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## Beholding Law: Amadeo on the Argentine Constitution

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## Beholding Law: Amadeo on the Argentine Constitution

Erin F. Delaney\* and Christina D. Ponsa-Kraus\*\*

Not too long ago, a group of legal historians gathered to discuss the past and future of their discipline's methodology.<sup>1</sup> The conference, held at the UC Davis School of Law and attended by renowned senior scholars and a younger cadre of up-and-comers, invited participants to consider a methodological reorientation. The dominant "law and society" paradigm had defined the discipline for decades; what if instead of thinking in terms of "law and..." scholars were to think instead in terms of "law as..."<sup>2</sup> This new formulation gave rise to an array of proposed conceptualizations of law for legal historians to consider: law as communication (the language of social relations); as consciousness (read: conscious resistance); as enchanted ritual (really – as in, magic); as sovereignty (always); and as economic and cultural activity (of course).

Notwithstanding the enthusiasm and creativity generated by the provocative question, the conference did not produce "a manifesto for the next wave of sociolegal history."<sup>3</sup> Perhaps that was a good thing, or so at least one of the participants seemed to think.<sup>4</sup> Let's stop searching for the next big methodological turn, he suggested. True, we should be methodologically self-conscious. But "[w]e cannot turn into the young and the restless, a James Dean (Rebel without a Scholarly Pause) sort of academic discipline always cruising down the road in search of the next big methodological approach."<sup>5</sup>

What a luxury, one cannot help thinking as one reads that sentence, to be able to stop worrying about methodology and just do what you love. But, of course, no academic discipline enjoys that luxury. It may be that a discipline can reach a certain kind of methodological maturity – a moment when its practitioners have earned a break from fretting about methodology just for a little while – but, for legal history, that moment may not yet have arrived. Will it ever? Every generation approaches the work of the previous with warranted skepticism about earlier historiographical practices. The reliability and sufficiency of sources and the persuasiveness of historical arguments are all revisited as scholars make novel finds, develop revisionist interpretations, and reflect on the past in light of cultural and technological change.

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<sup>1</sup> *'Law As...': Theory and Method in Legal History*, 1 U.C. IRVINE L. REV. (2011) (symposium issue).

<sup>2</sup> See Catherine Fisk & Robert Gordon, *Foreword*, 1 U.C. IRVINE L. REV. 519, 519–520 (2011).

<sup>3</sup> *Id.* at 527.

<sup>4</sup> Steven Wilf, *Law/Text/Past*, 1 U.C. IRVINE L. REV. 543 (2011).

<sup>5</sup> *Id.* at 563.

As with reading the past, reading comparative constitutional law introduces its own set of challenges, similarly affected by methodological flux. As Ran Hirschl has written, “since its birth, comparative constitutionalism has struggled with questions of identity.”<sup>6</sup> Is it a field? Does it have a distinct methodology? What are the normative implications of comparativism—are scholars searching for universal truths or contextualized cultural distinctions? Thus, to read and to use *Argentine Constitutional Law* today requires the same tools used in historiography: the excavation of the contextual background (including the strengths and weaknesses) of the comparative method at the time Santos Amadeo was writing, and some attempt at understanding the authorial choices and normative goals he might have brought to the project. While admittedly speculative, these insights should enrich our experience of *Argentine Constitutional Law* and allow current scholars to contend with both the highlights and the omissions in the book.

### *Reading Amadeo in Context*

Amadeo’s graduate studies in the United States occurred during a time of renewed interest in comparative constitutional law. The 1920s saw increased scholarly productivity in the field,<sup>7</sup> and the subject returned to law school curricula in the 1930s.<sup>8</sup> At Northwestern, where Amadeo received his J.D. degree, Dean Wigmore offered a course called the World’s Legal Systems,<sup>9</sup> derived from his three-volume compendium, *A Panorama of the World’s Legal Systems*, published in 1928. And at Columbia, where he earned his Ph.D. in law, Amadeo was able to enroll in a new comparative constitutional law seminar taught by Professors Francis Déak, Noel Dowling, and

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<sup>6</sup> RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 4 (2014).

<sup>7</sup> See, e.g., ROSCOE POUND, *COMPARATIVE LAW IN THE FORMATION OF AMERICAN COMMON LAW* (1928); JOHN HENRY WIGMORE, *A PANORAMA OF THE WORLD’S LEGAL SYSTEMS* (1928); Pierre Lepaulle, *The Function of Comparative Law with a Critique of Sociological Jurisprudence*, 35 HARV. L. REV. 838 (1922).

<sup>8</sup> See JULIUS GOEBEL, JR., *A HISTORY OF THE SCHOOL OF LAW* 328 (1955) (noting comparative constitutional law had for some time prior “fallen into low estate” at Columbia). The course had been offered at Columbia as early as 1877, when John W. Burgess had originally introduced it; his lecture notes for the year 1884-1885, along with the class notes of two students who took the course the previous year, survive in manuscript form. See *id.* at 86 (describing Burgess’ proposal for a course titled “The Comparative Study of the Constitutional Law of the Present”); “Notes of Lectures on Comparative Constitutional Law [The United States, England, the German Empire, and France] delivered by Professor John W. Burgess A.M., Law School of Columbia College, 1884-1885,” Columbia Law School Archives, Arthur W. Diamond Law Library, Columbia University, New York; Herbert Livingston Satterlee, class notes taken at the School of Law, Columbia University, manuscript 1883-1884, Columbia Law School Archives, Arthur W. Diamond Law Library, Columbia University, New York; John Armstrong Chaloner, class notes taken at the School of Law, Columbia University, manuscript 1883-1884, Columbia Law School Archives, Arthur W. Diamond Law Library, Columbia University, New York.

<sup>9</sup> This class was offered during the 1934-1935 academic year, when Santos Amadeo was enrolled at Northwestern. See NORTHWESTERN UNIVERSITY BULLETIN, 1934-1935, at 26; NORTHWESTERN UNIVERSITY BULLETIN, 1935-1936, at 46. Class lists are unavailable, so it is unknown whether Amadeo took the class.

Lindsey Rogers.<sup>10</sup> This latter experience would be critical to his development and interests in comparativism.

Amadeo arrived at Columbia Law School at a transformative moment in the history of American legal scholarship and education. “Ferment is abroad in the law” was how Karl Llewellyn memorably put it as he debated Roscoe Pound over legal realism in the pages of the *Harvard Law Review*.<sup>11</sup> Writing just a few years earlier, Columbia’s Dean Smith had argued, in a legal realist vein, that “the university law school cannot remain content with merely schooling students in legal doctrine and lawyer’s technique.... If the law is to be made more useful in the regulation of human affairs, the lawyers and judges of the future must also acquire an understanding of legal phenomena, an appreciation of the social implications of rules of law, and a knowledge of their actual effects, which cannot be obtained from the literature of the law alone.”<sup>12</sup>

This aspiration is discernible, if not explicit, in Edwin W. Patterson’s *Foreword* to the materials for Déak, Dowling, and Rogers’ comparative constitutional law seminar.<sup>13</sup> Describing comparative constitutional law as both “a method of the political scientist and of the practical statesman” and “an aid to philosophical speculation”—qualities reflecting the mission of the “university law school”—Patterson observed that “modern science” had transformed comparative law. Whereas earlier generations had believed “that the purely adventitious or nationalistic features of particular legal systems could be stripped from the indispensable nuclei of basic legal principles and concepts,” these “ambitious hopes for comparative law can hardly

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<sup>10</sup> The professors teaching Amadeo’s comparative constitutional law seminar were leading academic figures of the time: Professor Dowling was the Nash Professor of Law, focused on U.S. constitutional law, see William T. Gossett, *The Human Side of Chief Justice Hughes*, A.B.A. J., Dec. 1973, at 1415. Professor Rogers, the Burgess Professor of Public Law, co-authored *The New Constitutions of Europe* in 1922, a volume that provided English translations of post-WWI European constitutions and was widely praised for its attention to detail, see William M. Freeman, *Lindsay Rogers, Law Professor at Columbia, Dies*, N.Y. TIMES, Nov. 28, 1970, at 30). See also Arnold Bennett Hall, *The New Constitutions of Europe*, 23 COLUM. L. REV. 508, 508 (1923) (book review); James Hart, *The New Constitutions of Europe*, 32 YALE L. J. 635, 636 (1923) (book review); T.J. Michie, Jr., *The New Constitutions of Europe*, 9 VA. L. REV. 405, 405–06 (1923) (book review); Herbert F. Wright, *The New Constitutions of Europe*, 17 AM. J. INT’L L. 595, 597 (1923) (book review). And Professor Déak, educated at the University of Budapest and at Harvard, was an international law scholar of some renown, having taught in Geneva, Paris, and the Hague, see Francis Deak, 72, *Professor of Law*, N.Y. TIMES, Jan. 23, 1972, at 59.

<sup>11</sup> Karl N. Llewellyn, *Some Realism About Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). See also Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

<sup>12</sup> COLUMBIA LAW REPORTS (1929), at 99.

<sup>13</sup> As noted above, of the three professors who taught the seminar, only Déak was involved in preparing materials. See Francis Déak and A. Arthur Schiller, *Introductory Readings and Materials to the Study of Comparative Law*, Columbia Law School Archives, Arthur W. Diamond Law Library, Columbia University, New York. Note that Amadeo thanks both Déak and Dowling in the preface to *Argentine Constitutional Law*. SANTOS AMADEO, ARGENTINE CONSTITUTIONAL LAW (1943) (ix).

be indulged today," he wrote.<sup>14</sup> "Comparative law is not... a law of gravity for all legal systems. It is a method of study, a discipline, but it has no irreducible elements save those uncertain limits to the pliability of human nature." Turning to the objectives served by the study of comparative law, Patterson argued that it would be of value to practicing lawyers with matters involving foreign law, idealists working on international peace, and jurists and legal scholars hoping to improve American law, before adding a note on the more "philosophical" aims of comparative study: "After all, a sufficient justification for any university study is its capacity to satisfy man's mature intellectual curiosity. In addition to the worthy claims of professional training and contemporary public service, the university may well seek to satisfy the timeless claim of the philosopher." And by preparing materials that promised to serve all of these goals, he concluded, Déak and Schiller had "made comparative law a university discipline."

It was, of course, one thing to articulate the aspirations of a "university discipline" and another to achieve them.<sup>15</sup> Comparativists at the time struggled to identify a methodology and a governing purpose to the field. The observation or description of foreign law, as well as of international law, were both subsumed in the broader "comparative law" construct.<sup>16</sup> Wigmore suggested three approaches to its study: *nomoscopy*, or the aim of thick factual description; *nomothetics*, or the normative evaluation of different systems; and *nomogenetics*, the effort to trace "the evolution of various systems in their relation one to another in chronology and causes" (a description that resonates with today's focus on constitutional borrowing).<sup>17</sup> Once venturing beyond the purely descriptive, however, scholars failed to clearly define normative goals and to recognize their Eurocentric preconceptions. Max Rheinstein, a professor of Comparative Law at the University of Chicago, argued in 1938 that the field's core inquiry should be one of determining the "sociology of law," or the "social function of law," but he concluded that it was "so little developed" that it was hardly teachable. He argued for the "functional comparison of

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<sup>14</sup> These and the remaining quotations in this paragraph all appear in Patterson's *Foreword* to the class materials. See Edwin Patterson, *Foreword*, in Déak and Schiller, *Introductory Readings*, *supra* note 13, at iv.

<sup>15</sup> An analogous difficulty has been captured nicely by Robert Gordon in the context of the discipline of legal history, which experienced its own "ferment" in the 1930s. Articulating a distinction between "internal" legal history, which relies mainly on "distinctively legal sources"—particularly opinions written by judges—and "external" history, which looks to a broader range of materials encompassing sources not traditionally thought of as properly "legal," Gordon explains that, "though a conviction of the importance of the influence of social surroundings on law was what drove historians of this time to research in local sources..., it did not carry most of them to write external legal history." Robert W. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & HIST. REV. 9, 26 (1975). Willard Hurst, the subject of his article and the symposium it introduces, pioneered the writing of what Gordon calls "external" legal history, beginning in the 1930s. *Id.* at 11. Gordon then assesses various explanations before settling on his own suggestion: The failure of the period to produce an "extensive external historiography of law," he speculates, could be explained by historians' desire—an "anxious solicitude," Gordon puts it—to preserve the common law. *Id.* at 29

<sup>16</sup> See Walther Hug, *The History of Comparative Law*, 45 HARV. L. REV. 1027, 1027 (1932); Max Rheinstein, *Teaching Comparative Law*, 5 U. CHI. L. REV. 615, at 616–17.

<sup>17</sup> As described by Hug, *supra* note 16, at 1027, n.2 (citing JOHN HENRY WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS (1928), at 1115).

legal rules and institutions’,” as the only appropriate area for instruction, to be used to shed light on the “clarification and understanding of the rules and institutions of American law.”<sup>18</sup>

The materials for Columbia Law School’s comparative constitutional law seminar in the 1930s are not explicit in their methodological approach, but the content exhibits a functional focus on courts and the common law/civil code divide,<sup>19</sup> and includes work by a number of American theorists outlining American practices. We might imagine the conversations in class taking the form that Rheinstein advocated. The highlighted comparators are largely European-based, including the United Kingdom, France, the Netherlands, and Germany. Nevertheless, and notwithstanding the Eurocentric focus of the materials, the course assignments had a wider scope, as Amadeo was “assigned a topic on the Supreme Court of Argentina and its constitutional jurisprudence.”<sup>20</sup> In his paper, Amadeo’s primary focus—the judicial function in the maintenance of the federal system—reflected the interests of his main advisor, Professor Dowling, known for his study of the constitutional problems of federalism.<sup>21</sup> But the book that developed out of this paper would ultimately expand to cover individual rights in detail, with extensive evaluation of the jurisprudence of the Supreme Court of Argentina.

*Argentine Constitutional Law* is avowedly comparative: Amadeo explains in his preface that “since the constitutional law of the United States has had a profound influence on the development of constitutional law in Argentina, emphasis has been placed upon the relationship, the similarities and the differences, between the two.”<sup>22</sup> Amadeo’s hope was for his book to “provoke interest in the study of Argentine constitutional law on the part of students and commentators on the constitutional law of the United States,” leading to “further studies of a

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<sup>18</sup> Rheinstein, *supra* note 16, at 618–19, 622–23.

<sup>19</sup> This focus is unsurprising for an American course at the time. See David S. Clark, *Nothing New in 2000? Comparative Law in 1900 and Today*, 75 TUL. L. REV. 871, 888–92 (2001) (noting that the 1904 St Louis Congress of Comparative Law highlighted the role of courts and judicial power, in comparison to the 1900 Paris Congress which focused on “legislation—and the scholarly flavor of its legal culture”).

<sup>20</sup> Noel T. Dowling, *Doctrina: Paralelos Constitucionales Entre La Argentina y Los Estados Unidos*, 22 REVISTA ARGENTINA JURÍDICA (EDITORIAL LAW LEY) 1, 2 (1941) (translation by Ponsa-Kraus).

<sup>21</sup> Dowling also had a reputation for his “lawyerly” approach to teaching constitutional law. GOEBEL, *supra* note 8, at 270.

<sup>22</sup> AMADEO, *supra* note 13, at ix.

more specialized nature.”<sup>23</sup> Although this aspiration has been realized in the twenty-first century,<sup>24</sup> his book stood alone among works in English for much of the twentieth century.<sup>25</sup>

The book’s opening discussion of the history of constitutional development in Argentina is nuanced, as is its attention to context and history. Perhaps Amadeo’s “eight months in Buenos Aires studying the Argentine system on its territory” provided perspective.<sup>26</sup> He takes care to observe that although Argentinian federalism may have been influenced by external experiences, “the factors which gave rise to the idea and the necessity... had their deep roots in the political, economic, and social history of the nation, as well as in its geographical features, and in the characteristics of the Argentine people.”<sup>27</sup>

Notwithstanding these important gestures to context and the willingness to engage with alternative influences on Argentinian constitutional development,<sup>28</sup> Amadeo’s drive to find functional comparisons with the United States may have led him to prioritize perceived similarities between the two systems, with less critical attention to divergences. He does highlight one important difference: the enhanced role of the Argentine federal government in ensuring a “republican form of government” in the provinces. Although both constitutions share a “Republican Guarantee Clause,” the Argentine constitution further guarantees to each province “the enjoyment and exercise of its own institutions.”<sup>29</sup> This additional constitutional protection was used to justify federal intervention in provincial affairs for activities ranging from corruption of elections, to “usurpation of public offices after elector defeat,” to “the enactment of laws in violation of the Constitution.”<sup>30</sup> But in his brief analysis of these provisions, this “fundamental difference between the practice of federalism in Argentina and in the United States” is chalked

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<sup>23</sup> *Id.* at x.

<sup>24</sup> See, e.g., REBECCA BILL CHAVEZ, *THE RULE OF LAW IN NASCENT DEMOCRACIES: JUDICIAL POLITICS IN ARGENTINA* (2004); GRETCHEN HELMKE, *COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA* (2005); Robert S. Barker, *Background Notes and Constitutional Provisions Concerning Argentine Federalism*, 43 DUQ. L. REV. 539 (2004) (discussing the constitutional history of Argentina and the legal development of its Constitution); Lucas S. Grossman, *Argentine Constitutional Law. An Overview*, 43 INT’L J. LEGAL INFO. 1 (2015) (discussing the Argentinian constitutional reforms and problems with the Constitution over time); Abelardo Levaggi, *Three Matters Concerning Argentine Constitutional History*, 16 RECHTSGESCHICHTE-LEGAL HISTORY 82 (2010) (summarizing three distinct periods in Argentine constitutionalism).

<sup>25</sup> Sidney B. Jacoby, *Argentine Constitutional Law*, 12 U. CHI. L. REV. 304, 304 (1945) (book review) (describing Amadeo’s book as the “first textbook in English on Argentine constitutional law”). In the wake of the 1994 constitutional amendments, there was renewed interest in Argentine constitutionalism, see, e.g., Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT’L. L. 281 (1999).

<sup>26</sup> Dowling, *supra* note 20, at 2.

<sup>27</sup> AMADEO, *supra* note 13, at 7.

<sup>28</sup> *Id.* at 32 (referencing the Chilean Constitution of 1833, the Swiss Constitution of 1848, the German Confederation and the French Constitution of 1791).

<sup>29</sup> Const. Arg. arts. 5, 6 (1853).

<sup>30</sup> AMADEO, *supra* note 13, at 93.

up to the compromises made in the Argentine Constitution between federal and unitary principles. Amadeo takes the U.S. approach, leaving “the people of the states to solve their own political problems,” as the more appropriate baseline for a federal system.<sup>31</sup> But scholars today question that assumption, recognizing the enormous dangers of “subnational authoritarianism.”<sup>32</sup> A modern scholar might instead suggest that the U.S. approach gave states flexibility to structure their internal political systems in ways that disenfranchised and terrorized state citizens.<sup>33</sup>

Nevertheless, Amadeo is right to observe that the drafters of the Argentine Constitution were heavily influenced by the United States Constitution. Indeed, the text itself reveals it, as do the statements of contemporary Argentine statesmen and intellectuals whom Amadeo discusses.<sup>34</sup> His stated purpose is to highlight the links with the United States, and the book goes on to make many comparisons between Argentine and U.S. federalism, including detailed discussions of Argentine Supreme Court cases citing to Joseph Story’s *Commentaries on the Constitution of the United States* and to decisions of the U.S. Supreme Court. His success in meeting this goal is reflected by Argentina’s inclusion in George Billias’s *American Constitutionalism Heard Round the World, 1776-1989*.<sup>35</sup> In that book, Amadeo is referenced as a “learned Argentine scholar”; did Billias mean a learned scholar of Argentina? Or a scholar from Argentina? For it is Amadeo’s identity as a Puerto Rican that further complicates the question of his choices as a comparativist.

#### *Reading Amadeo as Amadeo*

Like the United States Constitution, the Argentine Constitution provided for the existence of territories (non-state “U.S. territories” in the United States; non-provincial “national territories” in Argentina). But this comparison just barely makes it into the book, though one strongly suspects that this relative inattention is not due to lack of knowledge or curiosity on Amadeo’s part. Amadeo does not address the territories as a stand-alone matter in the book but alludes to a marked distinction between the two systems in passing, in a discussion about the creation of legislative courts. In addressing whether the territorial courts in the federal capital were constitutional or legislative (and thus whether their jurisdiction could be altered by Congress),

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<sup>31</sup> *Id.* at 95.

<sup>32</sup> See Edward Gibson, *Boundary Control: Subnational Authoritarianism in Democratic Countries*, 58 *WORLD POL.* 101 (2005) (discussing Oaxaca in Mexico and Santiago del Estero in Argentina).

<sup>33</sup> See ROBERT MICKEY, *PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF AUTHORITARIAN ENCLAVES IN AMERICA’S DEEP SOUTH, 1944-1972* (2015).

<sup>34</sup> AMADEO, *supra* note 13, at 29–34. These included, of course, Juan Bautista Alberdi, known as the father of the Argentine Constitution. Amadeo addresses Alberdi’s contributions in detail, and the central role played by his book, *Bases and Points of Departure for the Political Organization of the Argentine Republic*, in which Alberdi recommended using the United States as a model for a federal system. *Id.* at 30–31.

<sup>35</sup> GEORGE ATHAN BILLIAS, *AMERICAN CONSTITUTIONALISM HEARD ‘ROUND THE WORLD, 1776-1989: A GLOBAL PERSPECTIVE* 135 (2009). Note that the influence of the American constitution has since declined. See generally David S. Law & Mila Versteeg, *Declining Influence of the United States Constitution*, 87 *N.Y.U. L. REV.* 762 (2012).



the Argentine Supreme Court cited Story favorably for the claim that, in the United States, territorial courts are legislative courts, “created in virtue of the general sovereignty which exists in the national government over its territories.”<sup>36</sup> Amadeo noted that Argentine writers had criticized this decision, because “the principle expounded by Story that the territories of the United States do not form a part of the nation is not applicable in Argentina in as much as under the preamble of the Argentine Constitution the territories are a part of the Republic.”<sup>37</sup> But he delves no further into the distinction or the role of U.S. influence in this area.<sup>38</sup>

Amadeo’s seminar paper, however, handles the territories differently. Although the discussion here is brief as well, it begins with a pointed declaration of the importance of the subject of such territories for an understanding of a federalist system. “As the knowledge of the political geography of a country, [e]specially like that of a federal state like Argentin[a], is essential[] in order to understand the organization of the federal system... it is necessary to discuss briefly the political subdivisions created by the constitution and which exercise governmental powers within the limits of the Argentine territory.”<sup>39</sup> The paper goes on to describe the four kinds of political subdivisions provided for by the Argentine constitution: provinces (fourteen at the time; by now twenty-three), the federal capital, the national territories (eleven at the time), and the central national government.<sup>40</sup> It then identifies two constitutional provisions specifically addressing the territories: One confers exclusive legislative power upon the Argentine Congress over the national capital and any territory annexed by purchase or cession to establish “forts, arsenals, magazines, or other useful establishment[s] of national utility”; the other empowers the Argentine Congress to establish governments in the national territories and to create new provinces. Finally, it summarizes the 1884 law that established these governments and set forth eligibility criteria for their admission into provincial status.<sup>41</sup>

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<sup>36</sup> AMADEO, *supra* note 13, at 60, n.19 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 445 (5th ed. 1891)).

<sup>37</sup> *Id.* at 60–61. Our own reading of the Preamble does not support this interpretation; indeed, it describes the Argentine Confederation as composed of the provinces, though at the time, Argentina’s territory consisted of both provinces and national territories. That said, the Preamble does promise the blessings of liberty to all people of the world who wish to live on Argentine “territory,” without limiting this promise to inhabitants of the provinces alone; perhaps that is the language Amadeo had in mind. Const. Arg. Preamble (1853).

<sup>38</sup> According to Amadeo, one Argentine writer, Dr. Felipe A. Espil, denied the relevance of Story’s analysis because it derived from a case involving a Congressionally created court in Florida, not one in the District of Columbia. *Id.* That distinction was not salient at the time of the Argentine case (1886), but Amadeo includes a brief footnote where he says that this distinction between territories and the federal district (Washington D.C.) (hypothesized by Espil) was made by the U.S. Supreme Court in *O’Donoghue v. United States*, 289 U.S. 516 (1933). AMADEO, *supra* note 13, at 61 n.20.

<sup>39</sup> Santos P. Amadeo, “The Argentine Constitutional System,” Seminar in Comparative Constitutional Law, Professors Dowling, Déak, and Rogers, Columbia University Law School, May 25, 1938, at 2–3.

<sup>40</sup> *Id.* at 3.

<sup>41</sup> *Id.* at 7–8; see Const. Arg. art. 64, cls. 14, 27 (1853) (Amadeo’s paper mistakenly identifies these provisions as Art. 67, cl. 14 and 27).

While concise, to be sure, these seminar pages lay down a marker for the proposition that there is more to Argentine federalism than the dual sovereignty of national and provincial governments, and that thorough comprehension of any federalist system requires the study of all varieties of jurisdiction. The book settles on a mere passing reference to the territories, leaving the reader with little more than a glimpse of what else might exist beyond the national and provincial governments, and without an assessment of its importance.

Moreover, neither the book nor the paper alludes to the influence of U.S. constitutionalism on this particular aspect of Argentine constitutionalism. There is no mention of the Territory Clause of the U.S. Constitution and no discussion of Supreme Court decisions dealing with the territories of the United States, whether before or after the annexation of Puerto Rico. None of this would feel quite so significant were the author not a Puerto Rican scholar. But he is, and so his relative silence on the subject of the territories is difficult for us to ignore; and, in light of his own observations concerning its importance in the original seminar paper, positively intriguing.

What precisely to make of this relative silence is a harder question, and not one we try to answer definitively here. Instead, we indulge in a bit of speculation. Maybe his editors at Columbia University Press thought the territories should await separate treatment. Maybe Amadeo, who among his many accomplishments would go on to publish numerous books, teach at the University of Puerto Rico law school, litigate a number of prominent cases as defense attorney for high-profile clients, and serve as counsel to the Puerto Rico branch of the ACLU, simply got too busy to develop the book in this direction. Maybe it is an instance of those “limits to the pliability of human nature” to which Patterson referred in his *Foreword* to the seminar materials. Maybe all of these are really the same thing.

Maybe, though, there is something more openly, if tacitly, normative in it. Maybe—this is just a guess, but maybe—Amadeo chose to take note of the full array of jurisdictions in Argentine federalism without then undertaking a full exploration of them himself because it was the provinces, in his view, that embodied what Argentine federalism should be, whereas the territories represented unfulfilled aspiration: exceptional, subordinate, and transitional. Maybe.

A similar mystery arises with the respect to the seminar materials, which in their own way remind us of the uncertain place of territories in a federalist system. As noted above, the materials adopted a Eurocentric perspective. Yet they concluded, improbably and without explanation, with an edited version of a 1920 decision by the Supreme Court of the Philippines, which were then, of course, a territory of the United States. The issue in the case, *In re Shoop* (1920), was on what grounds Max Shoop, a member of the Bar of the State of New York, could be admitted to the Bar of the Philippines.<sup>42</sup> The Supreme Court of the Philippines allowed admission based on comity: If New York State admitted lawyers from the Philippines to practice in New York, then the Court would allow New York lawyers to practice in the Philippines.

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<sup>42</sup> *In re Shoop*, 41 PHIL. REP. 213 (S.C. 1920).

In the unedited version of the case, the Supreme Court of the Philippines focuses first on the first prong of the New York State rule of admission, which included any person “admitted to practice and who has practiced five years as a member of the bar in the highest law court in any other state or territory of the American Union or in the District of Columbia.”<sup>43</sup> The question for the Supreme Court of the Philippines to answer, therefore, was whether the Philippines are a “territory.” It concludes the Philippines must be a territory: “Otherwise, the Philippines would be in an anomalous position like unto Edward Everett Hale’s ‘A Man Without a Country’ — a land neither ‘another country,’ nor a ‘state,’ nor a ‘territory’ — a land without status.”<sup>44</sup> The Court then decides that since the Philippines are covered by the first category under the New York law, there exists between the Philippines and New York “a basis of comity” sufficient for Shoop’s admission.

The Court goes on, however, to examine an alternative ground: the second prong of the New York State rule, which allowed the admission of “any person admitted to practice and who has practiced five years in another country whose jurisprudence is based on the principles of the English Common Law.”<sup>45</sup> If the Philippine Islands are not a “state or territory,” then they must be “another country,” and in that case, “[t]he question then presented is upon what principles is the present jurisprudence of these Islands based?” The Court embarks on a discussion, first, of what is meant by the “English common law,” and then, of whether the jurisprudence of the Philippines is based on the principles of the English common law. Many pages later, the Court arrives at an affirmative answer, and a second basis of comity.<sup>46</sup>

The editors of the course materials, however, chose to highlight only the second prong of the New York rule, covering lawyers from “another country,” and the Court’s discussion of it. Absent from the entire discussion is whether the Philippines are a “territory.” Instead, the edited version picks up just before the discussion of whether the Philippines have a jurisprudence based on the English common law. Thus do the Philippines become, with the stroke of a pen, “another country.” Both at the time of the 1920 case and when Amadeo took the subsequent seminar, the Philippines were a territory of the United States, subject entirely to U.S. sovereignty, and years away from gaining independence.

Any professor who has prepared materials for a law school course knows the challenges of editing cases. Asking students to read every page of every judicial opinion assigned would be a crushing demand, and so one tailors the cases toward the pedagogical ends of the course. But we have to wonder what precisely motivated the choice made here. The edited version of *In re Shoop* in these seminar materials omitted entirely the references to the Philippines as a territory, and left in place passages implying that the Philippines were a foreign country. (Of course, New York isn’t a sovereign country either, nor was it “foreign” to the Philippines. But it appears to stand in here for the “common law.” And at any rate, its status remains clear post-edits.)

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<sup>43</sup> *Id.* at 215.

<sup>44</sup> *Id.* at 218.

<sup>45</sup> *Id.* at 218.

<sup>46</sup> *Id.* at 256–57.

Might the deletion of references to the Philippines' status as a territory in the edited version of *In re Shoop* suggest something about the relationship between empire and comparative law—along with something about the seminar professors' views about that relationship? Did they find it uncomfortable? Or just befuddling? Whatever their understanding, their editorial choice seems to suggest that a colony is somehow not a proper subject of comparison; hence the erasure of the Philippines' colonial status for purposes of its role as an example in a comparative law course. The Philippines were then still part of U.S. sovereign territory; they were contained within the United States' internationally recognized boundaries. Perhaps the professors allowed themselves this sleight of hand because the United States had by then made clear that the Philippines would someday be independent.<sup>47</sup> Or perhaps, they knew little or nothing about the Philippines and their relation to the United States, in which case they were like most Americans in this respect.

But Amadeo was not. When he read the edited version of *In re Shoop*, he must have been struck by these erasures. Did he say anything about it to his professors? Did he try to find the unedited case? Did he question whether assuming that the Philippines were a foreign country was somehow essential to a comparative approach? We don't know. What we do know is that he believed that it is necessary to understand every variety of jurisdiction encompassed within a federal system in order to understand that system. We know that despite having made this view clear in his seminar paper, his book ultimately did not explore the topic of Argentina's national territories. And we know that, as a Puerto Rican, Amadeo knew exactly what he was doing when he made that choice.

#### *Conclusion: Inclusions, Omissions, and Comparisons*

As we turn to the past to revisit Amadeo's work, we find ourselves beholding Amadeo beholding law. Using the tools of historiography, we have sought to excavate the context and normative goals of an author, with a view toward a critical and engaged reading of his work. Amadeo wrote *Argentine Constitutional Law* when the modern field of comparative constitutional law was in its nascent state, at a time of methodological uncertainty for the discipline. Viewing his book over 75 years later, we are confronted with challenges that every scholarly generation faces: What is included and what is omitted? How can a reader, external to the experience of the one or more countries, evaluate the comparisons made? What do these comparisons reveal? Reflecting the practices and preoccupations of its time, to be sure, Amadeo's book offers an erudite and rigorous analysis of the jurisprudence of the Argentine Supreme Court, enriched by a historical introduction attuned to the importance of context for an understanding of law even as it serves primarily to set the stage for a doctrinally focused work. The book pioneered the comparative study of Argentine constitutional law for English-speaking scholars, and it stands to this day as essential reading on the subject. May it continue to serve as a gateway to further exploration of federalism, rights, judicial power, and constitutionalism around the globe.

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<sup>47</sup> Several years earlier, Congress had passed legislation providing for a process leading to Philippine independence. See *An act to provide for the complete independence of the Philippine Islands, to provide for the adoption of a constitution and a form of government for the Philippine islands, and for other purposes*, 48 Stat. 456 (March 24, 1934).