preventing groups of people from assembling or creating a formal association to promote discriminatory or hateful views. The analysis for an assembly to promote racist ideas generally shows a predominance toward ordinary law, since any lack of peacefulness or an expectation of violence associated with a message would weigh in the government's favor in deciding to stop said speech. For an association, however, there may be a problem with imposing limitations that are "reasonable and proportional."<sup>85</sup> For example, when a U.S. group has a primary goal to promote state's rights with minor undertones of discrimination in its purpose, it may be allowed to associate for the state's rights purpose with limitations in place for the discriminatory aspects of the association. An association like the Ku Klux Klan or Aryan Brotherhood, however, could be prohibited without a violation on the reasonable and proportional aspects given these groups' history of violence towards others.<sup>86</sup>

Finally, the Repository calls for evaluating the prosecution of current or former politicians according to whether the politician's unlawful act is predominantly a pure offense or a violation of ordinary law.<sup>87</sup> For the sake of analysis then, it must be asked, who counts as a politician? The Oxford English Dictionary defines a politician as "[o]ne who engages in party politics, or in political strife, or who makes politics his profession or business."<sup>88</sup> Interpol's Repository does not define a "politician," but the examples it presents fall in line with the dictionary's definition by mentioning presidents and the heads of various executive departments.<sup>89</sup> Most of Interpol's examples involve people of heightened national importance, indicating that the Interpol standard is narrowly tailored.<sup>90</sup> At the same time, Interpol provides the example of the wife of a nation's president who was also a founder and president of a political party, which indicates that "politician" is interpreted more broadly.<sup>91</sup> Given this lack of

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85. It should be noted that Interpol mentions hate groups or political parties as potential targets since they go against the principles of democracy by attempting to violate the rights of others. *Id.* at 18 ("Accordingly, banning a party that promotes racial supremacy, for example, would probably be a permissible limitation to the freedom of association.")

86. See S. POVERTY L. CTR., *KU KLUX KLAN: A HISTORY OF RACISM AND VIOLENCE* (Richard Baudouin ed., 6th ed. 2011).

87. REPOSITORY OF PRACTICE, *supra* note 30, at 11 (citing ICPO-Interpol G.A. Res. AGN/63/RES/9 (Sept. 28, 1994)).

88. *Politician*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

89. REPOSITORY OF PRACTICE, *supra* note 30, at 12.

90. *Id.*

91. *Id.*

definitiveness, this article will adhere to the dictionary's definition, as allowed under Article 31(1) of the Vienna Convention on the Law of Treaties.<sup>92</sup>

Once a person is determined to be a politician, there are specific policy considerations aside from the predominance test that arise if the politician is wanted in either his or her own country or another country.<sup>93</sup> If wanted in one's own country, Interpol must know if: (1) the politician is granted legal immunity from prosecution; (2) the politician's acts were conducted as an exercise of a political mandate which followed proper administrative procedures; and (3) the general context of the case indicates underlying political agendas.<sup>94</sup> If a politician is wanted by another nation, then the factors that matter are: (1) the position of the politician (where higher-up officials generally have international immunity); (2) if the politician is currently in office; (3) the source of information regarding the politician's activity; and (4) if the nation the politician works in objects to Interpol's involvement.<sup>95</sup>

The political legitimacy granted to hate group ideology by political figures means that the targeting of such figures would undergo Interpol's politician analysis.<sup>96</sup> Clearly, the mere fact that the hate group is using its political position to advocate for its beliefs is not a targetable offense. Thus, the necessary component for targeting politicians is their advocacy for one of Interpol's targetable prohibitions, such as the misuse of the freedom of expression, assembly, or association.

In comparing the Repository with the U.S. cases mentioned in Part II, the Repository follows a similar approach to the *Beauharnais* Court. In *Beauharnais*, the Court decided that the hate speech (i.e., "group libel") was rightly prohibited because it targeted the reputation of others and interfered with public order.<sup>97</sup> The Repository analysis would have found the same, first stating that the law in question did not itself create a pure offense.<sup>98</sup> Looking to the object of the targeted speech, or the black community and

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92. *Id.* at 7 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objects and purpose.") (quoting Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331).

93. *Id.* at 11-12. Generally, these factors would not mean much in the U.S. But the distinction between whether a U.S. state targets its own politician or that of another state may come into play, and Interpol's policy considerations for such an issue may influence how the U.S. should accordingly act.

94. *Id.* at 11.

95. *Id.* at 12.

96. *See supra* notes 18-22 and accompanying text.

97. *Beauharnais v. Illinois*, 343 U.S. 250, 259-63 (1952).

98. *See id.* at 253-56 (describing the origins and modern purposes of the criminal libel law).

black individuals in Chicago,<sup>99</sup> speech which targets apolitical individuals generally falls in the ordinary-crime definition. With this factor against the appellant's favor, as well as the international obligations of protecting public order and morals,<sup>100</sup> and the context of the case regarding the history of violence and riots in the region,<sup>101</sup> the predominant purpose of the law and the prohibition of this speech meets an ordinary-crime objective. Therefore, Interpol's Repository allows for targeting the appellant's speech.

Not only would the *Beauharnais* appellant's speech have been targetable, but the Repository would allow Interpol to target the White Circle League, of which the appellant was president.<sup>102</sup> This organization would seek protection under the freedom of association, so Interpol's analysis must see if the organization is "consistent with the principles of democracy," where any limitations to associating "should be reasonable and proportional."<sup>103</sup> Although the facts in *Beauharnais* do not directly state that the White Circle League is a hate group, it can be implied through the leaflet activity by the appellant and his members.<sup>104</sup> If given the opportunity to respond, the organization might argue that it adheres to the principles of democracy, since its goals include "[t]o adhere to Constitutional Government as established by our pioneer forefathers" and "[t]o preserve States' Rights."<sup>105</sup> However, the predominant purpose of prohibiting the group would be to protect the rights of others, since The White Circle League was an association that targeted other races,<sup>106</sup> and, considering the historical

99. *Id.* at 252-53.

100. This factor, although mentioned in the Repository, probably has little to no weight in the context of a strictly U.S. case. However, it is possible to have this factor suit U.S. requirements with mentioning's the state's need to use the police power to promote the general welfare. *See* *Printz v. United States*, 521 U.S. 898 (1997); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (Kennedy, J., concurring); *Texas v. White*, 74 U.S. 700 (1869); *McCulloch v. Maryland*, 17 U.S. 316 (1819).

101. *Beauharnais*, 343 U.S. at 258-61.

102. *See id.* at 252.

103. REPOSITORY OF PRACTICE, *supra* note 30, at 18.

104. *Beauharnais*, 343 U.S. at 252-53; *see* Informational Leaflet from Joseph Beauharnais, Founder, The White Circle League of America (Trumbull Park), ELEC. ENCYCLOPEDIA OF CHI. (photo. reprint 2005) (c. 1955), <http://www.encyclopedia.chicagohistory.org/pages/10721.html> (outlining the principles and goals of The White Circle League of America).

105. *Beauharnais* Informational Leaflet from Joseph Beauharnais, *supra* note 104.

106. The leaflet provided that the main purposes of The White Circle League of America included, among others,

1. To oust the Reds from America[;]
2. To preserve white neighborhoods for white people, and to bring about complete separation of the black and white races[;]
7. To support [a U.S. Senator's bill] to ship the Negro back to his Fatherland, Africa, with government aid[;]
10. To expose and resist the race-mixing evil growing up in our Churches[; and]

context of Chicago's race riots,<sup>107</sup> the prohibition of the association would be allowed in order to protect public order, safety, and morals.

Although the *Brandenburg* Court protected the free speech rights of the appellant and the free assembly and association rights of the Ku Klux Klan, Interpol's standard would have allowed for the appellant, the Ku Klux Klan, and those assembling with the appellant, to be targeted. For speech, the law itself is of an ordinary-crime basis as its purpose is to prevent the "advocat[ing] the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."<sup>108</sup> The case-by-case analysis would also find the speech targetable since it promotes the active targeting of another group and violates the rights of others.<sup>109</sup> With the predominant purpose of silencing the speech not being of a nature prohibited by Article 3, it follows that arresting the appellant would have been acceptable.

The Ku Klux Klan, as an association assembling to promote the Ku Klux Klan's views, would also be targetable under the Repository standard since it actively promotes hate towards other U.S. citizens based on ethnicity.<sup>110</sup> The law is of an ordinary-law aspect since it is meant to protect the public by criminalizing the "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."<sup>111</sup> An assembly to promote a march on the capital can be seen as political speech, which would be protected by the Repository. Since the assembly mostly calls for acts of violence to promote racism and white supremacy,<sup>112</sup> the predominant ordinary-law elements of public safety would allow the assembly to be prohibited. The same can be said for the Ku Klux Klan as an association, which is predominantly an association that promotes violence against non-White races.<sup>113</sup>

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13. To stop giving money to the Red Cross until it stops its horrible policy of mixing negro and white blood.

*Id.*

107. *Beauharnais*, 343 U.S. at 258-61.

108. *Brandenburg v. Ohio*, 395 U.S. 444, 444-45 (1969) (per curiam) (paraphrasing the Ohio Criminal Syndicalism statute at issue as criminalizing "'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and 'voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.'").

109. *Id.* at 445-47.

110. *See generally* KU KLUX KLAN, *supra* note 86.

111. *Brandenburg*, 395 U.S. at 444-45.

112. *Id.* at 446-47.

113. KU KLUX KLAN, *supra* note 86, at 20 ("[T]he Klan launched a campaign of terrorism in the early and mid-1920s, and many communities found themselves firmly in the grasp of the organization. Lynching, shootings and whippings were the methods employed by the Klan. Blacks, Jews, Catholics, Mexicans and various immigrants were usually the victims.").

Finally, as with *Brandenburg*, the political speech in *R.A.V.* of burning a cross on someone's lawn could be prohibited under the Repository's analysis even though the *R.A.V.* Court determined otherwise. The City of St. Paul prohibited symbolic or written expressions "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."<sup>114</sup> Since the purpose of the ordinance was to protect public order and morals, it did not criminalize a pure offense. It should be noted that the *R.A.V.* Court held the ordinance unconstitutional since it classified an entire aspect of content as prohibited without giving deference to the specific facts of a case.<sup>115</sup> Under the Repository's guidance, however, this would not be at issue since the analysis is done on a case-by-case basis.<sup>116</sup> For this case, the petitioner encroached the private property of black residents and burned a cross on their lawn.<sup>117</sup> The facts show the petitioner's intent to interfere with the public order and the rights of the victims, and therefore, the government's actions would have been acceptable under the Repository.

#### *B. Analysis Under the Repository is Similar to Other International Standards*

Interpol's Repository is a strong and easily adaptable process for silencing hate speech. In addition, the predominance test is consistent with multiple international law standards, which makes it a strong contender as a template for the U.S.<sup>118</sup> To make this point, two legal standards will be viewed alongside Interpol's standard: (1) the European Convention on Human Rights; and (2) the American Convention on Human Rights. Both documents promote the belief that people have a right to the freedom of ideas and expression.<sup>119</sup> At the same time, both conventions also place limitations

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114. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992) (quoting MINN., LEGIS. CODE § 292.02 (1990)).

115. *Id.* at 380, 395-96.

116. REPOSITORY OF PRACTICE, *supra* note 30, at 5.

117. *R.A.V.*, 505 U.S. at 379-80.

118. To understand why compliance with international standards is important, *see infra* Part IV(b).

119. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221 ("Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.") [hereinafter European Convention on Human Rights]; American Convention on Human Rights art. 13, Nov. 22, 1969, 1144 U.N.T.S. 123 ("Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.") [hereinafter American Convention on Human Rights].

upon such freedoms for the purpose of protecting the freedoms and rights of others.

In the European Convention on Human Rights, the balance between the right to free expression and the limitations for protecting others appear in two places. First, Article 10 states that the freedom of expression “may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society,” listing various reasons for what is considered “necessary.”<sup>120</sup> Second, Article 17 states that “[n]othing in this Convention may be interpreted as implying . . . any right to engage in any activity or perform any act aimed at the destruction [or limitation] of any of the rights and freedoms set forth herein.”<sup>121</sup>

The application of these articles in the European Court of Human Rights (“ECHR”) shows that Articles 10 and 17 do not grant hate speech and hateful associations any protection.<sup>122</sup> For example, in *Ivanov v. Russia*, the applicant used his newspaper company to print multiple publications inciting hatred and discrimination against the Jewish population by promoting “the exclusion of Jews from social life . . . , the existence of a causal link between social, economic and political discomfort and the activities of Jews, and . . . the malignancy of the Jewish ethnic group.”<sup>123</sup> The applicant was tried by the Novgorod Town Court and found “guilty of inciting to racial, national and religious hatred,” and banned from “engaging in journalism, publishing and disseminating in the mass-media for a period of three years.”<sup>124</sup> The applicant appealed to the Novgorod Regional Court, which upheld the conviction. He then appealed to the ECHR.

The main complaint that the appellant brought before the ECHR was that the lower court charge of incitement to hatred was unfounded, which the ECHR attributed to a claim for violating his Article 10 rights.<sup>125</sup> The ECHR stated that, although Article 10 does lay out a broad protection for freedom of expression, Article 17 limited that freedom if the expression was to achieve “the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the

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120. European Convention on Human Rights, *supra* note 119, art. 10, § 2 (“The exercise of these freedoms . . . may be subject to such formalities, restrictions or penalties as are prescribed by law and are necessary in a democratic society[.]”).

121. *Id.* art. 17.

122. See *Factsheet: Hate Speech*, EUR. COURT HUM. RTS. (June 2018), [http://www.echr.coe.int/Documents/FS\\_Hate\\_speech\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf).

123. *Ivanov v. Russia*, App. No. 35222/04, 1 Eur. Ct. H.R. 1 (2007), <http://hudoc.echr.coe.int/eng?i=001-79619>.

124. *Id.* at 2.

125. *Id.* at 3.

Convention.”<sup>126</sup> The Court then noted that the appellant’s goals of inciting anti-Semitic activity as well as the anti-Semitic sentiment in the appellant’s belief that the Jews were enemies of Russia.<sup>127</sup> The Court found that Article 17 prevented Article 10 protections from applying since this attack on an entire ethnic group blatantly goes against the Convention’s values.<sup>128</sup>

When analyzing the facts of *Pavel Ivanov* with the Repository’s predominant purpose test, the analysis leads to the same conclusion. The applicant’s expression would be targetable as incitement to hatred or violence, which goes against public order and morals.<sup>129</sup> The crime that the applicant was charged with was not a pure offense under the Repository since it was meant to protect public safety and order by criminalizing “public incitement to ethnic, racial and religious hatred through the use of the mass-media.”<sup>130</sup> With this established, the targeted activity must be predominantly political for it to be protected. Here, the applicant’s speech falls under the hate speech category that the repository clearly allows to be targeted because it advocates for discrimination against a whole ethnic-religious group, which goes against Article 2 of Interpol’s Constitution.<sup>131</sup> Therefore, protection would not be awarded and the charges against the applicant would be upheld.

The ECHR’s use of both articles is comparable to the predominance test that is applied via the Repository, and the more a case’s facts indicate a political rather than ordinary-law concern, the clearer the similarities become. For instance, in *Temel v. Turkey*, the applicant was president of the Peoples’ Democratic Party in Turkey and had given a speech which called against the actions of the U.S. in Iraq.<sup>132</sup> Specifically, he rallied against the imprisonment of the president of the Kurdistan Freedom and Democracy Congress (“KADEK”) for threats of terrorism, as well as Turkey’s involvement in allowing the imprisonment.<sup>133</sup> During his speech, the applicant and those in the audience raised chants of “No to War” and to release the imprisoned.<sup>134</sup>

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126. *Id.* at 4 (quoting European Convention on Human Rights art. 17, *supra* note 119).

127. *Id.*

128. *Id.* at 4, 5.

129. REPOSITORY OF PRACTICE, *supra* note 30, at 14.

130. *Ivanov*, App. No. 35222/04.

131. REPOSITORY OF PRACTICE, *supra* note 30, at 14.

132. *Temel v. Turkey*, App. No. 16853/05, Eur. Ct. H.R. ¶¶ 6-8 (2011).

133. *Id.* ¶ 8. KADEK is a subgroup of the Kurdistan Worker’s Party (“PKK”), which is registered as a terrorist organization. See *Kongra-Gel Kurdistan Freedom and Democracy Congress (KADEK) Kurdistan Workers’ Party (PKK)*, GLOBALSECURITY.ORG, <https://www.globalsecurity.org/military/world/para/pkk.htm> (last visited Dec. 20, 2017) [hereinafter *Kongra-Gel*].

134. *Temel*, App. No. 16853/05, ¶ 8.

Allegedly concerned with the applicant's advocacy for terrorist activities, Turkish authorities arrested and tried him for assisting the terroristic organization PKK-KADEK.<sup>135</sup> While the applicant stated that he was merely speaking against the U.S. war efforts and Turkey's involvement, the prosecutors claimed that he was spreading propaganda for the support of terrorism, which included encouraging youth to take up arms and begin a civil war against Turkey.<sup>136</sup> The Turkish Security Court overhearing the case found the applicant guilty, and the Court of Cassation agreed upon different legal grounds and called for a remand of the case.<sup>137</sup> Although the applicant showed that he never expressly called for any violence and argued that he was speaking on behalf of his party (as a way to divert liability), the Turkey Security Court found the appellant guilty since the propaganda was in support of the president of a terrorist group that led several massacres against civilians.<sup>138</sup>

The ECHR analyzed these facts under Article 10 and found no explicit findings that the applicant's speech went against the values of the freedom of expression in relation to the convention because his speech was over political imprisonment and government action rather than the promotion of propaganda and the views of a violent political party.<sup>139</sup> Therefore, to find an implicit showing of an Article 10 or Article 17 violation, the Court needed to see if the applicant's speech was in violation of a standard "'provided by [Turkish] law', [where the law] applies to one or more of the legitimate purposes referred to in paragraph 2 of Article 10," and to see if the language deserves protection as 'necessary in a democratic society' to achieve these goals" of the convention.<sup>140</sup> Regarding the law itself, the ECHR found that application of Turkey's Act No. 3713 on the fight against terrorism was acceptable,<sup>141</sup> and that Turkey's Act No. 3713 was for legitimate purposes as to the "prevention of crime 'as well as the protection of' national security."<sup>142</sup>

With regard to the applicant's speech being limited as "necessary in a democratic society," the ECHR found in favor of the applicant because the speech was of his political party's views on serious issues concerning Turkish government and international participation.<sup>143</sup> The ECHR also

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135. *Id.* ¶ 14.

136. *Id.* ¶¶ 16-17. This accusation is based upon the fear that Turkey has for an uprising from its Kurdish minority. See *Kongra-Gel*, *supra* note 133.

137. *Temel*, App. No. 16853/05, ¶ 21.

138. *Id.* ¶¶ 22, 23.

139. *Id.* ¶¶ 39-43, 44.

140. *Id.* ¶ 43.

141. *Id.* ¶ 49.

142. *Id.* ¶¶ 50-52.

143. *Id.* ¶ 60.

emphasized that the applicant was speaking on behalf of a political party in opposition to the controlling party, a situation that is important to the convention to allow criticism of controlling government officials.<sup>144</sup> Finally, the ECHR found that the legal analysis of the applicant's speech was unacceptable since the prosecution tried him for "a tenth of a sentence" in his speech rather than taking in the applicant's statement as a whole.<sup>145</sup> When looking at the whole statement, there was clearly no encouragement of the use of violence or armed resistance.<sup>146</sup> This, and the heavy sentence upon the applicant for his criticism of government action, meant that the government violated Article 10. The lower court conviction must be reversed, and the applicant must be compensated for the government's wrongful conviction.<sup>147</sup>

Again, if looking at *Temel* under the Repository, the same result would follow. The fact that the law in question dealt with a matter of national security meant that the crime itself was not a "pure offense" which solely targeted political, military, racial, or religious issues. Hence, an analysis into the predominant purpose of the targeted speech was necessary. The facts clearly indicated that even with advocacy for the release of the president of KADEK, the predominant purpose of the speech was political opposition to government action and international action by the U.S. and Turkey. This heavily political nature meant that the speech was protected, and that any interference by Interpol would be unacceptable. It also shows how Interpol's standard comports with the ECHR.

The Repository's comparability with the ECHR does not automatically mean it satisfies other international standards. Therefore, a second comparison of the Repository with the American Convention on Human Rights and the Inter-American Court of Human Rights ("IACHR") is necessary. When comparing the European and American Conventions on Human Rights, it is evident that the American Convention has a tighter grip on what is considered limitable speech. In Article 13, there is a broad allowance for limiting speech against the "respect for the rights or reputations of others; or the protection of national security, public order, or public health or morals."<sup>148</sup> The last clause of Article 13 also states that "any advocacy of national, racial, or religious hatred that constitute incitements to lawless

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144. *Id.* ¶ 63.

145. *Id.* ¶¶ 59, 61-62.

146. *Id.* ¶ 62.

147. *Id.* ¶¶ 63, 64, 91, 94.

148. American Convention on Human Rights art. 13, *supra* note 119.

violence or to any other similar action against any person or group of persons . . . shall be considered as offenses punishable by law.”<sup>149</sup>

Even though the decisions of the IACHR are tailored to the American Convention, there is evidence that the ECHR has significantly influenced the decisions of the IACHR.<sup>150</sup> It therefore makes sense that the IACHR would follow a similar pattern of analysis as the ECHR. The problem, however, is that the IACHR has yet to formally hear a case on hate speech, and the Inter-American Commission on Human Rights has not analyzed or defined the American Convention in this area. That being said, both organizations have been instructed to adhere to the policy of the U.N. or the ECHR on this topic,<sup>151</sup> and that the Commission had made a statement against the Charlottesville protest.<sup>152</sup> This indicates that the IACHR would also adhere to the international standards already looked upon. Since the Repository has been shown to follow to these same international standards, then it can be concluded that the Repository would also find the same results as the IACHR.

#### IV. U.S. LAW SHOULD BE ENFORCED UNIFORMLY ON A DOMESTIC AND AN INTERNATIONAL

The U.S. maintains some of the greatest protections for free speech.<sup>153</sup> At the same time, the U.S. also has a multitude of hate speech problems that comes from this extensive freedom.<sup>154</sup> The U.S. has yet to look at any

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149. *Id.*

150. See Eduardo Andrés Bertoni, *The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards*, 3 EUR. HUM. L.R. 332, 348-51 (2009).

151. Eduardo Bertoni, *Hate Speech Under the American Convention on Human Rights*, 12 ILSA J. INT'L & COMP. L. 569, 571 (2006).

152. Press Release, Org. of Am. States, IACHR Repudiates Hate Speech & Violence in Charlottesville, Virginia, United States (Aug. 18, 2017), [http://www.oas.org/en/iachr/media\\_center/PReleases/2017/124.asp](http://www.oas.org/en/iachr/media_center/PReleases/2017/124.asp).

153. See Richard Wike & Katie Simmons, *Global Support for Principle of Free Expression, but Opposition to Some Forms of Speech*, PEW RES. CTR. (Nov. 18, 2015), <https://www.pewresearch.org/global/2015/11/18/global-support-for-principle-of-free-expression-but-opposition-to-some-forms-of-speech/> (“[I]deas about free expression vary widely across regions and nations. The United States stands out for its especially strong opposition to government censorship[.]”) (cited in Alex Gray, *Freedom of Speech: Which Country has the Most?*, WORLD ECON. F. (Nov. 8, 2016), <https://www.weforum.org/agenda/2016/11/freedom-of-speech-country-comparison/>). But see ECONOMIST INTELLIGENCE UNIT, DEMOCRACY INDEX 2017: FREE SPEECH UNDER ATTACK 3 (reporting that the U.S. was “demoted from a ‘full democracy’ to a ‘flawed democracy’ in 2016.”), [http://pages.eiu.com/rs/753-RIQ-438/images/Democracy\\_Index\\_2017.pdf](http://pages.eiu.com/rs/753-RIQ-438/images/Democracy_Index_2017.pdf); FREEDOM HOUSE, FREEDOM IN THE WORLD 2019, 3, 18 (2019) (“[T]he United States ranks behind 51 of the 87 other Free countries in Freedom in the World.”), [https://freedomhouse.org/sites/default/files/Feb2019\\_FH\\_FITW\\_2019\\_Report\\_ForWeb-compressed.pdf](https://freedomhouse.org/sites/default/files/Feb2019_FH_FITW_2019_Report_ForWeb-compressed.pdf).

154. See *supra* Part I.

international standards to update its free speech laws. Since the U.S. has taken to international law to update domestic laws and court rulings for other issues, and since the Repository is so similar to other forms of international law, then it makes sense for the U.S. to use the Repository as a model to remove protections against hate speech.

The Repository's strong likeness to other international standards makes it a suitable model standard to consider. However, just because the repository standard is found as comports with international law does not mean that it is necessary for the U.S. to follow. The U.S.'s use of international law and legal opinions for its own decisions and law, and a showing of U.S. participation in international issues regarding hate speech must be viewed to determine that the Repository's international adherence is of important consideration.

#### *A. U.S. Court and Legislature Have Already Utilized International Law for Guidance and Harmonization*

Like many other nations, U.S. law is founded upon the traditions and practices that have come about in its own society. Yet, in legal areas where the U.S. does not have appropriate knowledge on the subject matter, where U.S. common law is confusing or developed in an inappropriate manner, or where deference to a uniform standard is beneficial, the U.S. has accepted the influence of international law. One example of this can be seen in the U.S. court system regarding capital punishment. The U.S. is an outlier on capital punishment as it remains one of only six industrial nations to still implement it in practice,<sup>155</sup> with only thirty-one U.S. states still implementing its capital punishment laws.<sup>156</sup>

Even though the U.S. has an entirely independent legal standard for capital punishment, the U.S. Supreme Court still found the need to look beyond its own laws in *Roper v. Simmons*.<sup>157</sup> In this case, the respondent committed premeditated murder when he was seventeen years old.<sup>158</sup> Even though he had no prior convictions and was a minor, the jury recommended the sentence of capital punishment, which the trial judge imposed.<sup>159</sup> Among other issues, the respondent appealed on the basis that executing someone

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155. *Abolitionist and Retentionist Countries*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries> (last updated Dec. 31, 2017).

156. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated May 31, 2019).

157. *Roper v. Simmons*, 543 U.S. 551 (2005).

158. *Id.* at 556.

159. *Id.* at 558.

who was under eighteen when the crime was committed is unconstitutional under the Eighth and Fourteenth Amendments.<sup>160</sup>

Looking at the respondent's argument, the Court first analyzed how interpretation of the Constitution is conducted, stating the importance of looking to "the evolving standards of decency that mark the progress of a maturing society."<sup>161</sup> The Court noted that the plurality decision in *Stanford v. Kentucky* held that it should not bring judgement on the issue of allowing the capital punishment for those above sixteen years old since twenty-two of the thirty-seven capital punishment States permitted it.<sup>162</sup> Since the Court's opinion changed over time with regard to the execution of the mentally retarded, the Court noted that the same analysis of changing standards had to be viewed in *Roper*.<sup>163</sup> The Court started by looking to U.S. history of executing juveniles, stating that "[i]n the past 10 years, only three [states] have done so."<sup>164</sup> The shift of "reducing . . . juvenile capital punishment, or in taking specific steps to abolish it, has been slower" than those changes towards execution of the mentally retarded.<sup>165</sup> Yet, the Court noted that the general awareness of juveniles having lower culpability than adults existed and no state reversed its repeal of juvenile execution laws.<sup>166</sup>

Even though juvenile culpability is legally lower than average criminals, the Court still needs to show that this lowering is enough to remove juveniles from being "the most deserving of execution."<sup>167</sup> After distinguishing that juveniles are culpably less deserving of capital punishment than ordinary criminals,<sup>168</sup> the Court then looked to international standards for the interpretation of the Eighth Amendment's prohibition of cruel and unusual

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160. *Id.* at 559.

161. *Id.* at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)). It had already been determined that "our standards of decency do not permit the execution of any offender under . . . [sixteen] at the time of the crime," a decision based upon the views of professional organizations, other nations "that share our Anglo-American heritage, and by leading members of the Western European community." *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion)).

162. *Id.* at 562 (citing *Stanford v. Kentucky*, 492 U.S. 361, 377-78 (1989) (plurality opinion), *abrogated by id.*).

163. *Id.* at 562, 563 (comparing the decision of *Penry v. Lynaugh*, 492 U.S. 302 (1989), which said that the Eighth Amendment did not exempt the mentally retarded from the capital punishment, with *Atkins v. Virginia*, 536 U.S. 304 (2002), which abrogated the *Penry* opinion; the Court notes the change of public opinion and standards of decency over time).

164. *Id.* at 564.

165. *Id.* at 565.

166. *Id.* at 566, 567.

167. *Id.* at 568 (quoting *Atkins*, 536 U.S. at 319).

168. *Id.* at 569-75.

punishment, noting that “the United States is the only country in the world that continues to give official sanction to the juvenile capital punishment.”<sup>169</sup>

To make the determination, the Court first looked to the United Nations Convention on the Rights of the Child, ratified by every country except for the U.S. and Somalia, which prohibits the execution of those under eighteen years old.<sup>170</sup> Next, Court reviewed evidence that the only countries to execute juvenile offenders since 1990 were the U.S. and seven other, non-Western European countries, and interpreted this fact as indicative of how out of touch the U.S. was with its contemporaries.<sup>171</sup> Finally, the Court looked to the legal history of the United Kingdom, since both nations are closely tied with regard to legal history and practice, indicating that the U.K. had already abolished capital punishment for those under eighteen years old in 1933.<sup>172</sup> The Court found that the evidence shows that “the opinion of the world community [provides] respected and significant confirmation” for its decision to affirm the lower court’s decision to set aside the capital punishment imposed on the respondent.<sup>173</sup> Although there is still debate on how much weight should be given to international values for domestic jurisprudence,<sup>174</sup> this case shows that international law can act as a guide when U.S. law is unclear or outdated.

It is not just the courts that have relied upon international law for guidance. Other branches of the U.S. government have looked to international law for creating harmonized domestic standards. On a more obvious level, this occurs when the U.S. takes on self-executing treaties, which makes a treaty supersede any conflicting pre-existing federal statutes.<sup>175</sup> If a treaty is not self-executing, then Congress is able to pass statutes, or the President can pass executive orders, to adhere to the treaty’s goals.<sup>176</sup> The harmonization to international standards can also be done without a treaty, with one example being the America Invents Act (“AIA”), where the patent law standard of looking to the invention date changed to the

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169. *Id.* at 575.

170. *Id.* at 576.

171. *Id.* at 577.

172. *Id.*

173. *Id.* at 578, 579.

174. *Id.* at 623-28 (Scalia, J., dissenting).

175. JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 67-70 (2d ed. 2003). It can sometimes be difficult to determine if international law supersedes U.S. law even if it is not explicitly self-executing. *See id.* at 323-24 (introducing how some believe that ratification of the U.N. Charter means that the Ninth Amendment of the Constitution should incorporate international standards of human rights and dignity).

176. *Id.* at 78-79.

internationally accepted filing date standard.<sup>177</sup> Finally, looking to the executive branch, it is generally accepted that the President must adhere to international customary law, as shown by the intent of the framers of the Constitution and the opinions of modern legal scholars and officials.<sup>178</sup> This, on top of the high importance that the presidential office holds with regard to international relations,<sup>179</sup> indicates that international custom is heavily considered when the U.S. president engages in or enacts foreign policy.

*B. The U.S. Domestic and International Approaches to Hate Speech and Discrimination Issues Should be the Same*

Since every branch of the U.S. government is accustomed to looking towards international custom and law to determine, update or clarify certain issues, there should be no problems with doing so for issues of hate speech, meaning that Interpol's standard can be analyzed and implemented by the U.S. However, just because the U.S. can harmonize does not mean that it will, even if it is in the U.S.'s best interest to do so. The U.S. Supreme Court is typically unwilling to overturn legal precedent based on international law but the laws of international authorities are considered instructive in interpreting the Constitution.<sup>180</sup> In *Roper*, the U.S. was already trending toward removing juvenile executions,<sup>181</sup> and the issue of juvenile executions had complicated legal precedent which was still undergoing development.<sup>182</sup> On the other hand, the Supreme Court and lower courts have consistently adhered to the rules regarding hate speech since *Brandenburg*. At the same time, comportment by the legislative and executive branches with international standards is typically seen where harmonization is required.<sup>183</sup>

It is true that the courts are willing to overturn bad precedent as necessary.<sup>184</sup> However, as argued in Justice Scalia's dissent in *Roper*, the

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177. *Summary of the America Invents Act*, AM. INTELL. PROP. L. ASS'N, <https://www.aipla.org/detail/advocacy-article/Summary-of-the-America-Invents-Act> (last visited Feb. 2, 2019).

178. PAUST, *supra* note 175, at 169-92.

179. *See* U.S. CONST. art. II, § 2, cl. 2.

180. *Roper v. Simmons*, 543 U.S. 551, 578 (2005) ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.").

181. *Id.* at 565-67.

182. *Id.* at 561-62.

183. *Id.* at 567.

184. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("Adhering to precedent 'is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.' Nevertheless, when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'") (first quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting), and then quoting *Smith v. Allwright*,

personal history and legal development of the U.S. should not be infringed upon or altered by the standards and customs of others.<sup>185</sup> Looking back to the problems of hate speech in the U.S. signifies the domestic need for change and that it is necessary to view other possible analyses or legal standards. So, for international law to be considered, it appears that an influencer outside of U.S. standards and custom must exist. The *Roper* Court presented the change in international practice and the place of the U.S. in comparison to show a necessity in updating the law to conform with those of its peers.<sup>186</sup> A similar argument can be made here since the U.S. appears to be out of touch with the rest of the international community regarding its hate speech standards,<sup>187</sup> but this alone may not be reason enough.

Justice Douglas's dissenting opinion in *Beauharnais*, which mirrors the arguments made *Brandenburg* and *R.A.V.*, succinctly states the U.S. views and interpretation of the First Amendment:

The First Amendment says that freedom of speech, freedom of press, and the free exercise of religion shall not be abridged. That is a negation of power on the part of each and every department of government. Free speech, free press, free exercise of religion are placed separate and apart; they are above and beyond the police power[.] The Framers of the Constitution knew human nature as well as we do. They too had lived in dangerous days; they too knew the suffocating influence of orthodoxy and standardized thought. They weighed the compulsions for retrained speech and thought against the abuses of liberty. They chose liberty. That should be our choice today no matter how distasteful to us the pamphlet of *Beauharnais* may be.<sup>188</sup>

The historic context for the nearly unwavering protection of speech comes from the control of the English kingdom over its subjects and colonies,

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321 U.S. 649, 665 (1944)); *see, e.g.*, *Whitney v. Cal.*, 274 U.S. 357 (1927), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (*per curiam*) (*overruling Whitney* insofar as it allowed a state to punish mere advocacy of particular acts); *see also* *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (making clear that the Court disapproved of and would not follow the 1944 *Korematsu* decision) (stating “*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution.”) (quoting *Korematsu v. United States*, 323 U.S. 214, 248 (1944)) (Jackson, J., dissenting)); *Plessy v. Ferguson*, 163 U.S. 537 (1987), *abrogated by* *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (*overruling Plessy's* “separate but equal” principle).

185. *Roper*, 543 U.S. at 624 (Scalia, J., dissenting) (“More fundamentally, however, the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.”).

186. *Roper*, 543 U.S. at 575-78.

187. *See* Kevin Boyle, *Hate Speech: The United States Versus the Rest of the World*, 53 ME. L. REV. 487, 493-94, 501 (2001).

188. *Beauharnais v. Illinois*, 343 U.S. 250, 286-87 (1952) (Douglas, J., dissenting).

which the U.S. was trying to break away from.<sup>189</sup> This is vastly different from the context upon which the U.N. and Europe based their declarations and conventions on human rights, especially when considering the rise and fall of Nazi Germany through World War II.<sup>190</sup> To the international community, although free speech is of heightened importance as seen in *Temel*, human dignity and safety and the rights of others can take greater precedent as seen in *Ivanov*.<sup>191</sup> This just is not the case under U.S. law, which looks for an actual incitement to immediate lawless action rather than a tendency to do so.<sup>192</sup> Yet, considering the trying times that we are put under with regard to the growth and spread of hate speech in the U.S., the policies of *Brandenburg* are not adequate. Hate speech in the U.S. has for too long been persistent, and thus special consideration should be carved out for this category with international influence coming into play.<sup>193</sup>

With issues where the U.S. is involved both domestically and internationally, it is necessary to have consistent international law approaches. Looking back to the AIA, a harmonized patent law system was beneficial for developing and protecting intellectual property.<sup>194</sup> In similar respects, it is necessary to determine how hate speech laws can be used both domestically and internationally. As it turns out, there are at least two areas where the U.S. would improve from updating its hate speech laws to an international standard.

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189. Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 547-48 n.1 (1903) (discussing how truth was not a defense to defamation under Roman law and legal systems throughout history that were based on Roman law principles). Under English seditious libel law, criticisms based on truth were more likely to result in liability. See PETER N. AMPONSAH, LIBEL LAW, POLITICAL CRITICISM, AND DEFAMATION OF PUBLIC FIGURES 42 (2004) (“This rule governing the English law of seditious libel gave rise to the maxim ‘The greater the truth, the greater the libel.’”) (internal citations omitted).

190. *What is the European Convention on Human Rights?*, AMNESTY INT’L (UK) (Aug. 21, 2018, 4:47 PM), <https://www.amnesty.org.uk/what-is-the-european-convention-on-human-rights>; see Johannes Morsink, *World War Two and the Universal Declaration*, 15 HUM. RTS. Q. 357 (1993).

191. *Ivanov v. Russia*, App. No. 35222/04, 1 Eur. Ct. H.R. 1 (2007), <http://hudoc.echr.coe.int/eng?i=001-79619>.

192. *Cf. Beauharnais v. Illinois*, 343 U.S. 250, 286-87 (1952), with *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

193. It could also be argued that, although hate speech may not actually incite immediate lawless action, the direct and indirect effects of hate speech in Part I can be enough by which hate speech can be triggered as unprotected. Most likely, however, the courts would be unwilling to change its precedent solely on this point.

194. Michael H. Anderson et al., *Why International Inventors Might Want to Consider Filing Their First Patent Application at the United States Patent Office & the Convergence of Patent Harmonization and Ecommerce*, 30 SANTA CLARA HIGH TECH. L.J. 555, 560 (2014).

The first regards the fight against terrorism. With the U.S. already being involved in this prospect,<sup>195</sup> it makes sense to enact laws toward this goal. One of the bigger problems with fighting ISIS is finding a way to target propagandists and prevent the spread of their ideologies on social media.<sup>196</sup> Though efforts have been made in this regard,<sup>197</sup> it has been proven difficult without the means to actually target a propagandist as a terrorist.<sup>198</sup> This is especially true when dealing with domestic promotion of terrorist or extremist groups by U.S. citizens.<sup>199</sup> If Interpol's standard were adopted, then targeting domestic or international propagandists would no longer pose a problem. Since terrorist and extremist propaganda attacks public safety, order, and morals, laws against such speech would be accepted under the Repository<sup>200</sup> and would bypass many of the difficult questions that are currently raised by the First Amendment.

The second example where an update in hate speech laws is beneficial involves the U.S.'s participation in the Organization for Security and Cooperation in Europe ("OSCE"). The OSCE's main objective is to "ensure respect for human rights . . . and promote tolerance and non-discrimination."<sup>201</sup> To implement the policies promoting tolerance and non-discrimination, one of the main measures that the OSCE promotes is to pass legislation or non-discriminatory policies within national security and governance.<sup>202</sup> As seen in the 2009 Human Dimension Meeting on effective implementation of hate crimes legislation, one of the main recommendations involved enactment of laws "that establish hate crimes as specific offenses" or enhance penalties for violent crimes committed against "the victim's race,

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195. Janice Yu, *Regulation of Social Media Platforms to Curb ISIS Incitement and Recruitment: The Need for an International Framework and its Free Speech Implications*, 4 J. GLOB. JUST. & PUB. POL'Y 1, 2 (2018).

196. See Dan de Luce et al., *Going After the ISIS Propaganda Mastermind*, FP (Aug. 31, 2016, 8:07 PM), <http://foreignpolicy.com/2016/08/31/going-after-the-isis-propaganda-mastermind/> (describing how, even after the U.S.'s targeted killing of ISIS's propaganda mastermind Abu Muhammad al-Adnani, it is difficult to prevent the spread of ISIS's message and influence on social media); Brendan I. Koerner, *Why ISIS is Winning the Social Media War*, WIRED, <https://www.wired.com/2016/03/isis-winning-social-media-war-heres-beat/> (last visited Mar. 21, 2018) (describing the tactics and successes of ISIS in gaining a wide social media audience and support).

197. *Propagandists, Recruiters, and Spokespersons*, COUNTER EXTREMISM PROJECT, <https://www.counterextremism.com/sites/default/files/Propagandists%20Recruiters%20Spokespersons.pdf> (last visited Mar. 21, 2018).

198. Michael J. Lebowitz, *Terrorist Speech: Detained Propagandists and the Issue of Extraterritorial Application of the First Amendment*, 9 FIRST AMEND. L. REV. 573, 600-01 (2011).

199. *Id.* at 579-80.

200. REPOSITORY OF PRACTICE, *supra* note 30.

201. *What We Do*, OSCE, <https://www.osce.org/what-we-do> (last visited Dec. 20, 2017).

202. *Tolerance and Non-Discrimination*, OSCE, <https://www.osce.org/tolerance-and-nondiscrimination> (last visited Dec. 20, 2017).

religion, ethnicity, sexual orientation, gender, gender identity, mental and physical disabilities, or other status.”<sup>203</sup>

Although there were debates about the protections of free speech, the consensus was that the passage and enforcement of such laws was appropriate for ensuring a safe environment.<sup>204</sup> As member of the OSCE,<sup>205</sup> it makes sense for the U.S. to promote this policy as well. While it is true that the U.S. has already implemented the use of hate crime enhancement laws,<sup>206</sup> it has also been shown above how laws which target hate speech are out of the question under the current U.S. standard.<sup>207</sup> The U.S. can only hold this inconsistent stance if it is maintaining partial cooperation with the viewpoints held by the OSCE, such as the necessity of utilizing educational and awareness-raising initiatives.<sup>208</sup>

At the same time, U.S. involvement with the OSCE clearly shows the full commitment of the U.S. to supporting the many goals of the OSCE.<sup>209</sup> The body through which the U.S. cooperates with the OSCE is the U.S.

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203. *Hate Crimes: Effective Implementation of Legislation*, OSCE (Sept. 15, 2009), <https://www.osce.org/odihr/38711?download=true>.

204. *Id.*; see *Preventing and Responding to Hate Crimes*, OSCE (Sept. 15, 2009), <https://www.osce.org/odihr/38711?download=true>.

205. *Participating States*, OSCE, <https://www.osce.org/participating-states> (last visited Dec. 20, 2017).

206. *Hate Crime Laws*, *supra* note 5.

207. See Anne-Marie Beliveau, *Hate Speech Laws in the United States and the Council of Europe: The Fine Balance between Protecting Individual Freedom of Expression Rights and Preventing the Rise of Extremism and Radicalization through Social Media Sites*, 51 SUFFOLK U.L. REV. 565 (2018).

208. Organization for Security and Co-operation in Europe [OSCE], *Combating Intolerance and Discrimination and Promoting Mutual Respect and Understanding*, Ministerial Council Dec. 13/06, OSCE Doc. MC.Dec/13/06, at ¶ 5 (Dec. 5, 2006).

209. On the issue of tolerance and non-discrimination, statements made by U.S. representatives on how more can be done by other member states to quell discrimination within their borders, see U.S. Dep’t of State, *Statement on Tolerance and Non-discrimination at HDIM Session 9* (2017), <https://www.osce.org/odihr/344736?download=true>; U.S. Dep’t of State, *US Statement on Tolerance and Non-discrimination at HDIM Session 8* (2017), <https://www.osce.org/odihr/344731?download=true>; U.S. Dep’t of State, *Statement on Tolerance and Non-discrimination at HDIM Session 7* (2017), <https://www.osce.org/odihr/344726?download=true> (“My delegation strongly supports the September 14 OSCE side-event on combating anti-Semitism through education, featuring the ‘Turning Words into Action’ Project initiated under the German OSCE Chairmanship.”); U.S. Dep’t of State, *Tolerance and Non-Discrimination: Responses to and Prevention of Hate Crimes in the OSCE Area* (Oct. 6, 2011), <https://www.osce.org/odihr/83672?download=true> (“We therefore continue to support the various OSCE initiatives that address prejudice, discrimination, and intergroup conflict, ranging from the work of the Office for Democratic Institutions and Human Rights (ODIHR), including its annual hate crimes report and new law enforcement training program, to the work of the Personal Representatives on Tolerance and the High Commissioner on National Minorities.”).

Helsinki Commission.<sup>210</sup> The goals of this commission are to ensure that the member nations of the OSCE are in compliance with the Helsinki Accords, as well as to advance “comprehensive security through promotion of human rights, democracy, and economic, environmental, and military cooperation in the [fifty-seven] nation OSCE region.”<sup>211</sup>

Looking specifically at the tolerance and non-discrimination branch of the OSCE, the Helsinki Commission has incorporated initiatives to collect data on hate speech and hate crimes.<sup>212</sup> In the U.S., the Helsinki Commission advocated for a U.S.-EU Joint Action Plan to combat prejudice and discrimination.<sup>213</sup> When comparing the commission’s goals with current U.S. law, there is a clear frustration of the OSCE’s purpose. The disallowance of laws against hate speech indicates that the commission is unable to do its job of promoting said laws, and thus unable to properly cooperate with the OSCE’s goals. This same issue can be seen regarding the U.S.’s involvement in Interpol, where maintaining the current hate speech standard would prevent the U.S. National Central Bureau from being able to implement Interpol’s hate speech policy, as seen in the Repository.

One possible solution for relieving the frustration is to have U.S. law apply differently for domestic and international issues, where U.S. citizens and domestic speech have greater protection than extraterritorial speech.<sup>214</sup> To do so would cause inconsistent and confusing application of the law, which is especially problematic when dealing with issues of high constitutional importance, as was seen regarding issues of habeas corpus and

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210. *About CSCE: Frequently Asked Questions*, COMM’N SEC. & COOPERATION EUR., <https://www.csce.gov/about-csce/our-structure/frequently-asked-questions> (last visited Mar. 25, 2019) (“The Helsinki Commission monitors and encourages compliance with the Helsinki Final Act and other OSCE commitments by strengthening human rights monitoring, defending those persecuted for acting on their rights and freedoms, and ensuring that compliance with Helsinki provisions are given due consideration in U.S. foreign policy.”).

211. *About the Commission on Security and Cooperation in Europe*, COMM’N SEC. & COOPERATION EUR., <https://www.csce.gov/about-commission-security-and-cooperation-europe> (last visited Dec. 20, 2017).

212. *Tolerance and Non-Discrimination*, *supra* note 202; see *About the Commission on Security and Cooperation in Europe*, *supra* note 211.

213. The U.S.-EU Joint Action Plan was proposed in a 2016 federal bill. The provisions establishing the Joint Action Plan were not incorporated into the enacted legislation. See S. 1635, 114th Cong. § 133 (2016); Act of December 16, 2016, Pub. L. No. 114-323, 130 Stat. 1905 (2016).

214. Timothy Zick, *Territoriality and the First Amendment: Free Speech at - and Beyond - Our Borders*, 85 NOTRE DAME L. REV. 1543, 1549 (2010) (“With regard to citizens, although First Amendment rights have not frequently been enforced extraterritorially the assumption is that the First Amendment formally applies to expressive activities beyond U.S. borders. By contrast, aliens abroad are presumed not to enjoy First Amendment rights. Thus, although they favor exportation of First Amendment norms in general, policymakers have been reluctant to acknowledge that First Amendment limitations apply extraterritorially.”).

the law of war.<sup>215</sup> If instead the U.S. adopted an internationally accepted standard, then the U.S. could better cooperate on this issue abroad while at the same time maintain consistent approaches of legal application. Therefore, the historical argument promoted by Justice Scalia would not apply here since the issue of hate speech is no longer of purely domestic policy, but also of maintaining consistent application on an international level.

## V. CONCLUSION

Interpol's standard is a highly successful and adoptable tool for the U.S. Yet, how much do the above arguments matter if President Trump is unwilling to acknowledge that a problem exists? His constant use of discriminatory rhetoric is a promotional influence for hate speech. If Congressional-majority support for President Trump is also considered, then a unified policy against hate speech will probably not come up soon.

Even with this being the case, positive changes in the law can still come about through precedents. It was shown above that the Court can look to international law and custom for its legal decisions, and how the Court has a tight control over the constitutionality of the First Amendment regarding how hate speech can be controlled.

At the same time, *Brown v. Board of Education* shows how the courts can start the process of creating progressive change in law and policy in the face of animosity by the other sectors of government.<sup>216</sup> Given this, it is clear that the Courts have the power to sway social and political opinion upon this issue if the Interpol standard is adopted. Therefore, the necessary changes can happen sooner if greater consideration is given to the hate speech problem.

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215. *Hamdan v. Rumsfeld*, 548 U.S. 557, 585-89 (2006) (finding that the Court should not refuse habeas corpus relief for Hamdan's military trial because the necessity of military discipline was not founded for a potential terrorist (a non-service member), and the fairness of military proceedings was not founded in this case, where the Constitution seeks to protect the rights of due process even for non-citizens).

216. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 489 (1954); see *History: Brown v. Board of Education Re-enactment*, U.S. CTS, <http://www.uscourts.gov/educational-resources/educational-activities/history-brown-v-board-education-re-enactment> (last visited Dec. 20, 2017).

# THE FOREIGN AGENTS REGISTRATION ACT IN THE AGE OF THE RUSSIAN FEDERATION: COMBATING INTERFERENCE BY RUSSIAN MEDIA IN THE UNITED STATES

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## INTRODUCTION

The media and the press provide essential avenues to inform the public, establish social unity and build trust between citizens and political figures. Western ideologies tend to regard these functions as essential to democracy, in part because they impose an obligation on news media to serve as political watchdogs, overseeing government action.<sup>1</sup> Since “wave[s] of political revolution” tend to follow technological advances that enable the spread of ideas, governments interested in preserving political dominance benefit from control over the information circulated to ensure the public views only information favorable to the state. Today, news and other media outlets, whether in print, over broadcast radio or television, or online, provide especially effective avenues for influencing public opinion.<sup>2</sup> Moreover,

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1. Roy Peled, *Sunlight Where it's Needed: The Case for Freedom of Medial Information*, 7 SW. J. INT'L MEDIA & ENTMT'L L. 65, 76 (2017) (“Freedom of Press itself is guaranteed in democracies because of the important role of the press as a monitoring mechanism, a watchdog to those in power.”); see also Peled, *supra*, at 68 (“inflict harm on the service provided by the press, compromise its standards, taint its content, and you have harmed social unity[.]”). Thomas Jefferson famously stated in defense of the press that:

[T]he basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter.

Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), in MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON, II, 84, 85 (Thomas Jefferson Randolph ed., Charlottesville, F. Carr & Co. 1829).

2. Social and governmental structures in Norway, Sweden, Russia, France, and the American Colonies, as well as other revolutions, such as the Protestant Reformation, followed the invention of the printing press. In each case, the spread of ideas through printed material led to the downfall of the then-in-power political regimes. This pattern demonstrates that governments interested in maintaining power have a strong interest in maintaining the status quo. Stanislav Getmanenko, Comment, *Freedom from the Press: Why the Federal Propaganda Prohibition Act of 2005 is a Good Idea*, 114 PENN. ST. L. REV. 251, 259-60 (2009) (citing HEINZ LUBASZ, REVOLUTIONS IN MODERN EUROPEAN HISTORY (1966); W. CHAMBERS, FRANCE, ITS HISTORY AND REVOLUTIONS (1873); BYRON J. NORDSTROM, THE HISTORY OF SWEDEN (2002); R. NISBET BAIN, SCANDINAVIA, A POLITICAL HISTORY OF DENMARK, NORWAY AND SWEDEN FROM 1513 TO 1900 (1905); MERRILL JENSEN, THE FOUNDING OF A NATION, 1763-1766 (1968)).

because information is easily communicated globally over the Internet, instances of State corruption and human rights violations are increasing more difficult to shield from the international community, and consequently, are more likely to be met with general public condemnation and possible intervention by organizations such as the United Nations. Thus, the news and the media is a more effective political tool than governmental or military force because, as revolutionary linguist and political activist Noam Chomsky explained, “when you can’t control people by force, you have to control what people think[.]”<sup>3</sup>

Practices of past and present-day Russian governments accumulated to form a highly illustrative study in how a government can shape political narratives by controlling information received by the public and, most importantly for this article, by concealing its command over that information.<sup>4</sup> A full account of Russia’s political and social evolution, while remarkable, is too vast to cover in detail here. However, three practices perfected by the various Russian regimes – defamation liability for news and media actors, financial takeover and ownership of news and media organizations, and deployment of covertly-controlled news and media internationally – gave way to Russian-regulated information outlets in the United States for which U.S. law provides no oversight.

In the United States, the Foreign Agents Registration Act of 1938 (FARA) is one of the only means of regulating foreign influences accomplished by domestic actors.<sup>5</sup> Passed in 1938, FARA was Congress’ response to Nazi propoganda disseminated in the U.S. during World War II that sought to undermine American democracy.<sup>6</sup> As amended, the Act now requires agents engaged in political activity on behalf of a foreign principal to register with the Department of Justice (DOJ) and submit any

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3. PETER WINTONICK & MARK ACHBAR, *MANUFACTURING CONSENT* 43 (Mark Achbar ed., 1994). Noam Chomsky explains that the “manufacture of consent” is essentially the creation of “necessary illusion.” See *MANUFACTURING CONSENT: NOAM CHOMSKY AND THE MEDIA* (Humanist Broadcasting Foundation 1992), discussed in Getmanenko, Comment, *supra* note 2, at 254.

4. Irina Naoumova et al., *Informal Instruments of Formal Power: Case of Russian Mass Media*, 6 *INT’L BUS.: RES., TEACHING, & PRAC.* 96, 97-99 (2012) (explaining that corrupt mass media limits opportunities for social change). The authors assert that Russian powers have traditionally used a variety of formal and informal pressures that limited its opportunities for political change. *Id.*

5. Getmanenko, Comment, *supra* note 2, at 279 (noting that, in light of First Amendment protections, “a regulatory framework forbidding political propoganda is largely nonexistent. However, [FARA] is a rare example of an effectual, although somewhat imperfect and antiquated, legislative response.”).

6. *Id.*

informational material intended for dissemination to the DOJ for review.<sup>7</sup> While the Act does not authorize the DOJ to prohibit or deny dissemination of such material, the DOJ may demand that the agent place a “conspicuous statement” on the materials indicating the author’s ties to a foreign principal.<sup>8</sup> In *Meese v. Keene*, the Supreme Court found that this disclosure requirement not only complied with the First Amendment but advanced free speech by demanding more information.<sup>9</sup>

Unfortunately, it remains unclear how to interpret the formed and the degree of “control” that is required before an agent is subject to FARA’s registration requirements.<sup>10</sup> Although FARA does not exempt indirectly controlled agents, in practice a foreign principal generally must exercise direct control over an agent’s activities in the U.S.<sup>11</sup> Because organizations like Russian-based media entities RT and Sputnik were indirectly controlled by the Russian government, RT and Sputnik successfully evaded DOJ oversight despite both entities maintaining close financial and political ties to the Russian government.<sup>12</sup> To account for future agents and principals similarly evading FARA, Congress must explicitly define “control” to include a bright-line approach to aid the FARA Enforcement Unit in its efforts to identify agents operating under indirect or obscured control of

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7. Foreign Agents Registration Act of 1938, 22 U.S.C. §§ 611-621 (2012); U.S. DEP’T OF JUSTICE, JUSTICE MANUAL: CRIMINAL RESOURCE MANUAL OF THE FOREIGN AGENTS REGISTRATION ACT ENFORCEMENT (2017) [hereinafter U.S. DEP’T OF JUSTICE MANUAL]; David Danner, *Propagandists by Statute: Reviewing the Foreign Agents Registration Act in the Post-Cold-War World*, 16 MEDIA L. & PRAC. 44, 44-45 (1995).

8. Foreign Agents Registration Act of 1938, 22 U.S.C. § 614(b) (2012); see 22 U.S.C. § 611 (providing that the policy and purpose of the Act is to “protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities.”).

9. *Meese v. Keene*, 481 U.S. 465, 481 (1987) (“Congress did not prohibit, edit, or restrain the distribution of advocacy materials in an ostensible effort to protect the public from conversion, confusion, or deceit. To the contrary, Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda . . . . By compelling some disclosure of information and permitting more, the Act’s approach recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful, and accurate speech.”).

10. Mark B. Baker, *Updating the Foreign Agents Registration Act to Meet the Current Economic Threat to National Security*, 25 TEX. INT’L L.J. 23, 27 (1990).

11. Samantha Laufer, Comment, *A Difference in Approach: Comparing the US Foreign Agents Registration Act with Other Laws Targeting Internationally Funded Civil Society*, 19 INT’L J. NOT-FOR-PROFIT L. 5, 7-8 (2017).

12. See NAT’L INTELLIGENCE COUNCIL, OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, ICA 2017-01D, INTELLIGENCE COMMUNITY ASSESSMENT: ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS (2017) [hereinafter NAT’L INTELLIGENCE COUNCIL].

foreign principles. This type of definite standard of “control” is necessary to qualify actors like RT and Sputnik as agents of foreign principles under FARA, which is required in order to allow the DOJ to compel compliance with the Act’s registration, monitoring and disclosure provisions.

This article will first explain FARA’s theoretical framework and its failure to account for agents indirectly controlled by foreign governments and will draw on past proposed amendments to advance new amending language. Second, by demonstrating how the Russian Federation’s defamation laws and ownership of national media entities established its control over public opinion, this article will show how these practices rendered FARA, as currently written, incapable of identifying Russian-led RT and Sputnik as foreign agents as the Russian Federation expanded its media operations internationally. Third, this examination will conclude that FARA must provide a more explicit measurement of control, integrating ownership as well as management considerations, by demonstrating how such language, if in force, would have successfully identified RT and Sputnik. Overall, this article aims to propose several amendments to the act that would empower the DOJ to monitor and label foreign influences, RT and Sputnik as illustrative examples of the benefits that a more bright-line standard would provide with regard to other similar covert agents of foreign principles.

#### I. IDENTIFYING FOREIGN AGENTS: HOW U.S. ACTORS OPERATING UNDER FOREIGN DIRECTION EVADE FARA AND DOJ OVERSIGHT

FARA, one of the only frameworks for monitoring activities of foreign influences acting through domestic actors, was designed to “neutralize the deceptive power of foreign agents.”<sup>13</sup> Enacted in 1938, FARA was Congress’ attempt to combat Nazi propaganda influencing U.S. policy and subverting the democratic process.<sup>14</sup> FARA provides registration, monitoring and disclosure requirements to help U.S. voters make informed appraisals of information in light of potential foreign interests and biases. Through these mechanisms, FARA ensures that the public is not “deceived

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13. Randall H. Johnson, *The Foreign Agents Registration Act: When is Registration Required?*, 34 S.C.L. REV. 687, 711 (1983).

14. H.R. REP. NO. 75-1381, at 1-2 (1937).

Incontrovertible evidence had been submitted to prove that there are many persons in the United States representing foreign governments or foreign political groups, who are supplied by such foreign agencies with funds and other materials to foster un-American activities, and to influence the external and internal policies of this country, thereby violating both the letter and the spirit of international law, as well as the democratic basis of our own American institutions of government.

*Id.*

by the belief that the information comes from a disinterested source.”<sup>15</sup> As Congressman Emanuel Celler stated, FARA focuses the “spotlight of pitiless publicity” on the activities of foreign agents.<sup>16</sup>

In *Viereck v. United States*, the Supreme Court elaborated that FARA is founded on the assumption that only adequately informed people may be trusted to distinguish truth and falsity.<sup>17</sup> As such, FARA does not authorize the DOJ to prohibit agents from disseminating information. Instead, agents of foreign principals operating in the U.S. must register with the DOJ as agents.<sup>18</sup> A registrant must then disclose the ties, financial or otherwise, that it maintains with the foreign principal to the DOJ.<sup>19</sup> Based on this information, the DOJ may require that the agent submit informational materials for review and, if deemed necessary, the Attorney General may require that the agent include a conspicuous statement on those materials to notify the public of the agent’s relationship to a foreign government.<sup>20</sup> Thus, as the Supreme Court held, the Act fosters free speech by providing more information, specifically regarding the foreign interests that may be motivating the agent in disseminating such information, so that the public

15. *Viereck v. United States*, 318 U.S. 236, 251 (1943) (Black, J., dissenting) (agreeing that FARA “[rests] on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source.”); see S. COMM. ON FOREIGN RELATIONS, 95TH CONG., THE FOREIGN AGENTS REGISTRATION ACT (Comm. Print 1977). (“[FARA] presuppose[s] that the public interest can best be served through disclosure and consequent publicity concerning persons and activities intended to influence governmental actions.”).

16. H.R. REP. NO. 75-1381, at 2 (1937) (“We believe that the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda. We feel that our people are entitled to know the sources of any such efforts, and the person or persons or agencies carrying on such work in the United States.”).

17. *Viereck*, 318 U.S. at 251.

18. Foreign Agents Registration Act of 1938, 22 U.S.C. § 612(a) (2012). FARA states that: No person shall act as an agent of a foreign principal unless he has filed with the Attorney General a true and complete registration statement and supplements thereto as required by subsections (a) and (b) of this section or unless he is exempt from registration under the provision of this subchapter. Except as hereinafter provided, every person who becomes an agent of a foreign principal shall, within ten days thereafter, file with the Attorney General, in duplicate, a registration statement, under oath on a form prescribed by the Attorney General.

*Id.*

19. 22 U.S.C. § 612(a)-(b).

20. 22 U.S.C. § 614(b).

It shall be unlawful for any person within the United States who is an agent of a foreign principal and required to register under the provisions of this subchapter to transmit . . . any informational materials for or in the interests of such foreign principal without placing in such informational materials a conspicuous statement that the materials are distributed by the agent on behalf of the foreign principal . . . . The Attorney General may by rule define what constitutes a conspicuous statement for the purposes of this subsection.

*Id.*

can develop a fully informed opinion about the information conveyed by the agent.<sup>21</sup>

However, FARA consistently fails to accomplish its noble purpose, principally because the DOJ struggles to identify actors that qualify as agents as defined by the statute. Any person required to register as an agent is subject to the Act's reporting and disclosure requirements regarding informational materials.<sup>22</sup> But, because the DOJ must establish that an agency relationship exists in order to trigger FARA's registration requirements, actors who obscure the agency relationship evade the registration requirement and may disseminate information without submitting the material for review from the DOJ and without a statement identifying the agent's foreign ties.<sup>23</sup> The difficulty the DOJ faces in identifying agents stems from the obscure definition of "control" under the Act, a problem consistently addressed by Congress.<sup>24</sup> As a result, the lack of specificity leaves the DOJ without a framework to identify actors qualifying as agents of a foreign principal. In addition, even if the DOJ identifies an agent that has failed to register, FARA offers few and ineffective means of compelling that agent to register under the Act.<sup>25</sup>

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21. *Meese v. Keene*, 481 U.S. 465, 480-81 (1987) ("Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda . . . . By compelling some disclosure of information and permitting more, the Act's approach recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful, and accurate speech.").

22. *See* 22 U.S.C. § 614(b).

23. *Attorney Gen. of U.S. v. Irish N. Aid Comm.*, 530 F. Supp. 241, 256 (S.D.N.Y. 1981), *cert. denied* 409 U.S. 1080 (1972) ("It is clear from the legislative history that before requiring an organization to register as an agent of a specific foreign principal, the Attorney General must establish the existence of an agency relationship."); *see Baker, supra* note 10 (explaining that subsidiary companies of foreign agents pose a particular difficulty for FARA identification methods).

24. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT OF THE NATIONAL SECURITY DIVISION'S ENFORCEMENT AND ADMINISTRATION OF THE FOREIGN AGENTS REGISTRATION ACT, ii (2016) [hereinafter OFFICE OF THE INSPECTOR GEN. AUDIT] ("[A] major difficulty [with FARA] is a lack of authority to compel the production of information from persons who may be agents.").

25. *Id.* at 5-6.

The FARA Unit attempts to identify and make contact with individuals or entities that may have an obligation to register under FARA. Identification is made primarily through review of a range of publications, web sites, and [Lobbying Disclosure Act] filings for indications of a connection between a potential agent and a foreign principal. Potential registrants may also be identified through review of existing registrant information, or through referral from other government offices or agencies, or from the public.

*Id.* at 13 (explaining typical identification procedures employed by the FARA enforcement unit).

*A. FARA Overview: A Useful but Flawed Framework for Monitoring Political Influence by Foreign Actors with Interests in Shaping U.S. Policy*

FARA requires individuals “doing political or advocacy work on behalf of foreign entities in the United States to register with the Department of Justice and to disclose their relationship, activities, and disbursements in support of their activities.”<sup>26</sup> Under the Act, a foreign principal includes a foreign government or foreign political party, a person who is neither a citizen of nor domiciled in the United States, or an association or business having its principal place of business in a foreign country. A party is an agent of a foreign principal if it “acts at the order, request, or under the direction or control of a foreign principal” and engages in political activities, public relations, financial contributions, or representations before government officials or agencies on behalf or in representation of the principal.<sup>27</sup> While FARA provides several exceptions to the requisite agency relationship,<sup>28</sup> any party qualified as an agent of a foreign principal must register under FARA and is then subject to the Act’s filing and disclosure requirements.<sup>29</sup> The government must, however, establish the agency relationship before any of FARA’s mandates attach to a domestic actor.

Today, FARA’s registration requirements do not apply unless (1) an agent-principal relationship exists, and (2) the agent undertakes political activities, public relations, financial contributions, or representations before

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26. *Foreign Agents Registration Act: An Overview*, CONG. RES. SERV. (Feb. 5, 2019), <https://fas.org/sgp/crs/misc/IF10499.pdf>.

27. Foreign Agents Registration Act of 1938, 22 U.S.C. § 611 (c)(1). FARA defines an agent of a foreign principle as any person who acts at the “order, request, or under the direction or control, of a foreign principal” or whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal” and “who directly or through any other person” engages in political activities in the U.S. for or in the interests of the foreign principle. *Id.*

28. FARA supplies exceptions for diplomatic or consular officers, officials of foreign governments, and persons qualified to practice law. 22 U.S.C. § 613(a)-(h). Importantly, FARA also excludes news or press organizations from qualifying as agents of a foreign principal *provided* that the organization is “at least [eighty percent] beneficially owned by, and its officers and directors, if any, are citizens of the United States[.]” In addition, to be exempt, news, press, or other publications may not be “owned, directed, supervised, controlled, subsidized, or financed” by a foreign principle and none of the organization’s policies may be determined by any foreign principal or any agent of a foreign principal. 22 U.S.C. § 611(b)-(d).

29. 22 U.S.C. § 614(a) (“Every person within the United States who is an agent of a foreign principal and required to register under the provisions of this subchapter and who transmits . . . any informational materials for or in the interests of such foreign principal [must] file with the Attorney General two copies thereof [within forty-eight hours].”). See *Foreign Agents Registration Act: An Overview*, *supra* note 26, for an explanation of the Act’s registration requirements. See U.S. DEP’T OF JUSTICE, *Advisory Opinion Concerning Application for the Foreign Agents Registration Act* (Sept. 7, 2018), <https://www.justice.gov/nsd-fara/page/file/1092646/download>.

Government officials or agencies on behalf or in representation of the principal.<sup>30</sup> In its original form, FARA only required persons employed to disseminate political propaganda for foreign principals to register with the Federal Government.<sup>31</sup> That is, whereas the original Act required an actor employed by a foreign principal to disseminate propaganda on its behalf register with the government, FARA's 1966 amendments altered the "agent of a foreign principal" definition to mean any person who acts at the "order, request . . . direction, or control" of a foreign principal.<sup>32</sup> When the 1966 amendments eliminated this employment criteria, the changes inadvertently lodged several impediments to FARA's enforceability as the new broader definition failed to substitute the employment standard with another "control" criteria.<sup>33</sup>

The new broad definitions created definitional loopholes which now allow otherwise qualified agents to evade the registration requirements. To illustrate, under the amended Act, even direct international funding is not enough to subject a U.S. agent acting to the Act's registration requirements,<sup>34</sup> unless such person or entity activities are substantially subject to a foreign entity's direction.<sup>35</sup> Moreover, the Act is silent as to what constitutes

30. 22 U.S.C. § 611(c)(1).

[A] party is an 'agent of a foreign principal' who must register under FARA if it acts 'at the order, request, or under the direction or control of a foreign principal' and engages within the United States in one of the following activities:

- (i) political activities for or in the interests of such foreign principal;
- (ii) public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal;
- (iii) solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal; or
- (iv) represents the interests of such foreign principal before any agency or official of the Government of the United States[.]

*Id.*; see Elena Postnikova, *Agent of Influence: Should Russia's RT Register as a Foreign Agent?*, ATLANTIC COUNCIL 6, 8 (2017); U.S. DEP'T OF JUSTICE, *Advisory Opinion Concerning Application for the Foreign Agents Registration Act* (Sept. 7, 2018) (quoting 22 U.S.C. § 611(c)).

31. "Political propaganda" was removed from the Act in 1995 and replaced with the term "informational materials." Foreign Agents Registration Act of 1938, Pub. L. No. 104-65, sec. 9(1), §§ 611(j), 614(a)-(c), 109 Stat. 691, 669-700 (codified as amended at 22 U.S.C. § 611).

32. Foreign Agents Registration Act of 1938, Pub. L. No. 75-583 (codified as amended at 22 U.S.C. §§ 611-622). The original act required "persons employed by agencies to disseminate propaganda in the United States" to register. *Id.*

33. See OFFICE OF THE INSPECTOR GEN. AUDIT, *supra* note 24, at 9; Philip J. Perry, *Recently Proposed Reforms to the Foreign Agents Registration Act*, 23 CORNELL INT'L L.J. 133, 137 (1990).

34. Laufer, *supra* note 11, at 8 ("A principal-agent relationship is not created simply because one party agrees to provide funding to a second party.").

35. The direction or control language has been interpreted to mean that the relationship must be one that "substantially obligates the agent to the foreign principal" to conclude that an individual is acting as an agent of the foreign principal. *Inquiry into the Matter of Billy Carter and Libya: Hearings Before the Subcomm. to Investigate the Activities of Individuals Representing the Interests*

substantial direction or control. As such, FARA provides little guidance regarding how the DOJ is to identify parties or agents under the control of a foreign principal, let alone an agent of an agent, or subsidiary of a subsidiary.<sup>36</sup>

FARA wholly fails to account for this type of indirect control and the absence of clear legal standards explains the DOJ's "lack of spirited enforcement."<sup>37</sup> With the exception of this peak in registration between 1985 and 1993, the number of registered agents remains essentially identical to the agents registered in the 1950s.<sup>38</sup> Further, even in the years in which registrations were highest, the number of registered agents account for a small fraction of the agents that are, or should have been, subject to the Act. From 1942 until 1966, agent registrations increased slowing, and, though registrations fell below those in 1966 until 1974, the 1966 amendments produced substantially higher active registrations from 1975 until 1998. Active registrations peaked in 1986, with 842 active registrants, and FARA saw its second-highest count in 1991, with 788 active registrants.<sup>39</sup> Still, even at its most effective, the agents registered accounted for only a small fraction of parties actually subject to the registration requirements,<sup>40</sup> and only half of those registered agents accurately and fully disclosed their activities.<sup>41</sup> After 1991, registration declined, and agent registration, until as recently as 2018, remains below the number of agents registered at the time the 1966

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*of Foreign Governments of the S. Committee on the Judiciary*, 96th Cong. 701 (1980) (statement of Phillip B. Heymann, Assistant Attorney General, Department of Justice).

36. Joseph E. Pattison & John L. Taylor, *Legislating Away the Mask: A Guide to the Foreign Agents Registration Act*, 5 DIST. L. 39, 44 (1980) ("[The commercial exemption], exempting 'other activities not serving predominantly a foreign interest,' often covers the activities of agents for U.S. subsidiaries of foreign companies or, similarly, foreign subsidiaries of U.S. companies."); Baker, *supra* note 10 ("FARA's definition of a foreign principal does not include subsidiaries incorporated in the United States with their principal places of business within the United States, so an agent of such a subsidiary is not an agent of a foreign principal.").

37. Jahad Atieh, Comment, *Foreign Agents: Updating FARA to Protect American Democracy*, 31 U. PA. J. INT'L L. 1051, 1058 (2010); see OFFICE OF THE INSPECTOR GEN. AUDIT, *supra* note 24, at 8 (finding seven criminal cases brought between 1966 and 2015, only one of which resulted in a conviction).

38. *Id.*

39. U.S. Dep't of Justice, 1986 U.S. ATT'Y GEN. ANN. REP 3 ("During the calendar year 1986, the Department received 155 new registration statements and terminated 98 registrations, leaving a total of 824 active registrations on file as of December 3., 1986."); see OFFICE OF THE INSPECTOR GEN. AUDIT, *supra* note 24, at I, 5.

40. *Modification of the Foreign Agents Registration Act of 1938: Hearing Before the Subcomm. on Administrative Law & Governmental Relations of the H. Comm. on the Judiciary*, 102d Cong. 31 (1991) (statement of Rep. Dan Glickman) (emphasizing that the 900 registrants in 1991 represented "only a fraction of the total [persons] who should register under FARA"); see Danner, *supra* note 7, at 45 (quoting Rep. Glickman, *supra*).

41. Danner, *supra* note 7, at 45.

amendments were enacted, more closely resembling the registrations reported to Congress from 1942 to 1966.<sup>42</sup>

The DOJ's inability to enforce the Act explains why there were only 428 active registrants on file with the DOJ in 2018;<sup>43</sup> compared to the 517 active registrants in 1965, 502 registrants in 1966, and 470 in 1967 – the period immediately before and after the pivotal 1966 amendments.<sup>44</sup> Strangely, the number of agents registered with the DOJ from 2000 to 2018 is nearly identical to those registered in the 1950s and 1960s despite enormous advances in communication technologies, business globalization, and media prevalence.<sup>45</sup> If the Act functioned properly, and in light of significant communication and information technologies, the number of active registrants today surely would neither be equal to those registered sixty years ago nor less than those reported when Congress passed the 1966 amendments. Thus, a new approach is necessary to prevent the Act from becoming obsolete entirely.

#### *B. Prior Attempts to Fix FARA: Possible Bright-Line Solutions to the Act's Long-Standing Definitional Issues*

Concern that FARA is unable to account for intermediaries and subsidiaries is not a new issue. Since FARA's inception, Congress discussed the Act's failure to set bright-line guidelines specifying which actors must register as agents.<sup>46</sup> In an effort to boost enforcement, Congress began amending FARA in 1939. Just one year after the Act's enactment. Its most significant changes came in 1966 to account for increasing foreign influence over economic policies.<sup>47</sup> Following the 1966 amendments, Congress continued to investigate FARA's ongoing deficiencies in 1974, 1977, 1980, 1988, and even as recently as 2017.<sup>48</sup> Despite clear failures to enforce the registration requirements and unsuccessful attempts to set bright-line criteria

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42. U.S. Dep't of Justice, 1942-2018 U.S. ATT'Y GEN. ANN. REP.; see OFFICE OF THE INSPECTOR GEN. AUDIT, *supra* note 24, at I, 5. The reports to Congress containing information relating to registration statistics are available at <https://www.justice.gov/nsd-fara/fara-reports-congress>.

43. *Id.*

44. *Id.*

45. The number of registrants from 2000 to 2018 is identical to those registered in the 1950s and 1960s. *Id.*

46. Perry, *supra* note 33, at 144-45.

47. *Id.* at 133-34.

48. U.S. GEN. ACCOUNTING OFFICE, B-177551, Report to the Committee on Foreign Relations: Effectiveness of the Foreign Agents Registration Act of 1938 (Mar. 13, 1974), <http://archive.gao.gov/f0302/095964.pdf> ("Since 1938, the Act has been amended several times, including a general revision in 1942 and major amendments in 1966.").

of control, the loopholes created in the 1966 amendments remain viable avenues for foreign governments to interfere in United States politics without DOJ oversight.

In 1965, Chairman James Fulbright investigated FARA's enforcement and submitted several recommended amendments to improve enforcement, in part because he was concerned with FARA's inability to cover "more than one intermediate link in the chain [in which the] relationship between principal and his intermediary is itself indirect."<sup>49</sup> To curtail evasion by these intermediate links,<sup>50</sup> Fulbright suggested a direction and control standard in which an agent of the subsidiary, as well as any agents employed to carry out the functions subsidized, would be deemed an agent of a foreign principal.<sup>51</sup> Though Congress increased the class of people required to register,<sup>52</sup> the

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49. To curtail the use of subsidies as a means of avoiding the Act's requirements, Senator Fulbright suggested that:

[P]roposed [1966] amendment would also make a number of changes in the definition of the term 'agent of a foreign principal' as it relates to the problem of indirect control exerted by foreign principals over their agents. It would cover the possibility of more than one intermediate link in the chain, providing for cases where the relationship between the foreign principal and his intermediary is itself indirect. In situations where subsidies are used as a means of control over an agent, the proposed amendment would provide that a major portion of the funds of a given undertaking would have to be traceable to the foreign principal in order for the agent of the recipient to be required to register, unless he is exempt.

JAMES W. FULBRIGHT, FOREIGN AGENTS REGISTRATION ACT AMENDMENTS, S. REP. No. 89-143, at 6-7 (1965).

50. *Id.* at 7 ("The proposed amendment would make it clear that mere receipt of a bona fide subsidy not subjecting the recipient to the direction or control of the donor does not require the recipient of the subsidy to register as an agent of the donor. However, the amendment would insure, in order to curtail the use of subsidies as a means of avoiding the act's requirements, that, where the foreign principal subsidizes a domestic person to the extent that the subsidy involves . . . direction and control of the activities subsidized, then the domestic person or group as well as any agents employed to carry out the functions subsidized will be treated as acting for the foreign principal.").

51. *Id.* ("The proposed amendment would make it clear that mere receipt of a bona fide subsidy not subjecting the recipient to the direction or control of the donor does not require the recipient of the subsidy to register as an agent of the donor. However, the amendment would insure, in order to curtail the use of subsidies as a means of avoiding the act's requirements, that, where the foreign principal subsidizes a domestic person to the extent that the subsidy involves . . . direction and control of the activities subsidized, then the domestic person or group as well as any agents employed to carry out the functions subsidized will be treated as acting for the foreign principal.").

52. FARA's 1966 amendments changed the definition of "agent of a foreign principal" to mean:

any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal[.]

Foreign Agents Registration Act of 1938, Pub. L. No. 89-486, 80 Stat. 244 (1966) (codified as amended at 22 U.S.C. § 611(c)).

1966 amendments failed to account for the intermediary link loophole the Chairman identified.<sup>53</sup>

Again in 1988, as a direct response to the Toshiba scandal of 1987, which again brought attention to FARA's inadequacies, Senator John Heinz proposed several amendments.<sup>54</sup> Toshiba Corporation, a subsidiary of Toshiba Machine Co., began selling submarine propellers to the Soviet Union, even though these submarine propellers were included on the Coordinating Committee for Multilateral Security Control's international list of prohibited exports.<sup>55</sup> When the sales became public in 1987, Congress banned all imports from Toshiba from anywhere between two to five years.<sup>56</sup> This ban prompted wholly-owned Toshiba subsidiary Toshiba America to hire advocates on behalf of parent-company Toshiba.<sup>57</sup> As a result of Toshiba's lobbying, Congress imposed only a three-year restriction on government purchases of Toshiba products.<sup>58</sup>

Senator Heinz was primarily concerned that Toshiba's subsidiary successfully mitigated the initial sanctions because congressmen had insufficient notice of the Toshiba America's foreign interests.<sup>59</sup> The Senator thus proposed reforms to address companies like Toshiba that fail to register lobbying efforts to affect U.S. trade policy.<sup>60</sup> Recognizing the potential for registration evasion, Senator Heinz proposed redefining "agent" and "principal" to specify exactly who should register under FARA.<sup>61</sup> Specifically, Senator Heinz proposed that "principal" should include domestic companies sponsored by foreign entities, pointing to FARA's "vague approach to controlled subsidiaries" as a significant impediment to

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53. Atieh, Comment, *supra* note 37, at 1058-59 ("[W]hile these amendments did much to increase the class of people who must register, they also simultaneously created many loopholes, including exemptions for attorneys, domestic subsidiaries of foreign corporations, and activities 'not serving [a] predominately . . . foreign interest.' Since FARA has not undergone a major overhaul since these amendments, all of the major loopholes that exist from this version are essentially still in effect today.") (quoting U.S. GEN. ACCOUNTING OFF., Effectiveness of the Foreign Agents Registration Act of 1938, as Amended, and its Administration by the Department of Justice 6 (1974)) (citing Michael I. Spak, *America for Sale: When Well-Connected Former Federal Officials Peddle Their Influence to the Highest Foreign Bidder*, 78 KY. L.J. 237, 248-49 (1990)).

54. CONG. REC. 28,862 (1988) (statements of Senator Heinz); Baker, *supra* note 10, at 28-32, 37.

55. Baker, *supra* note 10, at 30.

56. *Id.*

57. *Id.* at 31.

58. *Id.* at 31-32.

59. *See id.* at 31; Perry, *supra* note 33, at 146.

60. *See* Perry, *supra* note 33, at 145-46.

61. Atieh, Comment, *supra* note 37, at 1085.

its enforcement.<sup>62</sup> Heinz proposed defining “control” to include over 50% foreign ownership of a U.S. entity and less than 20% as presumptively not controlling.<sup>63</sup> Ultimately, however, Senator Heinz bright-line initiative failed.<sup>64</sup>

In 2017, Senator Shaheen introduced the Foreign Agents Registration Modernization and Enforcement Act (FMEA). The amended Act purports to “preserve the integrity of American elections” by providing the Attorney General with additional tools to investigate, identify, and prosecute foreign agents circumventing FARA’s registration requirements in order to influence domestic political processes.<sup>65</sup> While the recent proposal would improve FARA by means of requiring disclosures of social media and email, the 2017 amendments still struggle to bring foreign actors like RT and Sputnik under the Act because FMEA similarly does not account for control through intermediaries.

Russia has mastered media control without overt coercion – methods which only bright-line rules like those offered by Senator Heinz can bring intermediary links-in-the-chain like RT and Sputnik under FARA’s screening procedures. In addition to adopting Senator Heinz’ bright-line control standard, the DOJ should investigate ways governments have historically controlled agents.<sup>66</sup>

### *C. A Combined Approach to Enforcing FARA: Definitional Solutions and Practical Issues*

Several possible solutions to the DOJ’s identification and enforcement barriers, outlined in prior debates and amendment proposals, include increasing the FARA Enforcement Unit’s manpower, providing the DOJ with judicial enforcement mechanisms, and incorporating a bright-line agency standard in the Act itself. Though its definitional issues are complex, past proposals and initiatives provide solutions Congress may still adopt. First, and most importantly, Congress must narrow FARA’s concept of the agency relationship because the DOJ must first establish an agency relationship exists before compelling the agent to comply. Clearly the

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62. *Id.* at 1085-86; Perry, *supra* note 33, at 148-49 (citing 134 CONG. REC. S14,926 (daily ed. Oct. 6, 1988) (remarks by Senator Heinz)).

63. 134 CONG. REC. S. 14,926 (daily ed. Oct. 6, 1988) (remarks by Senator Heinz).

64. Charles Lawson, *Shining the Spotlight of Pitiless Publicity on Foreign Lobbyists? Evaluating the Impact of Lobbying Disclosure Act of 1995 on the Foreign Agents Registration Act*, 29 VAND. J. TRANSNAT’L L. 1151, 1168-69 (1996).

65. Foreign Agents Registration Modernization and Enforcement Act, S. 625, 115th Cong. (2017).

66. *See* Part I.B.1 (detailing the Russian Federations historical practice of controlling media).

employment standard of the original act was at least more effective than the current articulation. However, employment alone does not cover the range of methods a foreign principal may use to control an agent.<sup>67</sup>

Ownership percentage, proposed by Senator Heinz in 1988, combined with management authority are viable measurements in determining control. For instance, a New York district court determined that a parent company with a mere 25% ownership share that had ties to a foreign government did not satisfy the agency requirement.<sup>68</sup> The court explained the ownership share did not permit the shareholder to exercise control over the independent 75% shareholder. In addition, the majority shareholder's management position prevented the 25% owner from directing or controlling the defendant company. The court determined the company was not subject to foreign control because neither the majority shareholders nor its general managing agent were subject to the direction or control of the foreign intermediary.<sup>69</sup>

Another workable option is the proposed Repelling Encroachment by Foreigners into U.S. Elections (REFUSE) Act. The Act would set "two thresholds" of foreign ownership interest/funding: First, REFUSE would target foreign nationals not directly connected with foreign governments, but those which receive 20% of their total funding from foreign governments; and second, the Act would target foreign nationals directly connected with foreign governments and which receive only 5% of their total funding from the foreign government.<sup>70</sup> However, the REFUSE Act's bright-line rules would apply only to prohibit "election spending by foreign-influenced corporation . . . and organizations" under the Federal Election Campaign Act (FECA).<sup>71</sup> Regarding FARA, the REFUSE Act purports only to enhance FARA's enforcement by expanding the media considered "informational material" and by requiring the Attorney General to formulate "a comprehensive strategy to enforcement and administration."<sup>72</sup> Unclear is

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67. *See* Part II.

68. *Figli v. Fisheries Dev. Corp.*, 499 F. Supp. 1074, 1082 (S.D.N.Y. 1980).

69. *Id.* ("Neither FDC nor Gerson were therefore subject to the control of the Amorusos. A fair reading of the agreements compels the conclusion that Amfish, formed as an American general partnership for the construction and operation of American-built vessels, was under the management, direction and control of Gerson, its designated general managing agent and the principal stockholder of FDC.")

70. *See* Press Release, U.S. House of Representatives, Marcy Kaptur, Kaptur Introduces Bill to Boost Transparency and Reduce Influence of Foreign Money on American Democracy (June 27, 2018), <https://kaptur.house.gov/media-center/press-releases/kaptur-introduces-bill-boost-transparency-and-reduce-influence-foreign>.

71. *Id.*

72. *Id.* ("[Proposed section 207 would require] the Attorney General to promulgate final regulations for the implementation of a comprehensive strategy to improve enforcement and administration of FARA. Requires the Inspector General of the Department of Justice to review

why this proposed definition would not similarly apply to FARA's agency standard, which would itself aid the DOJ and the Attorney General in formulating a strategy to boost FARA's enforcement since definitional issues continue to be the Act's greatest hurdle.

The DOJ also needs more effective enforcement measures. Addressing practical barriers such as weak enforcement measures and staffing shortages will at least give FARA a more immediate boost in effectiveness. FARA authorizes the DOJ to seek injunctive remedies from a district court to compel an agent to comply with the Act.<sup>73</sup> However, the FARA Registration Unit needs more manpower to identify actors failing to register as agents before an injunction can be sought. In 2010, for example, the Unit employed only eight staff members, making it impossible to monitor not only the registered agents but also to investigate agent's failing to register.<sup>74</sup> As a result, the Unit "does not have the resources to undergo any investigations of fraudulent filings, let alone non-compliance altogether."<sup>75</sup>

FARA is a potentially powerful avenue for monitoring foreign influence particularly over public opinion, and it is unfortunate the Act has gone virtually unenforced at least since 1966. While FMEA proposals would update the Act to include technology not yet developed during the 1966 amendments, they fail to update the most problematic definitions: the 1966 vague standard of control. Bright-line ownership and management measures, like those proposed by Senator Heinz, the New York district court, and the REFUSE Act, would give the DOJ a guideline to identify agents subject to registration. Like Russia's legal and extra-legal methods used over the last several decades, the management standard would also help the DOJ identify obscure methods of control that direct ownership does not necessarily account for. While the definitional issues with its control standard may be more difficult to remedy, the DOJ's enforcement procedures and appropriate staffing of the FARA Unit serve as remedies that may at least give the Act a shot at achieving the democracy-preserving goal Congress envisioned in 1938.

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that comprehensive strategy and requires the Inspector General to issue a report to Congress on the results of that review.").

73. See Foreign Agents Registration Act of 1938, 22 U.S.C. § 618(f) (2012). FARA authorizes the Attorney General to seek an order requiring an agent to comply with the Act. *Id.*

74. Atieh, Comment, *supra* note 37, at 1068 (citing U.S. GEN. ACCOUNTING OFFICE, GOV'T ACCOUNTABILITY OFF., Post-Government Employment Restrictions and Foreign Agent Registration: Additional Action Needed to Enhance Implementation of Requirements 2-4 (2008); S. Comm. on Foreign Relations, 95th Cong., The Foreign Agents Registration Act 30 (Comm. Print 1977)).

75. *Id.*

## II. HISTORY OF RUSSIAN MEDIA: THE RUSSIAN GOVERNMENT'S METHODS TO CONTROL PUBLIC OPINION AND ITS CONTROL OF THE MEDIA

This section focuses on three factors that make Russian-based news and media outlets particularly First, media protection under the Soviet “duty to criticize” was not only eliminated after the collapse of the U.S.S.R. but produced a total paradigm shift, and even slightly critical publications exposed journalists, editorial boards, and media and news organizations and their owners to defamation suits by the newly established Russian Federation. Second, the Russian Federation inherited ownership of a significant number of news and media organizations, and subsequently obtained ownership of and control over nearly every other previously independent informational outlet through progressively hostile corporate take-overs. Finally, the Russian Federation now devotes significant assets and efforts to expanding its media operations on a global scale, and these outlets are subject to State oversight similar to Russia’s own media.

The Russian constitution expressly prohibits censorship of the press,<sup>76</sup> however, legal and financial advantages, specifically plaintiff-friendly defamation laws and media ownership, facilitate a high degree of state influence over public opinion. Media and news entities and individuals risk incurring defamation suits for criticizing the government and these media defendants often fail to establish a successful defense or fall into bankruptcy attempting to do so. In addition, direct and indirect control over nearly every media network<sup>77</sup> enables Russian authorities to selectively authorize or reject

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76. KONSTITUTSIYA ROSSIYSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 29 (Russ.). Translated, Article 29 states “The freedom of the mass media shall be guaranteed. Censorship shall be prohibited.”; see Frances H. Foster, *Information and the Problem of Democracy: The Russian Experience*, 44 AM. J. COMP. L. 243, 246 (1996) (“Throughout the post-Soviet era, the right to information has been established constitutional law in Russia. The Constitution of 1978, which remained in effect until December 1993, guaranteed each citizen the ‘right to seek, receive, and disseminate information freely.’ Likewise, the current Constitution stipulates that ‘[e]veryone has the right to seek, receive, pass on, produce, and disseminate information freely by any legal means.’”) (first quoting KONSTITUTSIYA RSFSR (1978) [KONST. RSFSR] [RSFSR CONSTITUTION] art. 43 ¶ 2 (Russ.), and then quoting KONST. RF, *supra*)).

77. According to Freedom House, “[t]he government controls, directly or through state-owned companies and friendly business magnates, all of the national television networks and many radio and print outlets, as well as most of the media advertising market.” *Freedom in the World 2018: Russia*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2018/russia> (last visited Jan. 17, 2019). The State specifically campaigns to control media, specifically television networks, because television “is regarded as the most effective medium for rapid dissemination of information” in modern Russia. Frances H. Foster, *Information and the Problem of Democracy: The Russian Experience*, 44 AM. J. COMP. L. 243, 278 n.220 (1996) (“Russian authorities have made a concerted effort to manage information in order to mold Russian populace into ‘democratic’ citizenry, loyal to ‘democratic’ leadership and reform program. In their campaign to transform public attitudes and behavior, they have placed particular emphasis on central control of mass media

certain publications that could be unfavorable to the State. As a result, the Russian Federation's legal and financial leverage provides strong incentives for journalists and media organizations to support rather than criticize the administration.<sup>78</sup>

Former President Boris Yeltsin's 1996 election and current President Vladimir Putin's 2000 election illustrate the real impact that manipulation of the media has over political results.<sup>79</sup> Prior to the 1996 election, Boris Yeltsin's administration led Russia in to serious economic turmoil, with significant "disintegration" of social welfare and health care systems.<sup>80</sup> Despite polling a mere eight percent approval rate just before the campaign began, Yeltsin won the 1996 election "by a comfortable margin."<sup>81</sup> Chomsky explains that Yeltsin's successful reelection despite such negative circumstances demonstrated "a seriously flawed election."<sup>82</sup> One explanation for the dramatic shift in public opinion regarding Yeltsin is the "massively mobilized" media campaign initiated in 1996 in an effort to secure Yeltsin's reelection.<sup>83</sup> Similarly, Vladimir Putin's 2000 election was successful in large part because state-run television and radio entities "campaign[ed] furiously" in Putin's favor, heavily criticized his opponents, and gave Putin's opponents no broadcasting time.<sup>84</sup> In both elections, the media was an effective tool for political leaders to maintain political power.

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(especially television) access and output."). Because state-controlled broadcasts reach the widest audience in Russia, the information issued by these outlets facilitates control over public opinion. According to Freedom House, "[t]he government sets editorial policy at state-owned television stations, which dominate the media landscape." *Freedom of the Press 2015: Russia*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-press/2015/russia> (last visited Jan. 15, 2019).

78. Russian journalist "stress their role in shaping the political agenda twelve times more than American journalists," whereas journalists in the United States view media's role in shaping the political agenda as "of least importance." Hedwig de Smaele, *Values Underlying the Information Culture in Communist and Post-Communist Russia (1917–1999)*, 3 MEDIA & COMM. 15, 19 (2015) (citing Wei Wu, David Weaver & Owen V. Johnson, *Professional Roles of Russian and U.S. Journalists: A Comparative Study*, 73 JOURNALISM & MASS COMM. Q. 534 (1996)).

79. Laura Belin, *The Rise and Fall of Russia's NTV*, 38 STAN. J. INT'L L. 19, 27 (2002); see Dmitry L. Strovsky, *The Media as a Tool for Creating Political Subordination in President Putin's Russia*, 7 STYLES COMM. 128, 136-37 (2015) ("Despite numerous failures in international and domestic affairs . . . , in particular, in the above-mentioned war in Ukraine and the economic sanctions from the USA and EU countries that followed this situation, Putin feels support from most of Russian population and seems to be confident, publicly at least, about his political course.").

80. EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT* xxvi (2000 ed. 1988) (noting that, under Yeltsin, the disintegration of social welfare and health care systems contributed to a "startling rise" in infectious diseases and mortality rates).

81. Belin, *supra* note 79, at 27; see WINTONICK & ACHBAR, *supra* note 3, at 396.

82. See WINTONICK & ACHBAR, *supra* note 3.

83. de Smaele, *supra* note 78.

84. HERMAN & CHOMSKY, *supra* note 80, at xi, xxvii. The State continued to consume media organizations into the 2011 elections. *Freedom in the World 2012: Russia*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2012/russia> (last visited Jan. 15, 2019) ("As the

Globalization of media operations through outlets like RT and Sputnik similarly allows the Russian Federation to implement its influence on public opinion on a global scale through the same tools that allowed the Russian Federation to successfully control public opinion domestically.<sup>85</sup> According to a 2017 U.S. National Intelligence Council report, Russian efforts to influence the 2016 U.S. presidential election reflect a significant escalation of the country's historical efforts to undermine Western democracy.<sup>86</sup> The Council concluded RT's criticisms of U.S. elections were the latest facet of its longstanding messaging operations likely aimed at undermining trust in democratic procedures and U.S. criticisms of Russian politics.<sup>87</sup> State-run domestic media outlets,<sup>88</sup> specifically RT and Sputnik, contributed to this multi-faceted campaign to influence the recent election.<sup>89</sup>

#### *A. Legal Bases: Defamation Laws and Internet Control*

Before 1990, the Soviet Union's "duty to criticize" insulated media and press from most legal repercussions, even for abusive publications.<sup>90</sup> Because the Soviet Government considered media critical to its political agenda, the Communist Party used extra-legal safeguards to shield the press – at least the state run press – from defamation actions.<sup>91</sup> Criminal and civil actions for defamation emerged most prominently in Russian law in the 1960s.<sup>92</sup> In the Soviet-era, the criminal code provided for prosecution of

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2011 Duma elections approached, businessmen close to Putin purchased additional television, radio, and newspaper assets.”).

85. Christopher Walker, *The New Containment: Undermining Democracy*, 178 WORLD AFF. 42, 44 (2015) (stating that Russia progressed from originally subverting democratic principles within its borders, to “methodically disrupting [democracy] beyond them”).

86. NAT'L INTELLIGENCE COUNCIL, *supra* note 12, at ii.

87. *Id.* at 7.

88. *Id.* at 3.

89. *Id.* at 6.

90. The Russian press operated under a duty to criticize from 1990 to 1995, which allowed it to subject others to public criticism and even ridicule. Peter Krug, *Civil Defamation Law and the Press in Russia: Private and Public Interests, the 1995 Civil Code, and the Constitution*, 13 CARDOZO ARTS & ENTMT L.J. 847, 860-62 (1995) (citing Serge L. Levitsky, *Copyright, Defamation, and Privacy in Soviet Civil Law*, in 22 LAW IN EASTERN EUROPE SERIES xii (1979)); see Belin, *supra* note 79, at 23 (explaining that the role of Soviet-era press was not only to report objective truths, but also to publicly ridicule opponents of the Soviet regime).

91. Krug, *supra* note 90, at 870 (citing Olympiad S. Ioffe, *Soviet Civil Law*, in 36 LAW IN EASTERN EUROPE SERIES 4 (1988)).

92. See UGOLOVNIY KODOKS ROSSIISKOI FEDERATSII (1960) [UK RF] [Criminal Code] art. 130-131 (Russ.); GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII (1964) [GK RF] [Civil Code] art. 7 (Russ.). Article 7 provided:

A citizen or an organization shall have the right to demand in court retraction of statements reflecting upon his or its honor and dignity, where the person who has circulated such statements fails to prove that they are true. If such statements are circulated through the press,

individuals but not the press: writers and editors were granted “de facto immunity” from criminal liability because prosecutors generally refused to initiate proceedings against the Soviet press.<sup>93</sup> The 1961 Civil Code, however, facilitated around 400 lawsuits per year, seventy-five percent of which were brought against newspapers.<sup>94</sup>

Changes to defamation law following the fall of the Soviet Union, however, led to a massive increase in defamation litigation, particularly against members of the news community.<sup>95</sup> Importantly, the Russian Federation eliminated the Soviet-era duty to criticize that provided news and media organizations a safeguard against defamation liability. Without this safeguard, news founders, editorial boards, and journalists became subject to civil and criminal prosecution for stories about the new administration and its members.<sup>96</sup> Under the revised defamation laws, publications concerning political figures were especially subject to defamation actions. Media outlets and their founders, publishers, and editorial offices became liable for defamation based on insult rather than truth or falsity.<sup>97</sup> As a result, most of Russia’s free-thinking journalists disappeared from television by the 2000s.<sup>98</sup>

In early 1994, for example, State Duma Deputy Vladimir Zhirinovskii publicly announced that any publication defaming the administration or a

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they must, if untrue, be retracted also in the press. The manner of retraction in other cases shall be established by the court. If the court decision is not carried out, the court may impose a fine on the offender which shall be collected for the benefit of the state. Payment of the fine does not relieve the offender from the duty to perform the act prescribed by the court judgment.

*Id.*; see Peter B. Maggs & Karl F. Winkler, *Libel in the Soviet Press: The New Civil Remedy in Theory and Practice*, 41 TUL. L. REV. 55, 55 n.1 (1966). Intent distinguished a criminal action from a civil action: Criminal defamation required malicious intent, but a civil claim remained viable absent intent to harm. Elspeth Reid, *Defamation and Political Comment in Post-Soviet Russia*, 38 REV. CENT. & E. EUR. L. 1, 7 (2013).

93. Maggs & Winkler, *supra* note 92, at 56 (noting that, even if the press could have been prosecuted, the State would have had difficulty proving the malice element required under the criminal law).

94. Reid, *supra* note 92, at 8.

95. The 1991 Russian Federation Civil Code “offers a remedy where: (i) the plaintiff can establish that the offending statement or publication have a damaging effect on honor, dignity or business reputation; and (ii) the defendant is unable to demonstrate the accuracy of its underlying factual basis.” GRAZHDANSKII KODEKS ROSSIISKOI FEDERATSII [GK RF] [Civil Code] art. 150, 152 (Russ.); see Reid, *supra* note 92, at 15; Krug, *supra* note 90, at 848-49 (citing 1990 Press Law; Civil Code pt. 1 (enacted Nov. 30, 1994)) (explaining that the 1990 Press Law and 1994 Civil Code exposed the press to extensive post-publication civil responsibility for statements injurious to personality and privacy interests).

96. See Krug, *supra* note 90, 860-62.

97. *Id.* at 855-56, 861-62.

98. Freedom House records Russia’s press as “Partially Free” until 2003. From 2004 until 2017, however, Freedom House recategorized Russia’s press as “Not Free.” *Freedom of the Press 2017: Russia*, FREEDOM HOUSE, <https://freedomhouse.org/report/table-country-scores-fotp-2017> (last visited Jan. 15, 2019).

party leader would “immediately be followed by a lawsuit.”<sup>99</sup> True to his word, Zhirinovskii initiated nearly 100 defamation lawsuits by July of the same year.<sup>100</sup> The Council of Europe determined in 2005 that the current defamation legislation has since had a profound impact on the press: Compared to the 400 actions per year under the Soviet defamation law, under the Russian Federation law, 8,000-10,000 libel suits are brought each year against journalists alone.<sup>101</sup> Considering the increase of successful litigation against media defendants following the Russian Federation’s rise to power, editors and journalists justifiably worried that publishing criticisms of party leaders would lead to defamation suits.<sup>102</sup>

The European Court of Human Rights (ECtHR) has found nearly forty freedom of expression violations under Article 10 of the European Convention on Human Rights<sup>103</sup> by Russian authorities since 1959. *Grinberg v. Russia*, the first Russian defamation case considered by the ECtHR, concerned an article, published by Isaak Grinberg in the newspaper *Guberniya*, that criticized Governor V.A. Shamanov.<sup>104</sup> Shamanov brought a civil defamation action against Grinberg, *Guberniya*’s editorial office, and the newspaper’s founder, claiming the statements were untrue and damaging to his honor and reputation. After the Russian District and Regional Court agreed, finding Grinberg and the newspaper’s founder liable for civil damages, Grinberg’s and the newspaper’s founder filed a claim with the ECtHR.<sup>105</sup> The ECtHR determined the Russian authorities violated Article 10 of the Convention, stating:

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99. Krug, *supra* note 90, at 849-50.

100. *Id.* at 860-61 n.59.

101. EUR. PARL. ASS., *Honouring of Obligations and Commitments by the Russian Federation*, Doc. No. 10568, ¶ 389 (2005), <http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10910&lang=en>.

102. *Id.*

103. Article 10 of the Convention reads:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 10 [hereinafter ECHR]. The European Court of Human Rights found that the Russian Federation violated Article 10 in thirty-nine cases – surpassed only by Turkey with an astonishing 281 Article 10 violations. VIOLATIONS BY ARTICLE AND STATE 1959-2017, EUR. CT. HUM. RTS., [https://www.echr.coe.int/Documents/Stats\\_violation\\_1959\\_2017\\_ENG.pdf](https://www.echr.coe.int/Documents/Stats_violation_1959_2017_ENG.pdf). For noteworthy cases on Russia’s Article 10 violations, see generally *Press Country Profile: Russia*, EUR. CT. HUM. RTS., [https://echr.coe.int/Documents/CP\\_Russia\\_ENG.pdf](https://echr.coe.int/Documents/CP_Russia_ENG.pdf) (last updated Mar. 2019).

104. Grinberg had charged that the Governor had “[n]o shame and no scruples!” Grinberg v. Russia, App. No. 23472/03, 43 Eur. H.R. Rep. 995, 997 (2006).

105. *Id.* at 998, ¶¶ 13-14.

The Court considers the contested comment was a quintessential example of a value judgment that represented the applicant's subjective appraisal of the moral dimension of Mr. Shamanov's behaviour. The finding of the applicant's liability for the pretended damage to Mr. Shamanov's reputation was solely based on his failure to show that Mr. Shamanov had indeed lacked 'shame and scruples.' This burden of proof was obviously impossible to satisfy.<sup>106</sup>

Concern that defamation litigation stifle governmental criticism remains relevant today, as Russian law continues to provide extensive remedies for defamation actions and greater liability for media persons or entities.<sup>107</sup> In 2012, the Steering Committee on Media and Information Society (CDMSI) reiterated its concerns from 2006 that Russia's officials use civil and criminal defamation statutes to manipulate and intimidate the media.<sup>108</sup> The CDMSI warned that these laws were "a serious impediment to the practice of investigative journalism."<sup>109</sup> Though the only independent source of information in Russia today is the Internet,<sup>110</sup> journalists are still legally responsible for the content of and comments posted to online blogs.<sup>111</sup> Therefore, in either print or online publications, journalists and media organizations in Russia risk heightened criminal and civil liability for criticizing the Government.

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106. *Id.* at 1002, ¶ 31.

107. Thomas M. Callahan, *Cauldron of Unwisdom: The Legislative Offensive on Insidious Foreign Influence in the Third Term of President Vladimir V. Putin, and ICCPR Recourses for Affect Civil Advocates*, 38 *FORDHAM INT'L L.J.* 1219, 1234-35 (2015); Rebecca Favret, *Back to the Bad Old Days: President Putin's Hold on Free Speech in the Russian Federation*, 12 *RICH. J. GLOBAL L. & BUS.* 229, 304 (2013).

108. Steering Committee on Media and Information Society [CDMSI], COUNCIL OF EUR., *Study on the Alignment of Laws and Practices Concerning Defamation with the Relevant Case-Law of the European Court of Human Rights on Freedom of Expression, Particularly with Regard to the Principle of Proportionality*, at 98, Doc. No. CDMSI(2012)Misc11Rev2 (Mar. 25, 2013), <https://rm.coe.int/09000016804915c5> ("Articles 151 and 152 of the Civil Code and Articles 129 and 130 of the Criminal Code are still being used by public figures in order to intimidate or silence hostile media. They are a serious impediment to the practice of investigative journalism, with its potential to publicize and thus to reduce incidents of corruption and wrongdoing in public life.").

109. *Id.*

110. Rachel Vanderhill, *Limits on the Democratizing Influence of the Internet: Lessons from Post-Soviet States*, 23 *DEMOKRATIZATSIYA* 31, 36 (2015).

111. Chip Pitts & Anastasia Ovsyannikova, *Russia's New Treason Statute, Anti-NGO and Other Repressive Laws: "Sovereign Democracy" or Renewed Autocracy*, 37 *HOUS. J. INT'L L.* 83, 130 (2015).

*B. Extra Legal Bases: State Corporate Ownership and Indirect Corporate Control*

In addition to creating greater risk of civil and criminal liability for defamation in print and online, privatization of prominent media organizations by the Government helped further chip away at the once independent media and press.<sup>112</sup> According to Freedom House, “The [Russian] government controls, directly or through state-owned companies and friendly business magnates, all of the national television networks and many radio and print outlets, as well as most of the media advertising market.”<sup>113</sup> For example, the Russian Federation owns a seventy-five percent stake in Channel 1, a thirteen percent share in Channel 2-Rossiya, Russia’s two most popular stations, and just under twenty percent of NTV, with the remaining majority shareholders maintaining close ties to the government.<sup>114</sup>

To rein in independent news agencies, the Russian Federation gained control over independent media outlets through corporate takeovers of privately owned media organizations.<sup>115</sup> One especially illuminating example of the Russian government’s power to take control of private news outlets is the case of formerly independent NTV.<sup>116</sup> NTV was once a fierce critic of the government, exposing falsehoods and corruption during the

112. IVAN ZASURSKII, *MEDIA & POWER IN POST-SOVIET RUSSIA* 16-17, 25 (2016) (emphasizing the “enormous power” Russian press held through the first years of Yeltsin’s presidency).

113. *Freedom in the World 2018: Russia*, *supra* note 77; see Barbara Junisbai et al., *Mass Media Consumption in Post-Soviet Kyrgyzstan and Kazakhstan: The View from Below*, 23 *DEMOKRATIZATSIYA* 233, 252 (2015); Strovsky, *supra* note 79, at 130 (noting that seventy-five percent of all news outlets are controlled by state authorities).

114. Elisabeth Schimpfossel & Ilya Yablokov, *Coercion or Conformism? Censorship and self-Censorship Among Russian Media Personalities and Reporters in the 2010s*, 22 *DEMOKRATIZATSIYA* 295, 298 (2014).

115. Frances H. Foster, *Information and the Problem of Democracy: The Russian Experience*, 44 *AM. J. COMP. L.* 243, 271 (1996) (“Economic subsidies, which for most Russian media spell the difference between economic survival or collapse, have been a particularly popular means to encourage obedience to official directives.”).

116. The “squeeze on the media became more visible with Media-Most’s forced change of ownership . . . to the state-controlled energy giant Gazprom in 2001[.]” Dorothea Schonfeld, *Tilting at Windmills: The European Response to Violations of Media Freedom in Russia*, 37 *REV. CENT. & E. EUR. L.* 233, 246 (2012). Also, in 2001, ORT, a channel similarly critical of the government, came under Gazprom’s ownership “under duress.” *Id.* It is now clear that media in Russia is controlled by political authorities and government directed corporations like Gazprom, with some analysts estimating more than 80% of broadcast media and 70% of print were news under direct or indirect government control as of 2012. *Id.* at 247 (first citing Victor Shenderovich, *Tales From Hoffmann: Putin Fails to See the Funny Side*, 37 *INDEX ON CENSORSHIP* 48, 57 (2008), and then citing Nadezhda Azhgikhina, *The Struggle for Press Freedom in Russia: Reflections of a Russian Journalist*, 59 *EUR.-ASIA STUDIES* 1245, 1253 (2007)); see generally Belin, *supra* note 79, at 19-20.

Boris Yeltsin presidency.<sup>117</sup> Under President Putin's administration, however, NTV's independently owned parent company, Media-Most, lost ownership of NTV to Gazprom Media.<sup>118</sup> Pursuant to a loan reimbursement agreement, Gazprom Media became the majority shareholder in NTV after Media-Most could not repay its \$211 million loan.<sup>119</sup> When NTV journalists staged a ten-day protest declaring Gazprom's takeover illegal, Gazprom took NTV's headquarter by force with the assistance of armed guards.<sup>120</sup>

Once NTV came under Gazprom ownership, the corporation immediately proclaimed loyalty to the Federation, and established its own editorial staff and policies.<sup>121</sup> Many journalists either resigned or were terminated as a result of the forcible takeover and Gazprom-appointed management.<sup>122</sup> For example, NTV terminated successful political reporter Leonid Parfenov's employment in 2004 after Parfenov violated a ban on reporting the Chechnya war.<sup>123</sup> Like Parfenov, most of Russia's free-thinking media personalities disappeared in the 2000s after expressing independent views, while individuals demonstrating solid loyalty to the Government retained their positions.<sup>124</sup>

Organizations in the oil and gas industry are either directly controlled by the government or are "subject to heavy government influence."<sup>125</sup> In addition to NTV, companies like Gazprom Media own a considerable number of other news entities. In 1998, for example, Gazprom Media and other Gazprom subsidiaries owned controlling stakes in daily and weekly publications such as *Rabochaya Tribuna*, *Profil*, and *Kompanya*, and

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117. Belin, *supra* note 79, at 19.

118. *Id.* at 35; Schonfeld, *supra* note 116, at 246. Though formally independent from the Russian government, Gazprom and nearly all other major media-holding companies, like Profmedia and Sviazinvestbank, align with the Kremlin. *Id.* at 248.

119. Belin, *supra* note 79, at 34 n.99.

120. *Id.* at 37.

121. Katja Lehtisaari, *Market and Political Factors and the Russian Media* 8 (Reuters Inst. for the Study of Journalism, Working Paper, Oct. 2015); Strovsky, *supra* note 79, at 134.

122. Lehtisaari, *supra* note 121, at 8.

123. Schimpfossel & Yablokov, *supra* note 114, at 306.

124. *Id.*

125. Jim Nichol, *Russian Political, Economic, and Security Issues and U.S. Interests*, CONG. RES. SERV. 22 (Mar. 7, 2014), <http://advocacy.calchamber.com/wp-content/uploads/international/trade/CRS%20Report-Polit-Ec-Security-Iss-and-US-Interests.pdf> ("The Russian oil and natural gas industries are important players in the global energy market, particularly in Europe and Eurasia. In 2010, Russia had by far the largest natural gas reserves in the world, owning nearly 24% of the world's total. It was seventh in the world in oil reserves, with over 5% of the global total. Firms in these industries are either directly controlled by the Russian government or are subject to heavy Russian government influence.").

financed around 100 other regional publications.<sup>126</sup> As of 2015, *Ekho Moskvyy* (“Echo of Moscow”), Russia’s only radio station embracing wide and sometimes heated political discussions, was financially dependent on Gazprom.<sup>127</sup> A 2012 study determined that in the majority of cases, media entities were acquired by or consolidated with private media companies, and most were acquired directly or indirectly through large companies like Gazprom.<sup>128</sup> Similar to Gazprom’s takeover strategy of NTV, these private companies substantially reorganized media entities shortly after acquisition.<sup>129</sup>

The majority of news outlets and media personalities, even those once critical of the government, demonstrate full loyalty to the Russian Federation.<sup>130</sup> The majority of personalities and reporters already held pro-Kremlin convictions and viewed their journalistic roles as one “defending the status quo.”<sup>131</sup> For example, in an interview published in 2014, Maksim Shevchenko of Channel 1 explained that, while he experienced no censorship from the state, if the state invests money in a media outlet, “it has the right to demand that it follow the state’s policy.”<sup>132</sup> Because the primary and most trusted sources of news and information are distinctively bias, public opinion is effectively shaped in the Government’s favor.<sup>133</sup>

### C. International Expansion of Russian Media

Russia devotes significant effort and financial support to its expanding operations throughout the Middle East, Latin America, Europe, and the United States.<sup>134</sup> Russia’s media presence in France, the Baltic states, Moldova, Georgia, Kyrgyzstan, and Kazakhstan serve as examples of successful Kremlin-sponsored, counter-democracy media campaigns by

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126. See generally Floriana Fossato & Anna Kachkaeva, *Russia: The Origins of a Media Empire*, RADIOFREEEUROPE (Mar. 9, 1998, 12:00 AM), <https://www.rferl.org/a/1088157.html> (detailing the extent to which Gazprom and its subsidiaries owned Russian media organizations in 1998).

127. Strovsky, *supra* note 79, at 136.

128. Naumova et al., *supra* note 4, at 103.

129. *Id.*

130. Schimpfossel & Yablokov, *supra* note 114, at 300, 306; see Maria Lipman, *Russia’s Nongovernmental Media Under Assault*, 22 DEMOKRATIZATSIYA 179, 183 (2014).

131. Schimpfossel & Yablokov, *supra* note 114, at 297, 311.

132. *Id.* at 305.

133. See Junisbai et al., *supra* note 113, at 255; Strovsky, *supra* note 79, at 130. Due to Russian authorities’ successful control over all media, if political authorities wish to manipulate public opinion, they have “all the levers in [their] hands to do so.” Schonfeld, *supra* note 116, at 249 (explaining that there are almost no independent television broadcast outlets after NTV and ORT were “brought into line” by Gazprom’s takeover).

134. Walker, *supra* note 85, at 50.

“raising doubts about the integrity of [those] young democracies.”<sup>135</sup> In France, for example, Sputnik and RT are two of the main information communicators sponsored by the Russian government.<sup>136</sup> In Kazakhstan, electronic media is largely either broadcasted from the Russian Federation, or owned by the Russian Federation. According to Christopher Walker, the Vice President for studies and analysis at the National Endowment for Democracy,<sup>137</sup> the Russian Federation used similar tactics in Moldova and Georgia, areas also considered politically as aspiring democracies.<sup>138</sup>

Globalization of its media operations through outlets like RT and Sputnik allows the Russian Federation to expand its influence campaigns from subverting democratic evolution internationally.<sup>139</sup> According to the U.S. Intelligence Council, the Russian Government historically used “covert influence campaigns” to sway foreign politics in favor of Russian interests.<sup>140</sup> Specifically, its influence campaigns are implemented through the State’s national and international media outlets, which are owned or controlled by the Government.<sup>141</sup> Its international outlets devote the majority of their efforts to attack and distort perceptions of Western democracy rather than supply an affirmative case for the Russian government’s system and achievements.<sup>142</sup>

Ultimately, the Russian Government, by threatening media entities, their owners, publishers, editorial boards, and journalists with personal liability for civil and criminal defamation, deters critical publications to control public opinion.<sup>143</sup> By gaining such exclusive control over public information, the administration effectively secures its political position, even in the face of severe economic failures and highly questionable political strategies.<sup>144</sup> As Russian-based media entities operate on a global scale, the Government

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135. *Id.* at 47-48; Junisbai et al., *supra* note 113, at 241.

136. Claire Demesmay, “*There are Always Two Sides to the Truth*”: *French Susceptibility to Russian Propaganda*, 4 DGAP KOMPAKT 1, 2 (Feb. 2016).

137. Christopher Walker is New President for Studies and Analysis at National Endowment for Democracy, NAT’L ENDOWMENT FOR DEMOCRATIC STUDIES (Feb. 5, 2016), <https://www.ned.org/christopher-walker-is-new-vice-president-for-studies-and-analysis-at-national-endowment-for-democracy/>.

138. Walker, *supra* note 85, at 48.

139. *Id.* at 44.

140. NAT’L INTELLIGENCE COUNCIL, *supra* note 12, at ii.

141. See Junisbai et al., *supra* note 113, at 253, 256.

142. Walker, *supra* note 85, at 50.

143. See WINTONICK & ACHBAR, *supra* note 3.

144. Strovsky, *supra* note 79, at 136-37 (noting that despite questionable practices President Putin and his administration managed to secure more than eighty-eight percent of the public support).

will most likely continue to utilize its highly effective means of media control to influence public opinion internationally.

Under FARA, the Act's failure to take into account the effect that Russian defamation laws has on its the press, editorial policies, and individual journalists, as well as the influence of state media ownership through subsidiaries like Gazprom – the mechanisms that brought nearly every media network under State control – renders it ineffective in identifying true agents of foreign principals. Arming FARA with provisions that direct the DOJ to investigate these factors would contribute to the disclosure requirements, since an agent cannot be compelled to disclose its foreign ties until the agent is first identified.

### III. REQUIRING REGISTRATION AND NOTIFICATION OF THE SOURCE OF INFORMATION TO COMBAT RUSSIAN INTERFERENCE

Launched in 2005, RT is the most widely recognized entity of Russia's international media empire, with broadcasts reaching an estimated 500 to 700 million viewers in more than 100 countries.<sup>145</sup> Sputnik, launched in 2014, broadcasts in over 30 languages, totaling more than 800 hours per day in broadcasting time.<sup>146</sup> In 2017, RT and Sputnik registered as foreign agents in order to avoid criminal liability.<sup>147</sup> In each entity's case, the agency relationship qualified RT and Sputnik to register as agents of a foreign principal, as their compelled registration demonstrates, but why did this relationship go undetected for thirteen years in RT's case and four years in Sputnik's?

The agency relationship and level of influence between Russia and RT and Sputnik illustrates the legal and historical factors FARA does not take into account. Elena Postnikova identifies three factors indicating Russia controls RT, which can also be applied in Sputnik's case. These factors include “(1) founding and continued control by a Russian state-owned news agency, (2) reliance on the Russian state for ninety-nine percent of its budget, and (3) non-transparent governance structure that . . . allows the Kremlin to

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145. STAFF OF S. COMM. ON FOREIGN RELATIONS, 115TH CONG., PUTIN'S ASYMMETRIC ASSAULT ON DEMOCRACY IN RUSSIA AND EUROPE: IMPLICATIONS FOR U.S. NAT'L SEC'Y 41 (Comm. Print 2018) [hereinafter PUTIN'S ASYMMETRIC ASSAULT ON DEMOCRACY].

146. *About Us*, SPUTNIK NEWS, <https://sputniknews.com/docs/about/index.html> (last visited Feb. 4, 2019).

147. Brett Samuels & Megan R. Wilson, *RT Chooses Registering as a Foreign Agent Over "Criminal Case,"* HILL (Nov. 13, 2017, 4:17 PM), <http://thehill.com/homenews/360110-rt-choose-s-registering-as-foreign-agent-in-us-over-criminal-case?rnd=1510608036>; Megan R. Wilson, *Russian News Outlet Sputnik Registers with DOJ as Foreign Agent*, HILL (Nov. 17, 2017, 1:15 PM), <http://thehill.com/business-a-lobbying/business-a-lobbying/360912-russian-news-outlet-sputnik-registers-with-doj-as>.

its policies and operations.”<sup>148</sup> As FARA is currently organized, its broad conception of the agency relationship misses important indicators of direction and control. Adopting a bright-line standard of direction and control along with allowing the DOJ to consider contextual control indications would significantly enhance the DOJ’s chances of detecting these obscure agency channels.

Agents like RT and Sputnik highlight the Act’s deficiencies that foreign principals may exploit to evade DOJ oversight. Of course, while RT and Sputnik offer especially illuminated answers to FARA’s difficulties, these are merely examples of how foreign principals avoid FARA detection and infiltrate and influence public opinion in the U.S. RT and Sputnik successfully operated without FARA’s obligations for an extended period of time, but they are by no means the only agents doing so. In general, however, the Office of the Inspector General determined in 2016 that FARA compliance rates were unacceptable overall, and that modifications and improvements were necessary.<sup>149</sup> Specifically, the inspector General Audit determined that nearly half of the informational materials submitted by seventy-seven (out of the total seventy-eight) registered agents failed to include the required disclosure statement.<sup>150</sup> The improvements and modifications must come from the legislature. Thus, Congress must re-examine FARA considering these most recent mistakes, as it did with the Toshiba scandal, and take steps to prepare FARA to combat future and more malevolent actors than RT and Sputnik.

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148. Postnikova, *supra* note 30, at 6.

149. *See id.* at 14. “While FARA provides tools to expose RT as an agent of a foreign principal, the fact that RT has not yet registered may be indicative of gaps in the administration and enforcement of the Act . . . . The RT case demonstrates a compelling example of [FARA’s] shortcomings and highlights the need for DOJ and, where needed, Congress to modernize how the DOJ administers and enforces FARA.” *Id.*; OFFICE OF THE INSPECTOR GEN. AUDIT *supra* note 24, at 16.

150. OFFICE OF THE INSPECTOR GEN. AUDIT, *supra* note 24, at 15-16. The results, specifically, stated that:

We tested informational materials submitted by the 78 agents of foreign principals we reviewed to determine if the documentation was submitted within the 48-hour requirement and included the required disclosure statement. We identified a total of 1,278 pieces of informational material, 780 pieces of which were submitted by one agent, and 498 of which were submitted by the other 77 agents. It appears that many of the one agent’s submissions were late because they were batched and mailed monthly without apparent regard to the date and time of transmission to the recipients, although each contained the requisite disclosure statement. As for the 498 pieces of information submitted by the other 77 agents, we found that only 457 included a date and time of transmittal to the recipients. The remaining 41 did not, which made determining timeliness for them impossible. Of the 457 pieces of informational materials with an identifiable transmittal date and time, we found that 179 (39%) were submitted timely within 48 hours of transmittal, but 278 (61%) were not. We also found that almost half or 234 of the 498 items of information materials (47%) did not include the required disclosure statement.

*Id.*

*A. Minimizing the Agency Relationship: The Effect of Russia's Control Over its Domestic Media*

Russian-based media outlets like RT and Sputnik successfully avoided FARA's registration and disclosure requirements because the organizations' funding is filtered through the obscure organizational structure.<sup>151</sup> In its U.S. operations, the Russian government provides significant funding for RT and Sputnik, spending \$190 million annually on RT program distributions alone.<sup>152</sup> From 2005 to 2013, RT received approximately \$2 billion from the Russian government.<sup>153</sup> And from 2013 to 2016, this government funding accounted for 99 percent of RT's "operational expenditures."<sup>154</sup>

RT's and Sputnik's corporate structures obscure who controls its management and editorial policies, giving these entities grounds to deny any association with the Russian Federation that would give rise to an obligation to comply with FARA.<sup>155</sup> Understanding Postnikova's second and third factors requires a deeper look into the organizational structure of both entities. Initially, Sputnik and RT are both organized under the same parent organization, RIA Novosti ("RIA").<sup>156</sup> In 2013, to distance the Government's connection to RT,<sup>157</sup> President Putin liquidated RT's then

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151. See discussion *supra* Part IV(A).

152. NAT'L INTELLIGENCE COUNCIL, *supra* note 12, at 10.

153. Postnikova, *supra* note 30 (citing Katie Zavadski, *Putin's Propaganda TV Lies About Its Popularity*, DAILY BEAST (Sept. 17, 2015, 1:13 AM), <http://www.thedailybeast.com/articles/2015/09/17/putin-s-propaganda-tv-lies-about-ratings.html>).

154. *Id.* (citing ANO TV-Novosti 2013-2015 reports "On financial expenditures and use of other property by nonprofit organizations, including those received from foreign and international organizations, foreign and stateless persons," available at <http://unro.minjust.ru/NKORreports.aspx> (in Russian)).

155. *Id.* at 6 ("RT's opaque corporate structure obscures who actually decides its management and editorial policy, so RT could deny that the news organization is controlled by the Russian government within the meaning of FARA."); see generally Nathan Layne, *U.S.-Based Russian News Outlet Registers as Foreign Agent*, REUTERS (Feb. 17, 2018, 7:07 PM), <https://www.reuters.com/article/us-usa-trump-russia-propaganda/u-s-based-russian-news-outlet-registers-as-foreign-agent-idUSKCN1G201H>.

156. Postnikova, *supra* note 30, at 6, 11. RIA Novosti and MIA Rossiya Segodnya are apparently used interchangeably, although MIA Rossiya Segodnya is the official legal name of RT's parent company. See *id.* A possible explanation is that in 2013 President Putin created MIA Rossiya Segodnya ("MIA") and simultaneously liquidated RIA Novosti, transferring all RIA's assets and subsidiaries to newly created MIA. *Id.* MIA then became RT's parent organization. *Id.*

157. *Id.* at 6 ("[RT's] autonomy can manifest as follows: (1) the assets contributed by the founder become property of the nonprofit, and (2) the founder cannot be held liable for the actions of the autonomous nonprofits, and the latter have no liability for the founder. In all other respects, the autonomous nonprofits are subject to control by the founder . . . . Therefore, the nonprofit's management decisions about its . . . hiring and employee relations, and – most importantly in this case – editorial policy, remain subject to control of the founder, unless the founder provides otherwise.").

state-owned founder, RIA, merging RIA's subsidiaries into a simultaneously created entity, MIA Rossiya Segodnya ("MIA").<sup>158</sup> MIA was officially declared RT's parent company, and RT along with all of its assets were transferred to MIA.<sup>159</sup>

To further distance itself from RT, the Government created ANO TV-Novosti (autonomous nonprofit organization TV news), which took over RT's financing and operation in the U.S.<sup>160</sup> This structure was "set up to avoid the Foreign Agents Registration Act[.]"<sup>161</sup> Even though ANO-Novosti is a subsidiary of the federal news agency, formerly known as RIA Novosti, RT claims it is independent from the state because its underlying legal entity, ANO TV-Novosti, is now an autonomous nonprofit organization.<sup>162</sup> Under Russian law, autonomous nonprofit organizations and their founders are not liable for each other's liabilities, and the nonprofit assumes the assets contributed by the founder.<sup>163</sup> Nonetheless, the Russian Federation is expressly responsible for its own participation in the nonprofits "managerial bodies."<sup>164</sup> Thus, the RT-Russian Federation relationship may be summarized as follows: The Russian Federation owns RIA/MIA, which owns ANO TV-Novosti, which owns RT.<sup>165</sup>

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158. *Id.* at 6-7 ("In RT's case, the single founder was Russia's state-owned news agency RIA Novosti, which was liquidated in 2013.").

159. *Id.* at 6, 11.

160. *Id.* at 11.

161. NAT'L INTELLIGENCE COUNCIL, *supra* note 12, at 12.

162. Postnikova, *supra* note 30, at 6 ("RT claims it is 'independent from the state' because ANO TV-Novosti, the legal entity behind RT, is an 'autonomous non-profit organization.'"); Exhibit A to Registration Statement, U.S. DEP'T OF JUSTICE (Dec. 11, 2017), <https://www.fara.gov/docs/6496-Exhibit-AB-20171211-2.pdf>. ANO TV-Novosti registered with FARA's registration unit on December 11, 2017 as an "autonomous non-profit organization."; see *About RT*, RT, <https://www.rt.com/about-us/> (last visited Feb. 11, 2018); NAT'L INTELLIGENCE COUNCIL, *supra* note 12, at 12.

163. Federal'nyi Zakon RF o Grazhdanstve Rossiiskoi Federatsii [Federal Law of the Russian Federation on Nonprofit Organizations], ROSSIKAIA GAZETA [ROS. GAZ.] Feb. 12, 1998, 229 (Russ.) [hereinafter Russian Federal Law No. 7-FZ]; see Postnikova, *supra* note 30, at 6 (citing Russian Federal Law No. 7-FZ on Non-Commercial Organizations, Jan. 12, 1996, art. 10).

164. Russian Federal Law No. 7-FZ on Non-Commercial Organizations, Jan. 12, 1996, art. 10(5) ("Where the founder of an autonomous non-commercial organization is the Russian Federation, a constituent entity of the Russian Federation or a municipal entity, a procedure for participation of their representatives in managerial bodies of the non-commercial organization shall be established by the Government of the Russian Federation, a state power body of the constituent entity of the Russian Federation or local authority.").

165. This and subsequent summarizations are simplified versions of only these aspects of the agency relationship. Unsurprisingly, the corporate intermediary and subsidiary relationships are complex and difficult to pinpoint exactly; which corroborates the DOJ's difficulty in doing so. For example, to add another complexity, RT's production company, T&R Productions, filed paperwork with the DOJ disclosing that its work benefits ANO TV-Novosti. Samuels & Wilson, *supra* note 147.

Similarly, in Sputnik's case, RIA Global, the company that "produces content" for Sputnik, protested its FARA registration, maintaining it still holds "independent editorial control[.]"<sup>166</sup> RIA Global's "customer of record" is MIA Rossiya Segodnya, formerly RIA Novosti, as the name might suggest.<sup>167</sup> The Sputnik-Russian Federation relationship might be summarized as follows: Russian Federation owns RIA-MIA, which owns RIA Global, which owns Sputnik.

On a larger scale, Gazprom, the major gas mogul whose majority shareholder is the Russian Federation, has registered as an agent of the Russian government since 2002, conducting enormously profitable "media relations" services in the U.S.<sup>168</sup> Gazprom owns many subsidiaries (e.g., Gazprom Export, Gazprom Media, RAO Gazprom, OAO Gazprom), and those subsidiaries own smaller media entities. For example, Gazprom, owned almost entirely by the Russian Federation, is the parent company of Gazprom Media, and Gazprom Media own media organizations like NTV.<sup>169</sup> NTV's relationship may be summarized as follows: Russian Federation to Gazprom to Gazprom Media to NTV.

In each case, as a subsidiary of a subsidiary of a company owned by the Russian Federation, the relationship between the Russian Government and RT, Sputnik, and NTV is difficult to identify and becomes increasing difficult as control is filtered through more subsidiaries. As such, the Russian Government sufficiently distanced itself from its subsidiary agents thus evading FARA's registration requirements. This is the exact "more than one intermediate link in the chain" problem Chairman Fulbright anticipated in 1965.<sup>170</sup> If the REFUSE standard were in place, the DOJ would only need to trace government funding or ownership interest equaling twenty percent or more. In addition, including a management standard would account for the Government's exclusive right under Russian law to manage entities, like RT's case, otherwise not expressly tied to the administration through liability or asset ownership.

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166. Layne, *supra* note 155.

167. *Id.* ("RIA Global's customer of record is Federal State Unitary Enterprise Rossiya Segodnya International Information Agency, the Russian state entity that owns Sputnik and was created by a decree of Russian President Vladimir Putin in 2013.")

168. Gazprom earned up to \$4 million in only six months.

169. See discussion *supra* Part III(B).

170. See JAMES W. FULBRIGHT, FOREIGN AGENTS REGISTRATION ACT AMENDMENTS, S. REP. NO. 89-143, at 6-7 (1965).

*B. Minimizing the Agency Relationship Through Obscure Ownership of Media Outlets*

Aside from the legal efforts to disassociate the Russian government from RT and Sputnik, decades-long threats of defamation liability and structural influence of corporate ownership allow the Russian government to control these entities from within, a method of control that FARA does not acknowledge. Decades of defamation liability, in addition to control the State maintains due to corporate takeover and ownership, allows the Government to dictate editorial policies independent of any official government action. According to the Foreign Relations Committee 2018 report, “Former staff report that RT’s editorial line comes from the top down, and managers choose what will be covered and how.”<sup>171</sup> Margarita Simonyan, RT’s Editor-in-Chief, believes that “since RT receives [a] budget from the state, it must comply with the tasks given by the state.”<sup>172</sup> Further, media outlets likewise tend to hire personnel whose beliefs already align with State policies, furthering diminishing any need for direct censorship.<sup>173</sup>

As a result of defamation intimidation and state-owned corporate ownership, state-friendly executives set RT’s employment and editorial policies to enable the Government to promote its interests without raising official censorship concerns. According to the DOJ, Kremlin closely supervises RT’s coverage and recruits employees who convey the Russian Federation’s messages because previously-held ideological beliefs align with the State.<sup>174</sup> In striking similarity to Shevchenko of *Channel 1*, RT’s editor-in-chief, Simonyan explains that, because RT receives funding from the Russian Government, “it must complete tasks given by the state.”<sup>175</sup>

Important to recount is that defamation suits are common, particularly against journalists.<sup>176</sup> However, since employees of RT already subscribe to Kremlin ideals, the State does not need to impose censorship or resort to lawsuits. Thus, by allowing journalists to freely express their preexisting pro-state viewpoints, the Government can promote its interests while complying with constitutionally mandated free press.

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171. PUTIN’S ASYMMETRIC ASSAULT ON DEMOCRACY, *supra* note 145, at 42; see Postnikova, *supra* note 30, at 8 (“Liz Wahl, the RT anchor who resigned on air in 2014 in protest of RT’s coverage of Ukraine, described how detailed directives on editorial coverage and selection of commentators came from RT’s Russian managers.”) (citing Liz Wahl, *Discrediting the West: An Insider’s View on Russia’s RT*, STOPFAKE.ORG (Mar. 8, 2016, 10:21 PM), <https://www.stopfake.org/en/discrediting-the-west-an-insider-s-view-on-russia-s-rt/>).

172. NAT’L INTELLIGENCE COUNCIL, *supra* note 12, at 9.

173. Schimpfossel & Yablokov, *supra* note 114, at 308.

174. NAT’L INTELLIGENCE COUNCIL, *supra* note 12, at 9.

175. *Id.*; see Schimpfossel & Yablokov, *supra* note 114.

176. See *supra* section III(A).

*C. Identifying the Agency Relationship and the Effect of Compelled Registration*

Subjecting sources like RT and Sputnik to FARA's registration requirements does not necessarily guarantee that either will be subject to the Act's disclosure requirements. Under §614(a), a person required to register as an agent of a foreign principal must submit to the Attorney General any "informational material" intended or likely to be disseminated to at least one other person in the interest of the foreign principal.<sup>177</sup> Because the Russian Federation has separated itself from RT and Sputnik, these entities are not agents under the current FARA requirements and thus are not required to register as foreign agents and submit their publications to the DOJ for review.<sup>178</sup> While registration does not necessitate disclosure of the agent relationship, agents like RT and Sputnik that evade the registration requirements never come under DOJ review and, thus, are never required to inform the public of their ties to the Russian Federation through conspicuous statements.

RT and Sputnik contribute significantly to the marketplace of ideas by publishing different perspectives on national and international issues, and it is not within FARA's authority to prohibit the entities from doing so. The informational value of RT and Sputnik must be recognized, as both have significantly contributed to social and political discourse in the U.S. and abroad. For example, RT received an Emmy nomination for its 2012 Occupy Wall Street coverage.<sup>179</sup> In *Meese v. Keene*, the Supreme Court clarified, however, that FARA's registration requirements apply "equally to friendly, neutral, and unfriendly governments."<sup>180</sup> The Court presumed that the National Film Board of Canada had been registered as a foreign agent because it was in fact an agent of the Canadian government. Ultimately, the Court determined that the films produced by the National Film Board of Canada classified as political propaganda because they contained political

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177. Foreign Agents Registration Act of 1938, 22 U.S.C. § 614(a) (2012).

178. See Danner, *supra* note 7, at 44.

179. Hannah Gais & Eugene Steinberg, *Russia's Foreign Media Outlets Aim to Undermine U.S. Credibility*, U.S. NEWS & WORLD REPORT, Nov. 24, 2014, 2014 WLNR 33184592; see NAT'L INTELLIGENCE COUNCIL, *supra* note 12, at 7. The Intelligence Committee emphasized that RT's editor in chief, Margarita Simonyan, characterized the coverage as "information warfare" meant to highlight dissatisfaction with the United States Government. *Id.*

180. *Meese v. Keene*, 481 U.S. 465, 469-70 (1987); see *Block v. Meese* 793 F.2d 1303, 1310 (D.C. Cir. 1986) (noting that FARA covers "all communications issued by foreign agents 'whether friendly or unfriendly, whether violent or mold'" and applies to "our allies as well as our enemies[.]" (first quoting H.R. Res. 424, 73d Cong., 78 CONG. REC. 11,069 (1934); and then quoting *United States v. Kelly*, 51 F. Supp. 362, 363 (D.D.C. 1943)) (citing 88 CONG. REC. 1139 (1942)).

material intended to influence U.S. foreign policy.<sup>181</sup> The Court noted that the films were not held exempt from FARA's disclosure requirements even though one won an "Oscar" for best foreign documentary in 1983.<sup>182</sup>

RT's editor-in-chief, Margarita Simonyan, condemned the DOJ for compelling the registration, claiming the move was an attack on free speech.<sup>183</sup> However, other official news organizations, like Chinese newspapers Xin Min Evening News and China Daily, have complied with the Act with no evidence that the DOJ hindered publication, which would be in violation of the First Amendment and not permitted by FARA. China Daily registered in 1983 and has filed required statements every year since, including in 2018 without the DOJ interfering in the organization's operations.<sup>184</sup> Around thirty other registrants were similarly involved in "media relations" as of July 2017.<sup>185</sup> These organizations merely report their activities to the DOJ, and the DOJ neither can nor apparently has tried to prevent any of these agents from carrying-on their media pursuits.<sup>186</sup>

Simonyan also objected to characterizing RT as "propaganda" in 2017 because the term comes with "a very negative connotation[.]"<sup>187</sup> The Supreme Court addressed the "propaganda" label in *Meese v. Keene*, holding that "political propaganda" for FARA purposes did not have a "pejorative connotation," as FARA defined the term to include materials that were misleading but also those that were "accurate and merit[ing] the closest attention and the highest respect."<sup>188</sup> Regardless, Congress amended FARA in 1995 to substitute "informational material" for "political propaganda"

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181. *Meese*, 481 U.S. at 470.

182. *Id.* at 475.

183. Samuels & Wilson, *supra* note 147.

184. China Daily Document Submissions, U.S. DEP'T OF JUSTICE, [https://efile.fara.gov/pls/apex/f?p=185:200:7376616772323::NO:RP,200:P200\\_REG\\_NUMBER:3457](https://efile.fara.gov/pls/apex/f?p=185:200:7376616772323::NO:RP,200:P200_REG_NUMBER:3457) (last visited Feb. 11, 2019); see Megan R. Wilson, *Russian News Outlet Sputnik Registers with DOJ as Foreign Agent*, HILL (Nov. 17, 2017 1:15 PM), <http://thehill.com/business-a-lobbying/business-a-lobbying/360912-russian-news-outlet-sputnik-registers-with-doj-as> ("Other state-owned media outlets are also registered as foreign agents, such as China Daily, and the foreign agent status does nothing to impede newsgathering or production activities.").

185. See U.S. DEP'T OF JUSTICE, Report of the Attorney General to the Congress of the United States on the Administration of the Foreign Agents Registration Act of 1938, as Amended, for the Six Months Ending June 30, 2017, <https://www.justice.gov/nsd-fara/page/file/1021601/download>.

186. Samuels & Wilson, *supra* note 147 ("Other state-owned media outlets are also registered as foreign agents, such as China Daily, and the foreign agent status does nothing to impede newsgathering or production activities.").

187. NAT'L INTELLIGENCE COUNCIL, *supra* note 12, at 8.

188. 481 U.S. 465, 477 (1987). Justices Blackmun, Brennan, and Marshal dissented on this point.

under the labeling provisions.<sup>189</sup> Thus, “political propaganda” is no longer the standard by which agent-disseminated material is assessed by the DOJ, whether the term’s connotation is pejorative or not.

Although RT and Sputnik disclose that Russian sources provide some funding, neither RT’s nor Sputnik’s characterization conveys the significance of the financial and social nature of the relationship, such as the decades-long threat of defamation liability that journalists and press establishments have faced, and continue to risk for criticizing the administration.<sup>190</sup>

## CONCLUSION

Through instilling fear of defamation suits, corporate takeover and control, and control over the Internet, the current administration manages what the citizens see and thereby controls public opinion. These same tactics are employed through Russian-based entities like RT and Sputnik to influence public opinion on an international scale. Members of the general public are not aware of the extent of government control over media organizations, which may well be the result of decades of calculated manipulation. Today, major media personalities and their respective employers primarily promote, rather than question, institutional goals after independent organizations are staffed with professionals who already agree with and support the Government. While the control illustrated by the Russian government is subtle, the Russian Federation does not need to take more blatant or forceful measures. This is because, as Chomsky warned, when people cannot be controlled by force, they must be controlled by what they think; and therein lies the danger.

News and media are essential to the functions of democratic societies. Because outlets like RT and Sputnik contribute to the free flow of information but potentially undermine democracy with inaccurate and biased information, their disseminations should be monitored by the DOJ under FARA. Though explicating FARA’s scope to account for entities and

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189. See Foreign Agents Registration Act of 1938, 22 U.S.C. § 614 (2012) (amended 1995) (“Pub. L. 104–65, § 9(4)(A) and § 9(6) the substituted term ‘informational materials’ for ‘political propaganda.’ Pub. L. 104–65, § 9(5) . . . substituted ‘without placing in such informational materials a conspicuous statement that the materials are distributed by the agent on behalf of the foreign principal’ for clauses (i) and (ii) and concluding provisions which made it unlawful for an agent of a foreign principal to transmit in the United States political propaganda unless the propaganda identified the agent and contained information about the registration of the agent and authorized the Attorney General to prescribe regulations relating to the information to be provided.”).

190. See Reid, *supra* note 92, at 8.

individuals indirectly controlled by foreign authorities would bring these actors under the registration and require disclosure, the Act would still promote First Amendment principles. Once registered, the information flowing from these outlets can be labeled with a conspicuous statement identifying the agent-principal relationship if the DOJ finds they are subversive of American democracy. Such labeling would not violate the constitutionally protected freedom of speech.

Congress must explicitly define FARA's concept of "control" to account for actors operating under indirect and obscured control of foreign principles. FARA is a potentially powerful tool to combat insidious and subversive forces, though it is unfortunately ill equipped to execute its purpose as the statute stands. An explicit definition of "control" is necessary to qualify actors like RT and Sputnik as agents of foreign principles under FARA, and thus subject them to the Act's registration, monitoring, and dissemination requirements. This would ultimately allow the DOJ to evaluate and require a conspicuous statement identifying the foreign relationship on agent-disseminated materials.