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Comparative Law at the Service of Democracy: A Reading of Arosemena's Constitutional Studies of the Latin American Governments

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ARTICLE: COMPARATIVE LAW AT THE SERVICE OF DEMOCRACY: A READING OF AROSEMENA'S
 CONSTITUTIONAL STUDIES OF THE LATIN AMERICAN GOVERNMENTS

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BIO: * Miguel Gonzalez Marcos is a lawyer admitted to the bar in the Republic of Panama, Minnesota, and New York. He worked for American and Panamanian law firms, and was a Professor of Law at the University of Panama. His work in constitutional law has led to a number of publications, including co-authorship of the 1994 Project for a Panamanian Constitution. He did his LL.B. at the University of Panama, his Ph.D. at the Johann Wolfgang Goethe University, Frankfurt, his J.D. at the State University of New York at Buffalo, and his LL.M. at New York University. My gratitude to Professors John Reid of New York University Law School, and Janet Lindgren of the State University of New York at Buffalo Law School, for their suggestions on earlier drafts of this paper. Likewise, I would like to thank Doctor Carlos Ivan Zuguardia and Doctor Martha Bigelow for their encouragement. I am indebted to the staff of the Library of Congress, the Edward Bennet Williams Law Library of Georgetown University, as well as the National Libraries of Colombia, Ecuador, Panama, and Peru for their assistance.

** Immanuel Kant, *Perpetual Peace: A Philosophical Essay* 120 (M. Campbell Smith trans., Macmillan Company 1917) (1903).

*** Michael Stolleis, *Staat und Staatsraison in der frühen Neuzeit: Studien zur Geschichte des öffentlichen Rechts* 10 (1990) (author translation).

**** William Twining, *Globalisation and Legal Theory* 108 (2001).

SUMMARY:

... In 1870, Justo Arosemena published *Estudios Constitucionales sobre los Gobiernos de America Latina* (Constitutional Studies of the Governments of Latin America or "Constitutional Studies") in France. ... Arosemena quotes three other authors extensively: John Stuart Mill, author of *Considerations on Representative Government*, Edouard Laboulaye, author of *Studies about the Constitution of the United States*, and Manuel Colmeiro, author of *Constitutional Law of the Hispano-American Republics*. ... Further, in his analysis, Arosemena adopts a comparative method and an unbiased perspective, thereby achieving a neutral stand without noticeable inclination to a particular national legal order. ... Laboulaye's work exposed Arosemena to an example of how to use comparative constitutional law to further constitutional reform. ... More importantly, through these authors Arosemena was exposed to ideas helpful in the construction of his comparative project: that societies are in different stages of development (from Mill), and that comparative law could be used for legal reform (from Laboulaye) and integration (from Colmeiro). ... Participating in the early developments of comparative law during the nineteenth century, the "Era of Comparison," Arosemena sought to facilitate democracy by applying the most advanced comparative method available to the Latin American Legal orders. ...

HIGHLIGHT: [*260]

First Definitive Article for Perpetual Peace

The civil constitution of each state shall be republican.**

There are only texts. There is no historical reality beyond language.***

If a text is worth studying, it is usually fruitful to subject it to charitable interpretation, even to try to make it the best it can be.****

TEXT:

I. Constitutional Studies for a Common Motherland

In 1870, Justo Arosemena published *Estudios Constitucionales sobre los Gobiernos de America Latina* (Constitutional Studies of the Governments of Latin America or "Constitutional Studies") in France.ⁿ¹ A Panamanian jurist in the Republic of Colombia, ⁿ² Arosemena wanted to promote a constitutional harmonization of the Latin American legal orders. He thought a harmonization would make it easier for a citizen of a Latin American country to enjoy similar rights in any Latin American country. He imagined Latin America as if it were a common motherland, ⁿ³ integrated by culture, economy, and law, but without a supranational government. Arosemena hoped that once the Latin American harmonization were completed, an integration of the American continent would be possible. ⁿ⁴ A utopian ideal of a universal society nourished Arosemena's work. He believed that in the future, humanity would be organized in small cities linked through morality, economy, culture, and science. ⁿ⁵ No [*261] more a source of national identity, the state would guarantee fundamental rights to every person, irrespective of nationality. Yet, the realities of the nineteenth and twentieth centuries challenged Arosemena's vision. Balkanized Latin American societies fostered their national interests;ⁿ⁶ racial bigotry led to genocide in Nazi Germany and Yugoslavia; ⁿ⁷ religious, economic, and political radicalisms overshadowed international relations. ⁿ⁸ Readily dismissible as utopian, Constitutional Studies was forgotten.

Recent events, however, vindicate Arosemena's foresight about integration and universal society. Six South American nations of the common market known as MERCOSUR will "allow their 250 million people to live and work in any other member country and be granted the same rights as the citizens of those nations."ⁿ⁹ Arosemena must have had a keen imagination to anticipate this outcome in 1870, when the War of the Triple Alliance, referred to as "the bloodiest conflict in Latin-American history," ⁿ¹⁰ had just ended. Describing this war, ⁿ¹¹ Arosemena suggested creating a confederation of autonomous states to bring order and peace [*262] to this region.ⁿ¹² If this confederation were organized, argued Arosemena, "they would be part of an honorable and respectable union, full of elements for prosperity and greatness. But this and other analogous plans, easy to sketch on paper, and based only on reason, are usually reduce to a category of well intentioned dreams." ⁿ¹³ In fact, nowadays commentators would see this conflict more as a civil war fought within the same political space that makes MERCOSUR possible. ⁿ¹⁴ Likewise, the current negotiations toward a Free Trade Area of the Americas by 2005, which aim for uniting the economies of the American continent, speak also for the accuracy of Arosemena's foresight. ⁿ¹⁵ Also, Arosemena is not alone in the belief in a new global community based on transnational loyalties. Former Czech president Vaclav Havel, for example, suggests that states should become simpler "and not the objects of emotional attachment. The global community, not the nation-state, should be the locus of sovereignty and the source and protector of basic human rights." ⁿ¹⁶ Thus, as Arosemena foresaw, integration in a global community guided by individual [*263] liberty is the direction in which the world is heading.ⁿ¹⁷ Nonetheless, as astonishing as Arosemena's foresight might be, it is not the sole justification for reexamining Constitutional Studies; after all, it could have been serendipitous. ⁿ¹⁸

Still, there is a good reason for reexamining Constitutional Studies anew. Globalization, a third wave of increasing world integration,ⁿ¹⁹ is bringing comparative constitutional law to the foreground. ⁿ²⁰ The [*264] renewed interest in comparative constitutional law is the result of two phenomena. First, integration requires coordinating constitutional norms in order to join in a community. For example, in Europe, some member countries of the European Union needed to amend their respective constitutions to incorporate Amsterdam Treaty provisions into their domestic legal orders.ⁿ²¹ In Latin America, constitutions are stalling further integration because they usually do not "resolve the legal problems of participating in a community-type economic integration." ⁿ²² Second and more importantly, human rights and constitutional democracy are becoming universal standards creating a set of transnational constitutional values. ⁿ²³ Despite the rising interest in comparative constitutional law, doubts [*265] about its method still exist.ⁿ²⁴ A reading of Constitutional Studies may contribute to thinking about the limits and possibilities of comparative constitutional law. Indeed, Constitutional Studies is both an attempt to coordinate constitutional law to promote integration and an attempt to develop a transnational constitutional discourse. Arosemena's methodological conception allowed him to see that the first step for a lasting integration in Latin America was to strive toward democratic standards. Further, Arosemena aimed for integration through the people as if they were members of a community, but without a supranational government. This showed an insight about what the obstacles hindering Latin American integration then were, and about what the desirable

goal of any integration should be. n25 To show how Arosemena gained his insight may be fruitful for comparative constitutional law today. n26

[*266] Arosemena's project emerged from the integrationist tradition in Latin America. n27 Elusive since the independence of the Latin American countries, the integrationist ideal had two main motivations: to organize governments that ensured individual liberties, and to balance the international arena vis-a-vis the Holy Alliance, Spain, and England. n28 Simon Bolivar's vision typifies this integrationist tradition. He wanted to organize South America into one of the greatest nations of the world, measured not by its extension or wealth, but by its liberty. n29 Determined to fulfill his vision, in 1824 Bolivar invited the governments of Colombia, Mexico, Rio de la Plata, Chile, and Guatemala to attend the Congreso Anfictionico de Panama for creating a permanent supranational institution. n30 This Congreso Anfictionico took place in 1826 with a disappointing [*267] outcome. n31 It adopted a treaty for a perpetual confederation, but without a supranational authority; the treaty stressed that the confederation would not limit in any way the sovereignty of the parties. n32 Arosemena would learn from this failed Bolivarian experience. He realized that integration was not feasible without minimal homogeneity among the Latin American societies. The approach to be used in reaching the goal of integration was as important as its outcome. Integration should not occur from the top-down through governmental institutions, but from the bottom-up through the people. To succeed, integration must be radically democratic. Arosemena believed that societies evolve from primitive forms to higher forms of civilizations, considering how well they assure individual liberty. For Arosemena, the highest expression of political organization for ensuring individual liberty was the constitutional democratic republic. Thus, organized constitutional democratic governments in each Latin American country would be the desideratum. Yet, the process toward constitutional democracies cannot be forced. Arosemena did not use prescriptions for imposing a model in each country; he evaluated the degree of political organization of each analyzed Latin American country and suggested changes to encourage progression toward a constitutional democracy. Contrasting institutional arrangements of a given country, Arosemena pointed out their similarities and differences from the democratic ideal. He did not discard the deviations from the ideal, but explained them historically, and then suggested feasible reforms to strengthen a country's organization toward a constitutional democracy. n33 It is for this methodological approach, an important feature of the standard [*268] method of comparative law today, n34 that Arosemena's Constitutional Studies is still praiseworthy.

This article shows that Arosemena's main contribution to comparative constitutional law lies in his method. The second part of the article gives basic information about the arrangement and purposes of Constitutional Studies, and reconstructs Arosemena's constitutional conception. The third part discusses the intellectual influences on Constitutional Studies, showing the sources from which Arosemena developed his comparative method. The fourth part contextualizes Constitutional Studies, analyzing how nineteenth and twentieth century scholars received it, and presents some suggestions encouraging further research to explain why Constitutional Studies was forgotten. The fifth and last part of the study presents the conclusion arguing what significance Constitutional Studies should have for the Latin American legal tradition. Although Latin American and European scholars have recognized Arosemena as one of the most important jurists of all times, n35 they have not examined Constitutional Studies, Arosemena's most important work. n36 This study aims to fill this [*269] gap in the history of legal thought by delivering a systematic analysis of Constitutional Studies. n37

II. Basics About Constitutional Studies

Constitutional Studies had three editions. Except for the change in the title and the inclusion of more Latin American countries, there were no fundamental changes from the first edition of 1870 to the last edition of 1888. The two-volume edition of 1870, under the title *Constituciones Politicas de la America Meridional, Reunidas y Comentadas*, analyzes the constitutions of ten Latin American countries: Brazil, Chile, Argentina, Uruguay, Paraguay, Bolivia, Peru, Ecuador, Colombia, and Venezuela. n38 In the 1878 edition, the title was changed to *Constitutional Studies of the Governments of Latin America*, the constitutions of Mexico, Guatemala, El Salvador, Nicaragua, Costa Rica, and Haiti were added, and the appendix was updated. n39 The 1888 edition was slightly updated. n40 The following sections of this article give basic information about Constitutional Studies. The first section will describe Constitutional Studies' structure and purpose. The second will discuss Arosemena's method and utopian core. The third will reconstruct Arosemena's constitutional conception.

A. Arrangement and Purpose

Arosemena pondered which of the Latin American countries to include in his study on the basis of geopolitics. Thinking the United States would seize Mexico and Central America as it had Texas, he excluded them from the first edition. n41

Also, Arosemena pondered the order in [*270] which he would analyze the countries; his criterion combined geography and what he called "political chronology" or "the natural evolution of the systems according to the social and political development of the societies."⁴² Thus, the book begins with the Brazilian monarchy, continues with the Chilean oligarchy, and follows with the Colombian and Venezuelan federations. The book places Central America and Haiti at the end because Central America had previously formed an existent federation, and Haiti had the potential of forming a Franco-Hispanic Alliance with the Dominican Republic. In Arosemena's view, this potential alliance represents the highest expression of political evolution, the bringing together of two culturally distinct societies. ⁿ⁴³

Arosemena also deliberately organizes his account of each country. He begins by reproducing the text of each country's constitution, followed by a section entitled Antecedents, which gives a survey of the country's constitutional history since its independence. He continues with a general assessment of the country's constitution, entitled General Observations; and ends with specific proposals for constitutional reform, under the title Particular Observations. The exposition is consistent with this arrangement, except in the following cases: for Colombia and Mexico, Arosemena includes constitutional amendments; for Ecuador, he includes a digression entitled "Chapter about the former Gran Colombia;"ⁿ⁴⁴ for Central America, he reproduces the constitutional texts of Guatemala, El Salvador, Nicaragua, Honduras, and Costa Rica, yet, he addresses their constitutional histories and commentaries together under the title of Central America. Arosemena stresses that those countries should develop [*271] toward a federation again, as they had in the early 1800s.ⁿ⁴⁵ Finally, for Haiti and the Dominican Republic, Arosemena only reproduces the constitutional text of Haiti and addresses together the two countries' constitutional histories and commentaries. Arosemena explains that after a rebellion in the Dominican Republic succeeded in March 1878, a Constitutional Convention was organized. He did not know whether that Convention would reinstate the Constitution of 1875 or proclaim a new one. If he had obtained it on time, he said that he would have added the Dominican constitutional text to the appendix. ⁿ⁴⁶

In the analysis of each country, Arosemena uses a notion of liberal constitutional democracy as a point of departure. He understood constitutional democracy as an institutional array – such as separation of powers and regular elections – adequate to ensure individual rights and to check the excessive concentration of power.ⁿ⁴⁷ A civilized government harmonizes divergent social interests, efficiently fostering individual rights. The degree of civilization is measured normatively by the closeness of institutions to a liberal constitutional democracy, and sociologically by compliance with the laws. Using those standards, Arosemena asked, then, in what stage of civilization the Latin American nations were. The section titled General and Particular Observations deals with the normative level, the section titled Antecedents deals with the factual level. On a normative level, Arosemena believed that certain institutions intrinsically favor authoritarianism and suggests avoiding those institutions. For example, a one-chamber legislature encourages the tyranny of the legislature, propitiating political instability, while bicameralism encourages moderation, [*272] propitiating political order. The lower chamber echoes new passions and interests; the higher chamber ensures a counterbalance against them.ⁿ⁴⁸ Also, concentrating the executive power in one individual might cause conflicts with the legislature, especially in Latin America with its strong tradition of caudillismo coupled with the popular election of the President. For that reason, Arosemena suggests a plural executive that shares responsibility with the legislature. ⁿ⁴⁹ On a factual level, Arosemena explains that a society could be in three legal-moral conditions according to the degree of compliance with its laws. One, the members of the society do not observe the laws because of a lack of public opinion to uphold them. Two, the members of the society usually observe the laws, except when they affect particular interests adversely. In that case, some members infringe or deceitfully interpret the laws to favor those particular interests. Three, the members of the society observe the laws, but with personal favoritism. ⁿ⁵⁰ According to these classifications, Britain and the United States are examples of the highest form of civilizations. ⁿ⁵¹ With some exceptions (Brazil, Chile, and Argentina would be considered relatively advanced), Latin American countries would be in the second group. ⁿ⁵²

Arosemena offers a historical explanation for this condition of the Latin American countries. Sharing similar backgrounds marked by conquest and colonization, mainly by the Spaniards and the Portuguese,ⁿ⁵³ Latin American colonial societies became multi-ethnic, class-conscious, and organized around racial notions. According to Arosemena's analysis, it could not have been otherwise because the colonizing nations, Spain and Portugal, had not yet undergone modernization as, for example, Great Britain had. ⁿ⁵⁴ The colonies had some features that favored democracy such as few aristocratic members and a large entrepreneurial population of the *estado llano*. ⁿ⁵⁵ Nevertheless, wars of independence allowed the growth of military caudillismo, which undermined the formation of a [*273] democratic culture respectful of the rule of law.ⁿ⁵⁶ Authoritarianism and anarchy would become Hispano-American political ills. ⁿ⁵⁷ In addition, particular regional characteristics explain the nuances of legal-moral conditions among the governments of Latin America. ⁿ⁵⁸ For instance, in Brazil, the administrative colonial model and its non-violent independence resulted in a

peculiarly legitimate and successful monarchy, while, in Mexico, the lack of tradition of the monarchy resulted in its failure. n59 In Argentina, the strong autonomous spirit and nomadic condition of the indigenous population influenced the colonization of the fluvial regions. n60 Bolivia, with a large indigenous population, suffered more militarism than other countries. n61 Briefly, the constitutional experiments seeking to organize these societies were caught between a strong social conservatism and the need for hastening modernization. n62 An example of this difficulty was the way in which the new societies maintained dominion and exploitation over ethnic groups through class-based and caste-like hierarchies. In general, the native people were denied civil rights, n63 and especially in Bolivia, the oppression of the native people was extreme. n64

With this moral-legal condition of the Latin American societies, Arosemena justified the educational purpose of Constitutional Studies. He wanted to foster common institutional knowledge among the Latin American countries so they could coordinate constitutional policies toward a liberal democratic model. He believed that a common knowledge could further a non-governmental union to overcome "the error and the injustice" of traditional socio-political values that slowed advancing democracy. n65 In Arosemena's words, "the aspiration of the honest men [and women] of Hispano-America" has always been to strive toward higher forms of political organization "for the people." n66 This should be the aspiration of political leaders as well as of the publicists.

B. Theory and Utopia

Arosemena distinguishes between the art of politics and the science of politics. The art of politics prescribes the rules to organize society and [*274] government; the science of politics describes the laws that influence them. The art of politics is the responsibility of the political leader, while the science of politics is the responsibility of the publicist. Through policy prescriptions, the political leader removes obstacles, such as the lack of education, to allow the laws influencing society and government to follow their course. Through observation, the publicist identifies the laws about society and government that shape the fate of a given nation, and draws from them workable policy recommendations for the political leader. n67 The efficacy of the policy prescriptions proposed by the political leader depends on understanding the laws influencing society, while the efficacy of the descriptions set forth by the publicist depends on using a fitting method.

To develop effective policy recommendations for the political leader, the publicist must use an inductive method. Arosemena refers to a methodological tradition started with Aristotle's *Politeia*, in which Aristotle compiled constitutions to deduce the general principles of the various forms of governments. According to this method, Arosemena distinguishes between pre-scientific publicists, such as the socialists from Plato to Fourier; scientific publicists with partial contributions, such as Aristotle, St. Thomas Aquinas, Bodin, Hobbes, Locke, and Montesquieu; and the scientific publicists, such as Comte, Guizot, Stuart Mill, Laboulaye, Tocqueville, and Hildreth. n68 Arosemena praises most the works by Tocqueville, author of *Democracy in America*, and by Hildreth, author of *Theory of Politics*. He considers that in these works "without aiming to support or to defend preconceived opinions about the origin of the governments or about the superiority of one form over another, they have exposed with commendable patience the facts related to the nature and effects of political institutions." n69

In the spirit of this tradition, in Constitutional Studies Arosemena seeks to determine the particulars of the Latin American societies in relation to a model of constitutional democracy. In his analysis, he assumes as a valid frame of reference Tocqueville's and Hildreth's findings about the nature of governments and society. For example, Arosemena supposes the origin of the government as empirical and not founded in a social contract. The need for government is rooted in basic human dispositions: domination, obedience, and liberty. n70 Social evolution grounded in these basic human dispositions brought differences in wealth as well as militarism and religion. Together with ethnic, geographic, and climate factors, these occurrences [*275] determine the particular form that a government adopts. n71 In addition, for Arosemena the transition from one form of government to another is controlled by the law of evolution. n72 Thanks to this law, it is possible to find analogies between the different forms of government described as ideal types, but with many variations. n73 The moderate monarchy is a good example of how evolution works; with the elimination of the monarch, the Republic could emerge, but the essential nature of public power would still be the same, as if nothing had changed. n74

As much as Arosemena used a natural science-like model for the analysis of Latin American legal orders, a utopian idea underpinned his inquiry. At its core, Constitutional Studies reveals a utopian notion, the universal society, and an archetypal form of government, the constitutional democracy. Arosemena believes that, according to the law of progressive evolution, in the future, nations will be organized in small cities within a universal society linked through

morality, the economy, culture, science, and laws.ⁿ⁷⁵ In this universal society, individuals will enjoy freedom in every state solely because of their human condition. This is, however, the future condition of humanity. Now, while raw power still prevails in international relations, it is necessary to organize as many large regional nationalities among the states, ⁿ⁷⁶ and as many liberal democratic federal republics, as possible. According to Arosemena, this organization would provide the optimal conditions for protecting individual freedom. ⁿ⁷⁷ If the liberty of the individual constitutes the purpose of civilization's progress, then the political organization must work toward furthering that goal. Therefore, Arosemena supports organizations based on [*276] what is known today as the subsidiarity principle.ⁿ⁷⁸ There are individual, as well as municipal, state, federal, confederative, and universal, sovereignties. Yet, individual sovereignty, with its bundle of rights, is the essential sovereignty because the other sovereignties gain legitimacy by serving it. For the same reason, Arosemena argues in favor of a constitutional democracy as the model for which political leaders have to strive.

Arosemena wished to translate findings of the science of politics into workable policy recommendations for the art of politics. Constitutional Studies' focus on constitutional law is explainable because for Arosemena the normative expression of politics is constitutional law. He understood constitutional law as a fulfillment of practicable justice aimed toward protecting individual rights. As a publicist, Arosemena assumed that the purpose of history is to increase individual liberty; thus, political leaders should prescribe constitutional policies to promote it. For Arosemena, constitutional democracy is the form of government that best assures individual liberty. Consequently, seeking to encourage a basic homogeneity of the legal orders that strengthen constitutional democracy, he put [*277] forward a harmonization of constitutional principles.ⁿ⁷⁹ A brief description of those constitutional principles follows.

C. Imaginable Constitution

The constitutional principles set forth in Constitutional Studies are those of a liberal constitutional republic.ⁿ⁸⁰ Arosemena's constitutional thought can be summarized by two principles: protection of individual liberty and adherence to the separation of powers. ⁿ⁸¹ A constitution must provide for individuals as much freedom as they inherently deserve; and must provide for the state as much control as it inherently requires. Thus, fundamental rights should preferably not be regulated by the constitution because they could be restricted by legislation. ⁿ⁸² If fundamental rights are regulated by the constitution, however, they should be defined in way that would deter their curtailment by governmental acts. ⁿ⁸³ The discretion of executive, legislative, and judicial authorities to interpret fundamental rights should be minimal, according to Arosemena. ⁿ⁸⁴ He proposed, for example, that the freedom of expression should not have any constitutional or statutory limitations. Therefore, no censorship should be allowed against publications. ⁿ⁸⁵ Arosemena believed the press has the ability to self-regulate. ⁿ⁸⁶ Moreover, injuries to the private honor caused [*278] by slander and libel should not be persecuted as crimes, but their redress should be left to custom and social practices.ⁿ⁸⁷ Similarly, other fundamental rights, such as the right to private property, should only have express constitutional limitations. For instance, indemnity for expropriation should always be previous, even in war. ⁿ⁸⁸ In addition, only the legislature should be able to impose taxes. ⁿ⁸⁹ For their part, governmental institutions need strict controls to avoid the abuse of power. Arosemena argues for a strict separation of powers and he is wary about constitutional provisions that make the president the supreme chief of the nation. In a republic, he believes, state powers should have equal hierarchy. ⁿ⁹⁰ Likewise, Arosemena believes that without judicial review the supremacy of the constitution against the abuse of state powers is meaningless. ⁿ⁹¹ Departing from the American federal judicial review model, he suggests that jurisdiction for determining the legitimacy of constitutional actions should be allowed without the need of the case and controversy requirement. ⁿ⁹²

Besides the liberal principles that a constitution should hold, the effectiveness of a constitution was a paramount concern for Arosemena. For a constitution to be effective, it must be faithful to the history and the realities of a given country.ⁿ⁹³ Incongruity between a constitution and its context, including a country's social realities and history, is a cause for disruption in Latin American institutions. ⁿ⁹⁴ For instance, in Bolivia, the prevalence of militarism offered a weak base for an effective constitutional democracy. ⁿ⁹⁵ In addition, in Mexico, a non-native monarchy imposed by the French failed. ⁿ⁹⁶ Arosemena warns briefly against transplanting institutions from one country to another without regard to their circumstances. ⁿ⁹⁷ More importantly for its effectiveness, the constitution must become deep-rooted in the popular culture and elicit a sentiment of loyalty from the citizens. The presence or absence of this sentiment toward the constitution allows the distinction between "real" and "paper" constitutions. ⁿ⁹⁸ In Latin America, constitutions are often "paper" constitutions because they are not followed. For instance, the Uruguayan constitutional text is well drafted, but it lacks effectiveness. ⁿ⁹⁹ Moreover, in [*279] Bolivia and Ecuador the dictatorships are the real governments.ⁿ¹⁰⁰ Nevertheless, it is necessary to distinguish whether a given institution failed because it was inherently flawed or because of the absence of political will to comply with it. ⁿ¹⁰¹ For Arosemena, the problem may not lie in the institutions

themselves, but in a lack of political morality, which is the source upholding a constitution. n102

Analyzing the state of the Latin American countries, Arosemena concludes that they did not yet have the conditions for an effective democratic government. Nonetheless, he advises putting democratic constitutions in place to disseminate their doctrines in hopes of educating bona fide citizens. Regardless of the degree of civilization of the Latin American countries, it is through the education of citizens that the constitution will gradually become more effective. n103 For that reason, Arosemena believed that a constitution should be able to prepare a country for the future; it should create the conditions for bettering the circumstances in a given country. n104

[*280] Arosemena, supposing the mestizaje brought new characteristics to the Latin American societies, n105 was convinced that every "race" is able to learn democracy. n106 He argues for a reform of the public school system to educate true citizens because the current system was educating to maintain social and political oligarchies. Moreover, the public school system was leaving large parts of the population outside of the economic mainstream and thus was indirectly creating the environment for popular restlessness propitious for militarism. n107 For Arosemena, equally important as the goal of educating citizens for democracy is the way in which this civic education takes place. Arosemena rejected the idea that well-intentioned tyrants can educate citizens for freedom; dictators who justified their power by claiming that they would prepare the population for a representative government had been, in fact, failures in educating the people for self-government. n108

In summary, the imaginable constitution in *Constitutional Studies* embraces the principles of a liberal constitutional republic. In this regard, Arosemena's constitutional tenets are an example of the "influence of political and economic liberalism" n109 prevalent in nineteenth century Latin America. n110 Yet, Arosemena's imaginable constitution is not only a model for the institutional organization of a particular Latin American country. This imaginable constitution is an ideal standard or tertium comparationis against which Arosemena analyzes particular institutions of the Latin American countries. It is this method that distinguishes Arosemena in the Latin American legal literature of the nineteenth century. To show how Arosemena developed this method that advanced comparative constitutional law, it is necessary to explore Arosemena's intellectual influences.

III. Intellectual Influences in Constitutional Studies

The purpose of this section is to explore the sources Arosemena used in writing *Constitutional Studies*. He used general and specialized sources. The antecedents rely on general sources such as reports, newspaper articles, and historical works, while the commentaries rely on specialized [*281] sources such as legal and political works. Arosemena deals with authors in two ways: some are mentioned by name only and others are referred to by naming a particular text they authored. Arosemena mentions only the authors' names to illustrate a point, for example, to show how an author has influenced national politics or has fallen out of favor because of religious intolerance. n111 Arosemena mentions authors with reference to a particular work to support an assertion, for example, to contend that the degree of a people's education should decide whether the representative's election ought to be direct or indirect, or to argue for the advantages of two legislative houses over one. n112

[*282] Particular works undergird Arosemena's conception. He names two authors as the initiators of rigorous political sciences: Alexis de Tocqueville, author of *Democracy in America*, and Richard Hildreth, author of *Theory of Politics*. These works can be considered fundamental models for *Constitutional Studies*. Arosemena quotes three other authors extensively: John Stuart Mill, author of *Considerations on Representative Government*, Edouard Laboulaye, author of *Studies about the Constitution of the United States*, and Manuel Colmeiro, author of *Constitutional Law of the Hispano-American Republics*. These authors' works are significant influences on *Constitutional Studies*. The three subsections of this part of the article will accordingly examine: fundamental models, Tocqueville and Hildreth; significant influences, Mill, Laboulaye, and Colmeiro; and a partial conclusion on Arosemena's method.

A. Fundamental Models: Tocqueville and Hildreth

Arosemena does not quote directly from Tocqueville's *Democracy in America*, although the work was an essential influence on *Constitutional Studies*. n113 A reading of *Democracy in America* and *Constitutional Studies* reveals that Arosemena borrowed the following ideas from Tocqueville: the duty to adapt democracy to the particular circumstances of each society; the comparative inductive method; and a disinterested perspective. n114 [*283] Arosemena constructed his comparative method partly on these ideas. Endorsing Tocqueville's prediction about the universal rise of democracy, Arosemena postulates a constitutional democracy as a model in his analysis without having to show its desirability for

Latin America. Further, in his analysis, Arosemena adopts a comparative method and an unbiased perspective, thereby achieving a neutral stand without noticeable inclination to a particular national legal order. Tocqueville's ideas undergird Arosemena's method and enlighten the analysis in *Constitutional Studies*.

In *Democracy in America*, Tocqueville wanted to show how democracy – as equality of condition and a new power – influences the government and laws of America.ⁿ¹¹⁵ Democracy was not limited to America, however. Tocqueville believed that democracy was a universal force taking over the world. For him, the advancement of democracy was ineluctable, almost divine: "The various occurrences of national existence have everywhere turned to the advantage of democracy... . The gradual development of the principle of equality is, therefore, a providential fact."ⁿ¹¹⁶ Moreover, Tocqueville asserts that "to attempt to check democracy would be ... to resist the will of God."ⁿ¹¹⁷ Tocqueville advises the leaders of the world to help advance democracy by adapting it to their unique places and circumstances. He affirms: "The first of the duties that are at this time imposed upon those who direct our affairs is to educate democracy... to adapt its government to time and place, and to modify it according to men and to conditions."ⁿ¹¹⁸ Arosemena took this advice seriously. He assumed the ineluctable coming of democracy. *Constitutional [*284] Studies* is an attempt to find out the particular causes delaying the advancement of democracy in Latin America.

Arosemena's analysis resembles Tocqueville's methodological conception. Tocqueville began a new method for political science: "A new science of politics is needed for a new world."ⁿ¹¹⁹ *Democracy in America* is an inductive and analytical work that shows how to overcome essentialism in the analysis of political phenomena.ⁿ¹²⁰ Tocqueville's analysis proceeds inductively through comparisons, without discarding abstract types.ⁿ¹²¹ Some scholars believe Tocqueville thought about France while writing about America:ⁿ¹²² "Using the comparative method, Tocqueville sought to discover why liberalism had been unable to establish itself in France as it had done in the Anglo-Saxon countries, even though the spirit of independence was fiercer in France than anywhere."ⁿ¹²³ In short, [*285] Tocqueville sought empirical regularities and then worked out generalizations.ⁿ¹²⁴ For his part, Arosemena analyzed the Latin American societies comparatively, based on an ideal model of constitutional democracy. He sought their similarities and differences, explained their deviations from the ideal of a constitutional democracy, and suggested changes to their legal orders to bring them closer to that ideal. If to solve the democratic question in France Tocqueville asked why democracy thrives in America, Arosemena asked the same question to solve the democratic question in Latin America.

Arosemena also adopted Tocqueville's disinterested perspective. Tocqueville warns that he did not write a panegyric:ⁿ¹²⁵ "This book is written to favor no particular views, and in composing it I have entertained no design of serving or attacking any party."ⁿ¹²⁶ Similarly, Arosemena says that "if it is true that the historian should not have motherland, neither religion nor profession, the publicist should be a man ... of a free and just conscience, a spirit foreign to concerns and subject only to the truth."ⁿ¹²⁷ This disinterested perspective allows Arosemena to analyze Latin American legal orders neutrally, without any noticeable preference for a particular national legal order. In addition, it allows him to criticize the advantages and disadvantages of given institutions without regard to their particular ideological affiliations. Thanks to this disinterested perspective, Arosemena's comparative analysis achieves a transnational quality.ⁿ¹²⁸

In summary, Arosemena used Tocqueville's ideas for his analysis of the Latin American societies. Yet, Tocqueville's ideas gained a strong normative flavor in Arosemena's hands. In *Democracy in America*, a work of political theory, the sociological and political aspects are in the foreground and are complemented by an institutional analysis. In *Constitutional [*286] Studies*, a work of constitutional law, the institutional aspects are in the foreground and are complemented by sociological and political observations. To be sure, Arosemena does not have a comprehensive conception as Tocqueville does. Arosemena's work developed within the paradigm developed by Tocqueville, taking his ideas as truthful propositions. For that reason, *Constitutional Studies* could be considered an application of Tocqueville's conception to Latin American constitutional law.

The other fundamental model for *Constitutional Studies* is Hildreth's *Theory of Politics*.ⁿ¹²⁹ Arosemena did not quote from *Theory of Politics* either. Yet, an examination of *Theory of Politics* and *Constitutional Studies* shows that Arosemena borrowed the following ideas from Hildreth: that society and government are subjected to natural laws; that government is a political equilibrium modifiable through evolution or revolution; that the sources of power are mainly psychological; and that there is a correlation between civilization and democracy. Arosemena used these ideas as postulates to frame his method and to heighten its natural science-like features. Based on Hildreth's ideas, for example, Arosemena justifies searching for patterns through comparison to harmonize the Latin American legal orders. If it is possible to determine the laws acting in a given society, then policy recommendations attuned to those laws could rationalize policy-making. Accepting the psychological nature of the basic sources of power led Arosemena to find a common ground explaining

political changes and struggles across societies. In addition, the correlation between democracy and civilization reinforced Arosemena's use of constitutional democracy as a desirable model for Latin America. Hildreth's ideas are an important ingredient of Arosemena's method.

Arosemena borrowed from Hildreth the notion that society and government are subject to natural laws that can be determined by scientific observation.ⁿ¹³⁰ Hildreth attempted "to apply rigorously and systematically... [*287] the Inductive Method of Investigation – a method which in Physical Science has proven successful beyond expectation; but ... has been very partially employed ... upon the yet nobler and more important Science of Man."ⁿ¹³¹ Similarly, Arosemena asserted, "nature ... did not ask us to solve riddles to discover its laws, but only patient observation." ⁿ¹³²

Arosemena also borrowed Hildreth's idea of government as a political equilibrium modifiable through revolution or evolution. Analyzing the political equilibrium called government, Hildreth asked: "What are those sources of power, those elementary forces, from the balance of which springs that political equilibrium which we call Government, and from the disturbance and overturn of which arises what we call Revolution, ending, in its turn, by producing a new equilibrium, a new government."ⁿ¹³³ Similarly, explaining the laws influencing political phenomena, Arosemena equates government with a political equilibrium, including the revolutions affecting a government. ⁿ¹³⁴

In addition, Arosemena used Hildreth's notion about the sources of power on which society and government rest. For Hildreth, there are primary elements of power, or intrinsic sources of inequality, such as knowledge, eloquence, and virtue. Moreover, there are secondary elements of power, or extrinsic sources of inequality, such as wealth, traditional respect, and mystical ideas.ⁿ¹³⁵ Arosemena mentioned some of these same sources of power to explain the natural foundation of the government. ⁿ¹³⁶ For Hildreth, the forces that produce the political equilibrium – or government – are above all psychological: the pleasure of superiority and the pain of inferiority. These forces are the basis of the disposition to dominate, to obey, and to resist. ⁿ¹³⁷ Similarly, Arosemena borrowed these ideas, saying:

There is in the human mind the capacity or disposition to dominate as well as there is the sentiment or disposition to obey, and those two simple laws are the elemental principle of every government. Correlative to these dispositions, there is a third disposition, which compels an individual to resist any oppressive domination.ⁿ¹³⁸

Arosemena also adopted Hildreth's idea about a correlation between the progress of civilization and democracy. Explaining how a form of government influences the progress of civilization and human happiness in general, Hildreth said that progress of civilization includes four branches: [*288] the advancement and diffusion of knowledge; the accumulation and diffusion of wealth; the increase of the average force of the sentiment of benevolence (moral progress); and an increased sensibility to several pleasures and pains (aesthetic progress). Hildreth explains: "These four branches of civilizations always tend, in the long run, to promote each other; nor can the progress of either be continued to any great extent, except simultaneously with the advancement of the others."ⁿ¹³⁹ According to Hildreth, democracy is the superior form of government in the furtherance of civilization's progress; it offers the greatest advantages because "while all are obliged to submit to the pain of obeying, all are allowed to participate also in the pleasure of commanding." ⁿ¹⁴⁰ Moreover, through elections, democracy sets a standard by which to measure the natural elements of power, and allows "a peaceful change, both of rulers and of policy." ⁿ¹⁴¹ More importantly, democracy ideally "tends to afford" all citizens "an equal chance" to education, to wealth, and to aesthetic satisfactions because it is based on the principle of equality. ⁿ¹⁴² As discussed above, for Arosemena the standard by which to measure the degree of a country's civilization is how close the society has come to attaining an effectively organized constitutional democracy. ⁿ¹⁴³

In summary, Hildreth's ideas heightened Arosemena's view of the empirical nature of the science of politics, helping him to simplify the political data of the Latin American societies. If power, government, and society are subject to the same laws everywhere, then the political events in the Latin American societies could be explained by those general laws. Nevertheless, Arosemena did not elaborate a comprehensive conception about the science of politics as Hildreth did. As with Tocqueville's ideas, Arosemena takes Hildreth's ideas as truthful findings on which to base a normative analysis.

Democracy in America and Theory of Politics were essential models for Constitutional Studies. Considering the affinity of Tocqueville and Hildreth's works, this is hardly surprising. Both considered democracy a superior form of government; both assumed that by observing empirical regularities, it is possible to obtain generalizations inductively;

both understood the notion of universal history as the history of the European [*289] "race"; and both opposed slavery.ⁿ¹⁴⁴ Democracy in America seemingly focuses on one case of democracy, the United States of America; but, as a discourse of political theory, its contributions were generally applicable to the analysis of modern democracy. ⁿ¹⁴⁵ Theory of Politics focuses on the sources of political power and its laws in general; yet, its exposition closes with the analysis of democracy in the United States. ⁿ¹⁴⁶ In fact, Theory of Politics provided a philosophical foundation for a previous work by Hildreth, History of the United States. ⁿ¹⁴⁷ In some ways, Hildreth's book is an expansion at a higher level of abstraction of Tocqueville's commentaries about the origin of power. In summary, Arosemena wrote Constitutional Studies based on Tocqueville and Hildreth's ideas. He extrapolated their assumptions, epistemological ideas, and political notions to Latin American constitutional law.

B. Significant Models: Mill, Laboulaye, and Colmeiro

Arosemena relied on John Stuart Mill's Considerations on Representative Government to support assertions on several topics.ⁿ¹⁴⁸ The influence [*290] of Mill on Arosemena was richer than to have quoted Considerations, however.ⁿ¹⁴⁹ There are implicit parallels between Arosemena's exposition and Mill's ideas. Mill approved of Tocqueville's method for the sciences of politics; asserted the compromise as an important condition for practical politics; and believed in a correlation between the historical stage of civilization of a society and its form of government. ⁿ¹⁵⁰ Through Mill, Arosemena corroborated the need for a more empirically oriented method for understanding political phenomena. More importantly, the value of compromise guided Arosemena in the formulation of sensible policy recommendations, while the notion of developmental stages of society was a component of Arosemena's comparative project.

In the review Mill wrote about Democracy in America, he concluded that this book was the first philosophical work about modern democracy,ⁿ¹⁵¹ and it marked the beginning of a new era for the science of politics. ⁿ¹⁵² [*291] Rather than praise his conclusions, Mill praised Tocqueville's method, which he analogized with the method of Bacon and Newton, "a combination of deduction with induction."ⁿ¹⁵³ In fact, Mill's study of Tocqueville contributed to "a shifting of [Mill's] political ideal from pure democracy ... to the modified form of it, which is set forth in [his] 'Considerations on Representative Government.'" ⁿ¹⁵⁴ Arosemena embraces Mill's opinion about the significance of the new method used by Tocqueville for the science of politics.

The Mill of Considerations argues that science, which deals with the commendable, should be a servant to the art of politics, which deals with the practicable.ⁿ¹⁵⁵ For practicable politics, Mill valued compromise the most, proclaiming a politics of consensus. Mill's emphasis on consensus for practicable politics was the result of his intellectual transformation of around 1826, when he suffered a personal crisis, abandoned Bentham's School, and became a pragmatist and an eclectic. ⁿ¹⁵⁶ Mill's notion of the [*292] different tasks of science and of the art of politics is found in Arosemena's work.ⁿ¹⁵⁷ Arosemena's choosing of Macaulay's maxim, "The essence of Politics is compromise," as a vignette for Constitutional Studies does not seem merely ornamental. ⁿ¹⁵⁸ It signals Arosemena's conviction about the pivotal value of consensus for practicable politics. This conviction guided Arosemena's constitutional policy recommendations for reforming the Latin American legal orders. Arosemena used this conviction as a check for reform proposals that were theoretically possible, but pragmatically unfeasible.

The Mill of Considerations believed there was a correlation between the historical stage of civilization and the form of government adopted in a given society.ⁿ¹⁵⁹ Stuart Mill developed this notion through the influence of the Saint-Simonians, ⁿ¹⁶⁰ mostly with their notion of the natural order of human progress classifying historical developments in organic and critical periods. In organic periods, humanity embraces a positive creed and internal progress. In critical periods, the creed is abandoned as false, but a new creed is not yet adopted. ⁿ¹⁶¹ Based on this idea, Mill accepted that a [*293] reform in practical politics needs historical knowledge. "To be effective," he wrote, the reformer would have "to ascertain what is the state into which, in the natural order of the advancement of civilization the nation in question will next come."ⁿ¹⁶² This idea of developmental stages of civilizations is found implicitly in Considerations. ⁿ¹⁶³ Here, Mill argues that a political institution has to be "adjusted to the capacities and qualities of such men as are available." ⁿ¹⁶⁴ Only then is it possible to expect that the people would be willing to accept a particular political institution and to do what is needed to achieve its purpose. ⁿ¹⁶⁵ In fact, "all that we are told about the necessity of a historical basis for institutions, of their being in harmony with the national usages and character, and the like, means either this, or nothing to the purpose." ⁿ¹⁶⁶ Besides, when a nation can adopt or learn new institutions, "it is quality in which different nations, and different stages of civilization, differ much from one [*294] another."ⁿ¹⁶⁷ Mill also thought that although a people may not be prepared for a new institution, it is advisable to propose good institutions as a way of educating the people: "To recommend and advocate a particular institution or form of government, and set its advantages in the strongest light

is one of the modes, often the only mode within reach, of educating the mind of the nation." n168 Mill concludes: "to introduce into any country the best institutions which, in the existing state of that country, are capable of, in any tolerable degree, fulfilling the conditions, is one of the most rational objects to which practical effort can address itself." n169 Analogously, based on the idea of a correlation between a society's degree of civilization and its form of government, Arosemena tried to determine the historical stage of civilization of each Latin American society. This was the purpose of the constitutional history accompanying each constitution in the Antecedents sections. Arosemena's conviction that the Latin American nations were not ready for democracy, but that it was necessary to propose it as a way of educating the people also resembles Mill's ideas closely.

In summary, Arosemena agrees with Mill's reading of Democracy in America as devising a new method for political science. Arosemena also applied Mill's notions that the first step of a constitutional analysis is to determine the developmental stage of each particular nation, and that compromise is essential for practical politics. Arosemena uses Mill's notions as a guide to formulate policy recommendations. Arosemena suggests only those sensible reforms that a society could bear according to that society's stage of development.

The two-volume *Estudios sobre la Constitucion de los Estados-Unidos* by Edouard Laboulaye was another significant influence on Constitutional Studies. n170 Laboulaye's book is quoted with approval in Constitutional Studies on several topics. n171 Although not explicit, the use of [*295] Laboulaye's work suggests another deep influence on Arosemena. n172 Laboulaye's work exposed Arosemena to an example of how to use comparative constitutional law to further constitutional reform. Laboulaye's work contains three important ideas for the comparative constitutional law method: that "better" solutions for solving similar problems can be learned from the experience of other legal orders; that despite the use of similar words, two legal communities may refer to different concepts; and that the political and legal developments in one society influence others worldwide.

For Laboulaye, comparative law is a way of furthering the exchange between nations seeking institutional reforms to avoid revolutions. n173 In fact, Laboulaye studied the U.S. Constitution to learn how to ameliorate France's instability. n174 Laboulaye was concerned with the constant French revolts and wanted to restrain the legislative power affecting individual rights. n175 He said, "reading Rousseau it is not a surprise to see Robespierre proclaiming the Supreme Being's cult ... it must be easy to understand, that when he was presiding over that party he believed to be the Licurgo of a regenerated France." n176 He added: "Saint-Just ... has given us fragments of republican institutions ... [when] caught by events bringing him to the guillotineFor Saint-Just, it was an easy thing to remake a nation, not only giving laws to the people, but also customs." n177 Laboulaye criticized the prevailing view in France about the notion of [*296] popular sovereignty as developed by Rousseau. Popular sovereignty was universal will. Therefore, the French understood the notion of popular sovereignty as "absolute, and hence despotic, which can only result in tyranny. n178

Americans understood popular sovereignty differently; for them it was the general will applicable to the general interest in the country. Yet, the common interests were not all encompassing. Outside of the common interests, there were individual interests, over which the general will has no influence. n179 Individual liberties, such as freedom of speech, belong to the individual as man or woman, and not as citizen. No majority can interfere with this individual liberty. Thus, in America the popular sovereignty has limited power. n180 Using the same word, Americans and French express different ideas. n181 According to Laboulaye, in France the constitution did not limit representatives to using "the law of the next day [to] revoke or infringe the law of the day before." n182 In America, the judicial power keeps the legislative power at bay, said Laboulaye. n183 Laboulaye thought the Americans had better political conceptions than the French, contributing to the stability of American society, and therefore better protected individual liberty. In addition, Laboulaye's comparative law is rooted in ideas about the solidarity of, and the interdependent development among, the nations: "We suffer, when despotism grows in one country and when freedom weakens in another. It is impossible that Russia would be a despotic power, without threatening Germany, and without resenting liberty in France." n184

Arosemena's ideas parallel some of Laboulaye's ideas. As Laboulaye shows concern with France, Arosemena shows concern for the instability and constant revolts in Latin American societies that affected individual liberty. Like Laboulaye, Arosemena postulates a sphere of individual liberty in which the legislature should not intervene. n185 With Laboulaye, Arosemena shares the opinion that America was more advanced in protecting individual liberty. n186 More importantly, Laboulaye's work exposed Arosemena to the use of other legal experiences to solve similar problems across legal orders. The search, through comparison, for fitting solutions according to the circumstances of each country is noticeable in Arosemena's exposition. For instance, Arosemena criticizes the election of the President of Uruguay by the legislative chambers – the House of [*297] Representatives and Senate – rather than by the people directly. Arosemena, comparing

this method to French parliamentary theory, points out that the method does not correspond to the overall institutional arrangement of the Uruguayan Constitution. In the French theory, the executive is a delegate of the legislature and enjoys powers appropriate to keeping a mutual check between the executive and the legislature. For example, the French assembly can revoke the executive's appointment, while the executive can call for new elections, dissolving the assembly. This is not the arrangement of the Uruguayan executive, in which the president was elected for four years without possibility of immediate subsequent reelection, and did not have the power to dissolve the assembly. Arosemena implies that the president's election by the general assembly in Uruguay, while still within an overall presidential arrangement, operates differently than in a parliamentary system. While in the French theory there is a mutual check between the executive and the assembly, there was no such check in the Uruguayan system. Furthermore, Arosemena argues that French parliamentary theory would be difficult to apply in Uruguay because it did not correspond to the political level of Uruguay's democracy. Thus, he suggests that the president should be elected by popular suffrage and should not be subordinate to the general assembly.ⁿ¹⁸⁷

The issue of the president's reelection presents another example of this search for fitting solutions through comparison. Arosemena considers that allowing the reelection of the president results in an exorbitant concentration of powers and causes the reelection to become a priority for the administration, which then puts aside other essential national priorities.ⁿ¹⁸⁸ He suggests banning presidential reelections, and predicts that even in the United States there will be a ban on presidential reelections at some point. ⁿ¹⁸⁹ Nonetheless, in nations with scarce men and women of talent for political leadership, it would be enough to ban the presidential reelection only for the subsequent period, as the Constitution of Paraguay contemplated. ⁿ¹⁹⁰ Arosemena also profited from Laboulaye's idea that comparative law is rooted in the solidarity and interdependence of nations. From his reading of Laboulaye, Arosemena understood that to have democracy in each Latin America country it was necessary to strive for democracy on the whole continent. ⁿ¹⁹¹ Knowing the failure of governmental alliances and suspicious of local oligarchies that had slowed down [*298] the advancement of democracy in Latin America, Arosemena stresses a harmonization of Latin American legal orders that would facilitate the free movement of people among Latin American nations.

Arosemena disregards some important issues in his method of comparison, however. Despite having been exposed to Laboulaye's cautious analysis of categories among legal orders, in which similar or identical words can have different meanings, Arosemena proceeds in his comparative commentaries as if there were a universal understanding among legal orders about political and constitutional categories. This lack of conceptual subtlety would perhaps be less significant if Arosemena's comparative observations were limited to Latin American legal orders, as promised in the introduction of *Constitutional Studies*; it would be easier to accept Arosemena's premise that there are more cultural similarities than differences among the Latin American countries, and that they share a common constitutional theory. Yet, Arosemena also makes observations about given issues and institutions from European countries and from the United States. It could be argued that Arosemena assumed that Latin American countries adopted constitutional models from those legal traditions. Still, even Laboulaye indicates some differences in meanings between words among the legal systems. How could Arosemena assume that by using the same words each legal order was referring to the same question? Arosemena usually relied on national commentators for interpreting a given institution. Nonetheless, his observations are taken unsystematically from different legal orders worldwide.

Derecho Constitucional de las Republicas Hispano-Americanas by Manuel Colmeiro is another important influence in *Constitutional Studies*.ⁿ¹⁹² In addition to quoting Colmeiro's work on some topics, ⁿ¹⁹³ Arosemena also implicitly shares some ideas with Colmeiro. For instance, both agreed on the need to harmonize the constitutional orders and to promote the political alliance of South America. Yet, while Colmeiro conceived of this alliance of governments as limited to Spanish-America [*299] and affected by European influences,ⁿ¹⁹⁴ Arosemena envisioned a Latin America, including Brazil and Haiti, united by people enjoying similar constitutional rights, and free from European influences. In addition, Colmeiro stresses the value of Spanish institutions as models because they would organize the same "race." ⁿ¹⁹⁵ Arosemena's democracy is not limited to one "race," but includes every ethnic group in a society. As mentioned, he deplores the condition of the indigenous in Latin America. Arosemena also stresses Anglo-American institutions as models because they would further modernity and progress for Latin America; but, at the same time, he insists on seeking institutional arrangements adapted to the circumstances of each society.

In addition, both Colmeiro and Arosemena used comparative law, albeit with radically different methods. Colmeiro's work exposes a doctrinal subject matter, and then states in which way that subject matter has been regulated in the constitutional texts.ⁿ¹⁹⁶ In other words, Colmeiro determines whether a constitutional provision has conformed to a given doctrine. Contrariwise, Arosemena begins with the complete constitutional texts, expounds on their political and

historical antecedents, then analyzes them, explaining their similarities to and differences from a model of constitutional democracy, and finally ends with policy recommendations for reform. At any rate, Arosemena was exposed to Colmeiro's idea of using comparative constitutional law for integrationist purposes in Latin America.

In summary, Mill, Laboulaye, and Colmeiro provided Arosemena with arguments and examples on some subjects, particularly on the formulation of policy recommendations. Arosemena quoted the authors correctly, without reservations. More importantly, through these authors Arosemena was exposed to ideas helpful in the construction of his comparative project: that societies are in different stages of development (from Mill), and that comparative law could be used for legal reform (from Laboulaye) and integration (from Colmeiro). Moreover, there is a transnational constitutional and political discourse in Arosemena's world. This assumption of transnationality may work at a general level in the comparative analysis, but it should not be taken for granted. Taking it for granted would open Arosemena to the criticism that he did not understand the particularities of a given constitution. Arosemena's comparative observations are more convincing when he deals with sociological and historical questions. When it comes to his normative analysis, Arosemena [*300] relies more on authoritative doctrine and on an uncritical use of universal constitutional categories. At this point, Arosemena satisfies himself too easily with making generalizations about the level of a society's evolution to explain a given institution. Yet, he maintains a key assumption for comparison: that it is possible to identify common problems and search for better solutions across legal orders using transnational constitutional categories.

C. Comparative Law Method in Constitutional Studies

Arosemena composed his method from various discourses. Constitutional Studies extrapolates Tocqueville's method and Hildreth's notions to the analysis of the Latin American societies. Tocqueville and Hildreth provided Arosemena with a conception of modern democracy and with the firm belief that the expansion of democracy was universal. Applied works rely on theory, axioms, and postulates, briefly, a *Weltanschauung*. This is what Tocqueville and Hildreth contributed to Arosemena's method. In addition, Constitutional Studies adopts Mill's notions about the developmental stages of nations, and shows some similarities with Laboulaye and Colmeiro in the use of comparative law for purposes of legal reform. Constitutional Studies is, however, a distinct work. It comprehensively compiles Latin American constitutional texts and their constitutional histories. In addition, it inductively compares their constitutional institutions, determines their similarities and differences, and proposes policy recommendations for furthering legal harmonization.

Arosemena describes his comparative constitutional law method. It is a method for determining the laws of political evolution to see whether and how the differences between legal orders are justifiable.ⁿ¹⁹⁷ According to Arosemena, only those aspects not related to each state's justification for existence should be harmonized.ⁿ¹⁹⁸ Arosemena's point of departure in [*301] the evaluation of each society is the ideal of a liberal constitutional republic. In his analysis, Arosemena finds institutional idiosyncrasies deviating from that ideal. Arosemena then explains those deviations, and the explanation becomes part of a new enriched model for examining other constitutions. This way of analyzing internal public law, or constitutional law, of the Latin American countries is Constitutional Studies' innovation in comparative constitutional law.

Arosemena's analysis shows some weaknesses as well. As much as Arosemena tries to assume an empirical foundation for political institutions, he resorts to morality as the foundation of laws. How this moral foundation relates to empirical realities in a given society remains unsaid. In addition, Arosemena's policy recommendations seem more effective when dealing with institutional arrangements such as the desirability to have two legislative chambers, than when dealing with dysfunctional legal orders. Arosemena's explanation that non-compliance with laws is a result of lack of education seems unconvincing, for example. Also, although Arosemena organized his exposition according to a schematic structure for each legal order, on occasion his analysis becomes too associative. For example, he justifies a comparison between the Brazilian Constitution and European constitutions only by saying that the former is the most liberal among the monarchic constitutions. Moreover, Arosemena takes for granted a transnational constitutional discourse. Additionally, Arosemena's understanding of particular institutions is sometimes the result of identifying pseudo-problems, and therefore leads to his drawing erroneous policy recommendations. For example, despite Arosemena's familiarity with Joseph Story's and James Kent's commentaries on the U.S. Constitution,ⁿ¹⁹⁹ he misreads the role of the case and controversy [*302] requirement in the American tradition and proposes the introduction of a type of abstract judicial review power.ⁿ²⁰⁰

Despite these flaws, Arosemena's method is close to the current method of comparative law. Nowadays, it is accepted that comparative law method entails determining similarities between and differences among the legal orders being compared, and an awareness of possible functional equivalence "in assessing the significance of differences."ⁿ²⁰¹ [*303]

Moreover, the *tertium comparationis* is seen as essential for comparison. This refers to a "common point of departure for the comparison, typically either a real-life problem or an ideal. For instance, [a] comparative study of constitutional law might ask how and to what extent each country under study implements the ideal of the rule of law."ⁿ²⁰² Using a *tertium comparationis* one may, for example, "compare each country's legal system with the ideal, and then ... compare the ways in which each legal system fulfills or departs from the ideal to investigate similarities and differences between or among them."ⁿ²⁰³ This comparative law method is applied for the following purposes: to prepare new legislation within a national legal order; to interpret a particular law within a national legal order; to develop teaching materials; and to seek legal harmonization.ⁿ²⁰⁴ There is, however, a difference between only contrasting provisions and using functional comparative law. The first is limited to a normative description; the second is genuine comparative law. The normative description is deductive, while comparative law is inductive and neutral towards national legal orders. These are the characteristics that, according to Konrad Zweigert and Hein Kötz, make comparative law correctly and authentically international.ⁿ²⁰⁵

When measured against this contemporary standard of comparative law method,ⁿ²⁰⁶ *Constitutional Studies* is a genuine comparative work, [^{*304}] except that it does not consider functional equivalence in its analysis. *Constitutional Studies* applies the comparative law method for seeking legal harmonization. It uses the ideal of the liberal democratic republic as *tertium comparationis* and, by advancing inductively, it achieves neutrality towards national legal orders.ⁿ²⁰⁷ Arosemena arrived at these principles [^{*305}] constructing his method on findings from Tocqueville, Hildreth, Mill, Laboulaye, and Colmeiro. To understand the significance of *Constitutional Studies* in the history of comparative constitutional law, it is necessary at this point to analyze *Constitutional Studies*' reception. This is the purpose of the article's next section.

IV. Readings of *Constitutional Studies*

This part describes how *Constitutional Studies* was received. It also contextualizes *Constitutional Studies*, showing that its lineage belongs to comparative constitutional compilations that flourished in nineteenth century Europe.

A. Reviewing *Constitutional Studies*

Despite its three editions, *Constitutional Studies* had hardly any reviews. F. R. Dareste and P. Dareste mentioned *Constitutional Studies* in their two-volume constitutional compilation of 1883, *Les Constitutions Modernes, Recueil des Constitutions en Vigueur dans les divers Etats d'Europe, d'Amerique et du Monde Civilise*.ⁿ²⁰⁸ In the general bibliography listing previous constitutional compilations preceding their work, these authors referred to *Constitutional Studies* as follows: "Collection contenant tous les textes en vigueur, avec notices et commentaires theoriques" (Compilation of constitutions containing all the [constitutional] texts in force, with notices and theoretical commentaries).ⁿ²⁰⁹ From this listing it is safe to say that Dareste and Dareste considered *Constitutional Studies* to belong to a lineage of comparative constitutional compilations. In addition, it is likely that Dareste and Dareste, who did not hold back evaluations of their sources,ⁿ²¹⁰ considered Arosemena's scholarship reliable because they took the constitutional texts of Peru and Uruguay from *Constitutional Studies* for their compilation.ⁿ²¹¹ Likewise, in their cursory description of the compilations that mentioned whether the works contain historical notices or observations, they characterize only *Constitutional Studies* as containing theoretical commentaries. Dareste and [^{*306}] Dareste did not elaborate on this characteristic; nonetheless, this characterization could designate the general and particular observations in Arosemena's work as containing analyses of certain institutions and policy recommendations for constitutional reform. The typical compilation listed by Dareste and Dareste contained only the constitution with a brief historical introduction.

In his 1887 book entitled *Estudios Constitucionales*,ⁿ²¹² another commentator of *Constitutional Studies*, Francisco Bauza, dedicated twenty-three pages to a critique of the 1878 edition of Arosemena's book. Bauza, limiting his criticism to the chapter about Uruguay, considered *Constitutional Studies* superficial.ⁿ²¹³ Bauza classifies Arosemena among what he calls "political prophets," yet he distinguishes Arosemena from them because Arosemena is an "honest prophet."ⁿ²¹⁴ After reproducing Arosemena's opinion that Uruguay was a country created for diplomatic reasons,ⁿ²¹⁵ Bauza argues that, although Arosemena's comment is relatively sound, the Uruguayan could not care less about geography and politics.ⁿ²¹⁶ According to Bauza, Arosemena has a mistaken notion about the history of Uruguay because Arosemena refers to it as a "small republic dominated by foreign powers."ⁿ²¹⁷ After establishing Arosemena's inaccurate notion about Uruguay's history, Bauza then systematically criticizes Arosemena's general and particular observations about the Uruguayan Constitution. For instance, Bauza counters Arosemena's critique by arguing that it is appropriate for the Uruguayan Constitution to recognize an official religion. According to Bauza, if a constitution accepts the freedom of all

religions, it would be the equivalent of proclaiming atheism. n218 Where Arosemena praised articles 25 and 31 of the Uruguayan Constitution, which restrict diplomats, high army officers', and Church members' eligibility for public office, Bauza saw these articles as censurable. In short, by derisively calling Arosemena a "political prophet," Bauza suggests that Arosemena is speculating about the future of the Latin American countries.

[*307] Yet, Bauza's criticism against Arosemena's commentaries about Uruguay is unconvincing. Contemporary commentators from Uruguay acknowledge the diplomatic influence in establishing the Uruguayan state, concluding that the Uruguayan Constitution of 1830 created a state in name only because the Constitution did not take into consideration the socio-economic conditions of Uruguay. n219 Moreover, Arosemena's General Observations in the chapter on Uruguay in *Constitutional Studies* has twelve paragraphs, of which ten are an extensive quotation from a manifest explaining the Constitution of Uruguay written by Uruguayan members of the 1830 constitutional convention. n220 After this extensive quotation, Arosemena says that the findings of that manifest about the anarchy that follows from the disrespect of a constitution are applicable not only to Uruguay, but to almost all Latin American countries. Despite well-drafted constitutions, the political reality has been one dominated by instability. Instead of accepting this state of affairs, Arosemena argues for the need to devise appropriate constitutional arrangements for educating the population to respect a constitutional order, according to the circumstances of each society. n221 Moreover, Bauza's critique of Arosemena's policy recommendations shows more of an ideological difference between the two about the relationship between church and state than a sound critique. Arosemena praised the Uruguayan Constitution because it does not prohibit the practice of religions other than Catholicism. He objected, however, to the fact that the Uruguayan Constitution made Catholicism the official religion of the state, giving to Catholicism a preferential protection. n222 After analyzing the relation between church and state historically, n223 Arosemena insists on their separation. n224 Bauza's argument that to proclaim freedom of religion would be equivalent to proclaiming atheism misses Arosemena's point. Nonetheless, Bauza's criticism exposes the [*308] difficulty already mentioned about Arosemena's exposition. Arosemena assumed a transnational constitutional discourse. At the transnational level of the discourse, Arosemena's disquisitions about separation of church and state and about religious freedom are plausible. But, what was the understanding of the Uruguayan legal community at that time? Was Bauza's critique equating religious freedom with proclaiming atheism only faulty logic or was it a dominant opinion of his legal community? Is Bauza's interpretation plausible in light of article 134 of the Uruguayan Constitution, which reserves the private actions of men only to God, and exempts those actions that are not "against the public order nor prejudicial to others" from the authority of the state magistrates? Could it be interpreted that the recognition of Catholicism as the state religion is part of the public order and, therefore, even some "private action of the men" that affects the Catholic religion would be subject to the "authority of the magistrates"? n225 At any rate, it must be kept in mind that Arosemena used Uruguayan primary sources for his analysis, and that he was making suggestions for constitutional reform to achieve what he considered the next stage in development toward a liberal constitutional republic. Moreover, his suggestions about separation between church and state are not limited to Uruguay, but are extended to all constitutions that favored a particular religion. Thus, Bauza's critique seems unwarranted.

Constitutional Studies is still mentioned as an important contribution to the legal historiography of Panama and Colombia, albeit for different reasons. In Panama, *Constitutional Studies* is mentioned as the major work of the founding father of the Panamanian nationality. n226 Panamanian scholarship about Arosemena has been concerned with emphasizing nationalistic features of his work, and has had difficulty reconciling that with a universal approach from an author who identifies himself in *Constitutional Studies* as a "lawyer from Colombia and Chile." n227 Indeed, Panamanian scholars have aggrandized national heroes, offering a different interpretation about the origin of Panama than the one that emphasizes [*309] the United States' interest in the building of the Panama Canal. n228 Arosemena is one of the national heroes. The two biographies about Arosemena were written on the occasion of a competition organized by the Panamanian National Assembly in 1917. n229 These books are part of what the Panamanian historian Carlos Manuel Gasteazoro calls "patriotic works," n230 because they were intended to demonstrate the existence of a pre-1903 Panamanian national identity. In this context, it is perhaps understandable why, except for some chapters, n231 *Constitutional Studies* has never been reprinted in the twentieth century, despite being considered Arosemena's most important work. Conversely, Arosemena's essay proposing the creation of a Panamanian Federal State within the Republic of Columbia, which was presented before the Colombian Senate in 1855, has been reprinted six times. n232 Within the paradigm of justifying [*310] the Panamanian official national history, *Constitutional Studies* has been difficult to explain. Ricaurte Soler, one of the experts on Arosemena, talks about the paradox that the main theorist of the Panamanian nationality would be also one of the key theorists of the Hispano-American nationality. n233

In Colombia, *Constitutional Studies* is mentioned within the lineage of Colombian constitutional law treatises. For

instance, A. J. Cadavid, in his prologue to a book entitled *Apuntamientos de Derecho Constitucional*, which reviews the development of constitutional law in Colombia, describes Constitutional Studies as a comparative study written by a person of talent and wisdom.ⁿ²³⁴ Nevertheless, he considered Constitutional Studies "not so deep" given the scope of the subject matter, and warned the reader to take into account the recent constitutional developments in Latin America.ⁿ²³⁵ Carlos Restrepo Piedrahita considered Constitutional Studies unique among the Colombian constitutional treatises because it used comparative constitutional law.ⁿ²³⁶ Restrepo Piedrahita mentioned the influence of Tocqueville on Constitutional Studies and Arosemena's utopian ideas regarding the Latin American integration. Restrepo Piedrahita suggested that these utopian ideas could explain Arosemena's comparative efforts.ⁿ²³⁷ Examining Arosemena's comments about the Colombian Constitution of 1863, of which Arosemena was co-author as a member of the Constitutional Convention of Rio Negro, Restrepo Piedrahita stressed Arosemena's opinion favoring judicial review over a legislative constitutional review to assure the supremacy of the Constitution, saying: "A history of the evolution of this important Colombian [*311] institution [of constitutional review] should rescue and appreciate in its full dimension the creative value of Arosemena's ideas."ⁿ²³⁸

On the subject of constitutional review, Arosemena deplored that, according to the Colombian Constitution, unconstitutional acts violating the sovereignty of the member states by the Colombian Federal Congress and by the executive could be annulled by a majority of the state legislatures. Arosemena argues that the state legislatures should not have this power for constitutional review because they are an interested party and this function is judicial in nature; therefore, it should be the responsibility of the Supreme Court. In addition, Arosemena warns that the Colombian Constitution did not establish the annulment of legislative and executive national acts. Arosemena points to the example of American judicial review, suggesting that it should be adopted for Colombia. He did not see, however, why the competence of the American Supreme Court is limited by the "case and controversy requirement" and suggests that the Supreme Court should have the power of constitutional adjudication even when that requirement is not fulfilled. It could happen, insists Arosemena, that a law plainly opposed to the fundamental institutions of the United States could be passed.ⁿ²³⁹ At any rate, Arosemena concludes that judicial review should be contemplated in every legal order to ensure the supremacy of the constitution.ⁿ²⁴⁰ Regardless of the merits of Arosemena's view, his comments about the case and controversy requirement, as mentioned before, resulted from a partial understanding of American judicial review.ⁿ²⁴¹

Lastly, Restrepo Piedrahita indicates that constitutional law as a specialized field progressed admirably in Colombia during the nineteenth century with regard to its style of exposition and its conceptual precision. Restrepo Piedrahita says that in Colombian constitutional law history "Arosemena – together with Gonzalez and De Leon [other nineteenth century Colombian constitutional scholars] – will not be surpassed scientifically."ⁿ²⁴² Although Restrepo Piedrahita did not elaborate further on this, it could imply that Arosemena, Gonzalez, and De Leon made definitive contributions in the quest for developing categories and methods for the specialization of constitutional law in nineteenth century Colombia.

In summary, analyses of Constitutional Studies have been limited. In the nineteenth century, Dareste and Dareste correctly classified Constitutional Studies in a lineage of comparative constitutional works, while Bauza dismissed it as a superficial work. In the twentieth century, scholars still mention Constitutional Studies as an important contribution to [*312] comparative constitutional law,ⁿ²⁴³ but do not elaborate much on this assertion. When scholars examined Constitutional Studies partially, as Bauza and Cadavid did, they saw an unsatisfactory work. Certainly, Constitutional Studies exhibits shortcomings. For instance, in some cases Arosemena's criticisms of constitutional provisions downplay other plausible interpretations.ⁿ²⁴⁴ Likewise, Arosemena's utopian and theoretical assumptions can be a matter of debate. More importantly, some of Arosemena's comparative observations are too associative and unsystematic.ⁿ²⁴⁵ Nonetheless, a criticism based only on the analysis of some chapters of Constitutional Studies is unbalanced. Arosemena's work attempted to improve the despairing state of democracy in Latin America by making concrete constitutional policy recommendations. As this article argues, Constitutional Studies' main contribution lies in how Arosemena approached the task of analyzing the Latin American orders, using features of a comparative constitutional law method very similar to current standards. Only by reading Constitutional Studies as a whole and in context with other similar works can its contribution be appreciated.

B. Constitutional Studies and the Rise of Comparative Constitutional Law

A cursory comparison of some other works with Constitutional Studies shows that, as a constitutional compilation, Constitutional Studies participated in the rise of comparative constitutional law of the nineteenth century.ⁿ²⁴⁶ To be sure, since jurisprudence has existed, the method of [*313] comparison has been used.ⁿ²⁴⁷ Nevertheless, the focus here is on works that are roughly contemporaneous with the emergence of the modern constitutionalism, and particularly

on those works that deal with a legal community. Although Dareste and Dareste mentioned its second edition of 1878, *Constitutional Studies* was first published in 1870. Therefore, this section examines some works from around 1800 to show the lineage from which *Constitutional Studies* originated.

One of the most important forerunners of comparative constitutional law before 1800 was Gottfried Achenwall, author of the 1749 work *Staatsverfassungen der heutigen vornehmsten Europäischen Reiche und Völker im Grundrisse*.²⁴⁸ Achenwall proposed *Statistik* as a theory – at once empirical and normative – to describe a constitution. His exposition follows [*314] a regular scheme to describe each country, and analyzes, for example, Spain, Portugal, France, Great Britain, Russia, Denmark, and Sweden.²⁴⁹ Achenwall's work includes empirical, historical, pragmatic, cultural, and comparative components in the analysis of the law.²⁵⁰

Likewise, Johann Heinrich Gottlieb von Justi, author of the 1762 work *Vergleichungen der Europäischen mit den Asiatischen und andern vermeintlich barbarischen Regierungen*, was an important forerunner to Arosemena.²⁵¹ With the purpose of determining, through comparison, the best institutions, Gottlieb von Justi questions the prejudiced distinction between civilized and barbaric nations.²⁵² His work is divided into three sections. The first addresses the monarchy, the second addresses the administration of justice, and the third addresses the monarch's education. Gottlieb von Justi's book finishes with a description of the Inca Empire, but without comparative observations, as he himself recognized.²⁵³ M. De La Croix, author of the 1791–1793 work *Constitutions des Principaux Etats de L'Europe et des Etats-Unidos de L'Amerique*, was another precursor of nineteenth century constitutional compilations.²⁵⁴ De La Croix examined, for example, ancient Greek and Roman governments, as well as the constitutions of Poland, Sweden, Holland, Great Britain, the United States of America, Spain, Portugal, and France. His exposition contains historical observations and general commentaries about the analyzed legal orders.

Constitutional compilations became more common in the nineteenth century, the time to which the beginning of modern comparative law is dated.²⁵⁵ For instance, the 1821–1823 *Collection des Constitutions, Chartes* [*315] *et Lois Fondamentales des Peuples de L'Europe et des deux Amerique; avec des Precis Offrant l'Histoire des Libertes et Institutions Politiques chez les Nations Modernes* by P. A. Dufau, J. B. Duvergier, and J. Guadet was prepared to provide legislators and publicists with the sources of political institutions of all civilized nations as well as to provide citizens the history of their freedoms.²⁵⁶ After discussing Aristotle, Montesquieu, and Domat's concept of constitution, the authors emphasize the notion of fundamental political laws defining a political organization. In addition to European and American state constitutions, this work includes the constitutions of the following South American countries: Buenos Aires (*Constitution des Provinces Unies de L'Amerique du Sud*), Venezuela, and Colombia. Those states' constitutions are preceded by a historical introduction entitled *Amerique Meridionale*, *Precis des Revolutions de L'Amerique Meridionale*, which addresses conquest, colonization, and the South American independence revolutions.²⁵⁷ The 1832–1833 work *Die Europäischen Verfassungen seit dem Jahre 1789 bis auf die neueste Zeit–mit geschichtlichen Erläuterungen und Einleitungen* by Karl Heinrich Ludgwing Pöhlitz also dated from this time.²⁵⁸ In his compilation, Pöhlitz mentions De La Croix's and Dufau's works as precursors.²⁵⁹ Pöhlitz includes European constitutions to increase the comparative law sources enriching the constitutional law of each state. Pöhlitz also said that he had planned a volume including the Central and South American constitutions.²⁶⁰ [*316] Similarly, *Les Constitutions d'Europe et d'Amerique*, written by M. E. Laferriere and M. A. Batbie in 1869, is another good example of a nineteenth century constitutional compilation.²⁶¹ Laferriere and Batbie's work does not have historical observations or commentaries, but contains only the constitutional texts. From South America, it only includes the Brazilian Constitution.

In synthesis, Arosemena's work shares characteristics with the works of Achenwall, De La Croix, Dufau, Pöhlitz, and Laferriere and Batbie: the inclusion of constitutional histories; consideration of cultural, political, and economical factors in a given country; and, in some cases, compilations made in an effort to find out what the best government is. Several works before *Constitutional Studies* included Latin American constitutions. Specifically, Gottlieb von Justi addressed the Inca Monarchy; Dufau included some South American constitutions; Pöhlitz had at least planned to include a volume dedicated to Central and South America; and Laferriere and Batbie included the Constitution of Brazil.²⁶² Yet, Arosemena's *Constitutional Studies* offers a complete compilation of Latin American constitutional texts and is the first to propose a Latin American legal family. Moreover, in addition to presenting a historical account for each constitution, Arosemena makes systematically comparative observations for constitutional policy-making. Dareste and Dareste perceived this particularity of Arosemena's work when they attributed theoretical commentaries (*commentaire theorique*) to *Constitutional Studies*.

[*317] More importantly, Arosemena's work shares with these comparative constitutional works the underlying

ideas that allowed the emergence of comparative law in the nineteenth century, namely: a universal idea of law common to all societies; the idea of law as an observable phenomena subject to empirical laws that can be determined through observation; and the ideas of development and evolution.ⁿ²⁶³ Based on these ideas, comparative law began to assume its distinctive trait as a method for determining general legal principles across legal orders.ⁿ²⁶⁴ As Riles puts it, "the founding moment of comparative law was also a moment of acknowledgement that comparative law is [only] a 'method,' not a science."ⁿ²⁶⁵ This article has shown how Arosemena constructed his version [*318] of a comparative constitutional method based on Tocqueville, Hildreth, Mill, Laboulaye, and Colmeiro.

C. Justo Arosemena: Unexplored Precursor

The influence of Constitutional Studies on Latin American constitutional law developments has been meager. Hypotheses for its lack of influence may open other lines of inquiry for future research. One explanation could be Arosemena's radical liberal ideas, such as recognizing the right of women to vote and recognizing the indigenous peoples as true citizens of conservative societies. But this is only a partial explanation. A brief survey of some constitutional law books written in Latin America, usually for teaching purposes, in Arosemena's time shows a strong liberal ideological influence. For instance, the Portuguese Pinheiro Ferreira wrote his book to help the transition from absolutism to a representative system.ⁿ²⁶⁶ Pinheiro Ferreira's book was also translated into Spanish and was widely known.ⁿ²⁶⁷ It is considered the first to develop a constitutional liberal theory in the Portuguese language.ⁿ²⁶⁸ Pinheiro Ferreira's exposition showed a special care for defining categories, in which the influence of Benjamin Constant is noticeable, particularly in the chapter about the moderative power.ⁿ²⁶⁹ Similarly, the Colombian Cerbeleon Pinzon, in his two-volume *Tratado de Ciencia Constitucional*,ⁿ²⁷⁰ written to use for instruction at the Colegio Velez, pointed out the standard subjects of constitutional law for organizing a liberal republic: legislative, executive, and judicial powers, fundamental guarantees, municipal government, and constitutional power. Pinzon acknowledged using *Curso de Política Constitucional* by Benjamin Constant, albeit critically, because Constant's work deals with the organization of a monarchy.ⁿ²⁷¹

[*319] In addition, Constant's liberal ideology permeated the constitutional law books of Arosemena's time through other sources. For instance, Gonzalez, who wrote his book, *Lecciones de Derecho Constitucional* for teaching purposes at the University of Buenos Aires, Argentina,ⁿ²⁷² pointed out that his was the first book in Spanish that elucidated the republican governmental theory as practiced in the United States. One of the main sources for Gonzalez was Laboulaye, who identified himself with the liberal notions of Benjamin Constant.ⁿ²⁷³ In short, in Arosemena's time, internal public law or constitutional law was understood in South America as a set of principles for organizing a liberal republic. The French tradition, via Benjamin Constant, was substantial in this discourse. Thus, the liberal theory in Constitutional Studies was likely to have grown from Constant's liberal discourse, a common denominator in the development of constitutional law in South America. Therefore, the radical liberal ideology of Arosemena does not seem a strong hypothesis for explaining his lack of influence in South America.

More likely, the answer to the lack of influence of Arosemena's work lies in his approach. During the nineteenth century, the Latin American societies were consolidating national states.ⁿ²⁷⁴ Consequently, the efforts of legal scholars in each of the Latin American countries were directed towards developing a national jurisprudence. Arosemena's idea of harmonizing national legal orders to achieve a liberal republican standard among the Latin American countries may have been seen as utopian and [*320] running against national ideologies. Moreover, Latin American legal scholars at that time did not consider other Latin American legal orders worthy of analysis; only the European or American ones were worthy of study.ⁿ²⁷⁵ For example, the Chilean Lastarria asserted that in South America there was a lack of originality regarding constitutional law, and that examining it was needless, because Europe offered rich and proven experience with constitutional institutions. Lastarria was persuaded that the virtue of a new continent was only to transfer European institutions.ⁿ²⁷⁶ Also, Gonzalez sought to promote an American constitutional theory for Argentina. He believed the American constitutional institutions were already proven successful in practice; therefore, the Argentine Republic should adopt them.ⁿ²⁷⁷ Even works such as *Bases y Punto de Partida para la organizacion Política de la Republica de Argentina* by Alberdi analyzed some Latin American constitutions through cursory comparisons, only to point out some of their deficiencies.ⁿ²⁷⁸ According to Alberdi, Argentina should avoid these deficiencies in drafting its constitution and should follow instead for its organization the Constitution of California.ⁿ²⁷⁹ Contrariwise, Arosemena's work sought to analyze the constitutional organization of each of the Latin American countries to infer from them the most acceptable institutional arrangements depending on the countries' particular circumstances. Arosemena deplored that decontextualized imitations of European and American institutions in Latin American circumstances had rendered these institutions ineffectual in their new environment. This different conception explains the exceptionality of Constitutional Studies in the nineteenth

century Latin Americas, and at the same time, it explains its limited influence.

[*321] Another reason that may have plausibly contributed to the limited influence of Constitutional Studies lies in what Arosemena understood by the integration of Latin America. Traditionally in Latin America, integration was considered from a national perspective, as aimed toward unifying states. This is the Bolivarian tradition.ⁿ²⁸⁰ Arosemena thought of integration from a multinational perspective, and as aimed toward freeing the movement of people. In Arosemena's conception, the role of the government was limited to ensure fundamental rights and to allow measures necessary to harmonize those rights. He wanted, for example, a person born in Argentina to be able to move to Chile and to continue to enjoy similar fundamental rights. Arosemena expected that giving this free movement would result in people's identification with a Latin American community rather than with any particular national state. He argued that by freeing the movement of people within a community, a unification of the states could take place naturally. But this was neither a preordained outcome nor a desirable one necessarily. Arosemena was concerned that a supranational government could curtail individual freedoms and the Latin American local communities. For that reason, he said that any initiative seeking transnational structures must also simultaneously seek stronger autonomy for local governments. From this point of view, it is not a paradox that Arosemena promoted a Panamanian Federal State within the Republic in Colombia, and at the same time promoted a Latin American community. To sum up, a work aiming to harmonize Latin American legal orders and seeking to develop a Latin American constitutional community for the benefit of the people, but without unification of governments, must have been considered outside of the mainstream and easily discarded as utopian.

Arosemena's integrationist ideal was rooted in realities, however. He understood that international relations are determined by gross powers,ⁿ²⁸¹ and that to ensure the independence and freedom of the Latin American nations, a big umbrella was needed. He understood also that this umbrella should not be constructed militarily, but by consensus, in order to last. In addition, he saw above all that a constitutional democracy [*322] that ensures individual freedom and is not an abstract recipe of imported models, but rather a native development of particular societies, has to be the core value in any integrationist project. Using comparative law, Arosemena set himself to the task of determining what changes were needed to develop a sound and lasting democracy in Latin America. His ideals were not only inspired by the study of the most advanced literature on political theory, on constitutional law, and on comparative law, but also by experience. His cosmopolitan vision was enhanced by diplomatic missions in Chile, Venezuela, Great Britain, France, and the United States; the practice of journalism in Peru; the practice of law in New York and Panama; participation in constitutional conventions in Colombia; drafting numerous constitutional projects and codifications; extensive travels through Latin America, Europe, and the United States; and involvement in congresses discussing integration.ⁿ²⁸²

V. Constitutional Studies in the Latin American Legal Tradition

Constitutional Studies is not merely a compilation of constitutional texts. Arosemena defined his book as a "curso familiar e informal de derecho publico interno comparado" (familiar and informal course of comparative internal public law).ⁿ²⁸³ For its subject matter, structure, and method, this definition is accurate. It is familiar because it addresses a general audience. It is informal because the constitutional topics are scattered through the exposition. It is internal public law because its subject matter focuses on the constitutional organization of the Latin American societies. Finally, it is comparative because Arosemena's method, neutral in its consideration of legal orders, attempted inductively and systematically to determine categories for a more efficient constitutional policy-making. This method, close to current standards of comparative constitutional law, is Constitutional Studies' main contribution. Participating in the early developments of comparative law during the nineteenth century, the "Era of Comparison,"ⁿ²⁸⁴ Arosemena sought to facilitate democracy by applying the most advanced comparative method available to the Latin American Legal orders.

Constitutional Studies should be read with more acumen today. Democracy reigns almost undisputed in Latin America after dictatorships and authoritarian governments blemished Latin American history for many years. Latin America should aspire to rediscover its democratic tradition. Constitutional Studies is one milestone of this tradition. As the first systematic work of comparative constitutional law in Latin America, [*323] Constitutional Studies is a source and a testimony. As a source, it represents the best example of a comparative constitutional law tradition in Latin America. As a testimony, it provides inspiration to continue consolidating a common democratic motherland. Undeniably, the comparative law method used by Arosemena has become accepted convention, and some of its features have been surpassed. Yet, if there is something that Arosemena offers us today, it is the spirit of his perspective. More than ever, "globalisation and interdependence ... dictate that even the most local phenomenon needs to be viewed in ever widening contexts, up to and including the world and humankind in general."ⁿ²⁸⁵ In a world threatened anew by iconoclastic ideologies that have given distressing meaning to the date September 11th, Arosemena's hopes for a universal society

a description of the creation of MERCOSUR see Wilson Nerys Fernandez, *MERCOSUR–Estados Unidos, Alca: Globalizacion y Regionalizacion en el Cambio de Siglo* (2000) and *MERCOSUR: Entre La Realidad Y La Utopia* (Jorge Campbell ed., 1999).

n10. The War of the Triple Alliance was fought between Brazil, Argentina, and Uruguay against Paraguay. "Paraguay had been involved in boundary and tariff disputes with its more powerful neighbors, Argentina and Brazil, for years." OnWar.com, Armed conflict Events Data, War of the Triple Alliance 1864–1870, at <http://www.onwar.com/aced/data/tango/triple1864.htm> (last updated Dec. 16, 2000). Further, the war left "Paraguay from its prewar population of approximately 525,000 with about 221,000 in 1871, of which only about 28,000 were men." *Id.*

n11. See *Constitutional Studies*, *supra* note 1, at paras. 423–25.

n12. See *id.* at para. 439.

n13. *Id.*

n14. See Alberto Da Costa e Silva, *Da Guerra Ao Mercosul. Evoluçãodas Relações Diplomaticas Brasil-Paraguai*, in *A Guerra Do Paraguai: 130 Anos Depois* 171 (Maria Eduarda Castro Magalhães Marques ed., 1995) (commenting that Leslie Bethell and Leon Pomer considered the War of the Triple Alliance a civil war). For Da Costa e Silva, the War of the Triple Alliance took place in a single political space that today facilitates the creation of MERCOSUR: "O fato de esse espaço ter uma unidade possibilitou a rápida concretizaçãodo Mercosul," *id.* at 172. According to Da Costa e Silva, the motives that prompted the War of the Triple Alliance are the same motives urging Brazil, Argentina, Uruguay, and Paraguay to work together today. See *id.* at 172–73. See also Julio Jose Chiavenatto, *Genocidio Americano: A Guerra Do Paraguai* (21st. ed. 1987) (emphasizing that Brazil, Argentina and Uruguay were instrumental in reaching the goal of the English imperialism to eliminate the self-sufficient Paraguayan economy); Lilia Zenequelli, *Cronica De Una Guerra: La Triple Alianza 1865 - 1870* (1997).

n15. See the Official Website of the Free Trade Area of the Americas, at <http://www.ftaa-alca.org/alca.e.asp>. See also Johannes Henricus M. van de Ven, *Western Hemisphere Economic Integration under the Enterprise for the Americas Initiative: Washington Consensus or Inside the Beltway Illusion? The Case of Brazil* 7 (1995) (unpublished Ph.D. dissertation thesis, Catholic University of Nijmegen), available at <http://www.newsadder.com/swissconsultin/Thes.pdf> (stating that "for the first time in the history of the Americas, mutual trade is officially recognized as a key component in integration between the United States and the Latin America.").

n16. Weitz, *supra* note 7, at 253–54 (stating that "in a vastly accelerated world, it should be possible to envisage the waning of the nation-state over, say, the next 50 years."). Cf. Christoph Konrath, *Der Staat als Identitätsstifter?*, in *Der Staat Der Zukunft: Vorträge der 9. Tagung des Jungen Forum Rechtsphilosophie in der IVR* 173, 185–87 (Graf-Peter Calliess & Matthias Mahlmann eds., 2002) (questioning whether the state can, should, or must still have a role in "identitätsstiftung").

n17. Cf. Kofi A. Annan, *We the Peoples: The role of the United Nations in the 21st Century* 7 (2000), available at <http://www.un.org/millennium/sg/report/> (last visited Oct. 10, 2003) ("No shift in the way we think or act can be more critical than this: we must put people at the centre of everything we do."). See also Cornelia Navari, *Internationalism and State in the Twentieth Century* 1 (2000) (indicating that in the twentieth century "occurred a transformation in the relations of states so fundamental that later scholars may come to see it in terms of a revolution... . Some called it 'internationalisation,' while others used the term 'interdependence' and still others spoke of the development of 'world community.'"). See generally Daniel J. Elazar, *Constitutionalizing Globalization: The Postmodern Revival of Confederal Arrangements* (1998); Thomas M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (1999) (suggesting developments toward a universal constitutional democracy).

n18. Cf. Dick Teresi, *Lost Discoveries: The Ancient Roots of Modern Science—From the Babylonians to the Maya* 29 (2002) (emphasizing that no western civilizations contributed to sciences, and arguing against Morris Kline, who accepts that Babylonians and Egyptians "pioneered mathematics long before the Greeks, but ... dismisses them as pragmatists").

n19. See The World Bank, *supra* note 8, at 3–7 (distinguishing three waves of globalization: 1870 to 1914, 1950 to 1980, and 1980 to present); Mark Eyskens, *Culture and Progress*, in *Law in Motion* 19, 23 (Roger Blanpain ed., 1997) (stating that globalization is creating a universal society, but is also alienating many citizens: "Universalism often calls for a reaction in terms of particularism and cocooning."); Anthony G. McGrew, *Global Legal Interaction and Present-Day Patterns of Globalization*, in *Emerging Legal Certainty: Empirical Studies on the Globalization of Law* 325, 341 (Volkmar Gessner & Ali Cem Budak eds., 1998) (concluding that globalization "implies a spatial reorganization of social life in which political and legal space is no longer solely coterminous with national territorial space"). See also Eduardo Saxe Fernandez, *La Nueva Oligarquía Latinoamericana: Ideología y Democracia* (1999) (considering globalization as an ideology that supports hegemonic domination by the United States); Joseph E. Stiglitz, *Globalization and Its Discontents* 247 (2002) (urging the reformation of international financial institutions and a change of the "mindset around globalization" to make it "fairer, and more effective in raising living standards, especially of the poor").

n20. See James T. McHugh, *Comparative Constitutional Traditions* 216 (2002) (indicating that "the significance of constitutionalism has been magnified by the increasing interdependence and interaction of the world community... . International law is the context of this process; constitutional law is its political subtext"). See also Andrew Harding & Esin Özkaya, *Preface to Comparative Law in the 21st Century* ix (Andrew Harding & Esin Özkaya eds., 2002) (indicating that "the comparative approach has a renewed legitimacy" for constitutional law); Vicki C. Jackson & Mark V. Tushnet, *Introduction to Defining the Field of Comparative Constitutional Law* xix (Vicki C. Jackson & Mark V. Tushnet eds., 2002) (stating that "explicit or implicit in virtually all of these chapters is the theme that globalization as a phenomenon requires comparative constitutional study").

n21. See Armando Toledano Laredo, *The Effects of Integration on the Constitutional Law of Member States of the European Union*, in *European Integration and Constitutional Law* 5, 10–11 (2001) (explaining that Austria, France, and Ireland had to undertake constitutional amendments to comply with the Amsterdam Treaty).

n22. Allan R. Brewer-Carias, *Constitutional Implications of Regional Economic Integration*, in *Comparative Law Facing the 21st Century* 682 (John W. Bridge ed., 2001). The lack of uniformity among the constitutions of the MERCOSUR member states on the status of international treaties in relation to domestic laws is also further hindering integration. See generally Roberto Ruiz Diaz Labrano, *La Integración y Las Constituciones Nacionales*

De Los Estados Parte Del MERCOSUR, in *Anuario De Derecho Constitucional Latinoamericano* (Konrad et al. eds., 1999).

n23. See Lawrence M. Friedman, *Some Thoughts on the Rule of Law, Legal Culture, and Modernity in Comparative Perspective*, in *Toward Comparative Law in the 21st Century* 1075, 1088 (The Institute of Comparative Law in Japan ed., 1998) (commenting that "the rule of law, and concepts of human rights, may be making the transition from culture to technology – a technology of modernity... they seem to be shifting from a set of norms that grew out of one setting, to a set of norms that spans the entire globe."). See also Juliane Kokott, *From Reception and Transplantation to Convergence of Constitutional Models in the Age of Globalization – with Special Reference to the German Basic Law*, in *Constitutionalism, Universalism and Democracy – a Comparative Analysis* 71, 74 (Christian Starck ed., 1999) (stating that the "modifications of the principle of sovereignty now exclude the view that constitutional orders are merely internal matters. Rather, international law prescribes the protection of human rights, and according to an increasingly held view, even democratic governance."); Rainer Grote, *Rechtskreise im öffentlichen Recht*, 126 *Archiv des öffentlichen Rechts* 10, 20 (2001) (mentioning that the model of *Verfassungsstaatlichkeit*, characterized by separation of powers, protection of fundamental rights, and constitutional review, has found general recognition.). Grote also speaks of a "dritte große Rezeptionswelle," id. at 20. See also *The International Commission on Intervention and State Sovereignty, The Responsibility to Protect* (2001), available at <http://www.dfait-maeci.gc.ca/iciss-ciise/report2-en.asp> (concluding that when a state is unwilling or unable to protect its people from harm, "the principle of non-intervention yields to the international responsibility to protect").

n24. See, e.g., Hartmut Krüger, *Eigenart, Methode und Funktion der Rechtsvergleichung im öffentlichen Recht*, in *Staatsphilosophy Und Rechtspolitik* 1393 (Burkhardt Ziemse, et al. eds., 1997) (commenting that contrary to public law, the comparison in private law "can look back to an old methodological tradition."); Francois Venter, *Constitutional Comparison: Japan, Germany, Canada, and South Africa as Constitutional States* 19 (2000) (acknowledging that "stimulating work has been done in the field of constitutional comparison... It would, however, be a gross exaggeration to say that comparative constitutional law has developed into a comprehensive and systematized field."). See generally Peter Thomas Muchlinski, *Globalisation and Legal Research*, 37 *The Int'l Law.* 221, 239–240 (2003) (stating that the comparative law method "is at a politically significant cross-roads: either it takes a more academically credible route ... or, it continues to be based on a search for crude a-historical, and culturally suspect, similarities of meaning and purpose in legal phenomena, which will deliver the illusion of an emergent global law serving as the legal expression of globalization."); Georgios Trantas, *Die Anwendung der Rechtsvergleichung bei der Untersuchung des öffentlichen Rechts* 63–91 (1998).

n25. A twentieth century jurist analyzing Latin America would rediscover later that to develop a Pan-American consciousness, each society must first achieve a democratic order. See Gallardo, *supra* note 6, at 24. Cf. John Pinder, *The European Union: a very short Introduction* 158 (2001) (concluding that "the necessary sharing of sovereignty is possible only for pluralist democracies that are willing to accept a common rule of law, and have the capacity to develop legislative institutions to enact it and a system of government to implement policies within it").

n26. Cf. William Twining, *Globalisation and Legal Theory* 184–193 (2001) (urging a rethinking of comparative law, and particularly its method, from a global point of view); Roy N. Freed, *A Task for Comparative Law Teachers in the Age of Globalization: To Harmonize Laws through International Cross Fertilization*, in *Toward Comparative Law in the 21st Century* 1057–58 (The Institute of Comparative Law in Japan ed., 1998) (indicating that "it is particularly timely, at the present stage of globalization, for comparative law teachers to modernize their approach and become comfortable being judgmental and actively favoring specific legal rules that should be preferable

economically or even socially").

n27. See, e.g., Blas Piñar Lopez, *Cronologia de la unidad hispanoamericana, Mistica y Politica de Hispanidad*, at <http://usuarios.lycos.es/hispanidad/blashi12.htm> (Apr. 19, 1961) (mentioning among the early advocates of the idea of a Hispano-American unity, Francisco de Miranda, who around 1785-1790 wanted to organize an American Empire). See generally Luis Castro Leiva, *La Gran Colombia. Una Ilusion Ilustrada* (1984) (describing the disintegration of La Gran Colombia into three states, Colombia, Ecuador and Venezuela, and discussing the survival of the idea of the union as a principle actor in international relations among the nations liberated by Simon Bolivar).

n28. Based on the Holy Alliance Treaty of 1815, the alliance of Austria, Prussia, and Russia "was essentially an attempt by the conservative rulers to preserve the social order," after the fall of Imperial France. Holy Alliance, in *Columbia Encyclopedia* (6th ed. 2003), available at <http://www.encyclopedia.com/html/H/HolyAlli.asp> (2003). See also Celestino Andres Arauz, *Panama y sus Relaciones Internacionales* 28 (1994) (mentioning the geopolitical factors motivating the initiative of the Congreso Anfictionico de Panama); Manfred Kossok, *Im Schatten Der Heiligen Allianz: Deutschland Und Lateinamerika, 1815-1830: Zur Politik der Deutschen Staaten Gegenuber der Unabh^{ang}igkeitsbewegung Mittel-Und S^udamerikas* 29, 103-04 (1964) (stating that the Heiligen Allianz reacted contemptuously to "the political/ideological impact of the South American independence movement," and that Russia, Austria, and Prussia supported the 1822 Manifest of Fernando VII, asking all powers not to grant recognition of the American colonies); Simon Bolivar, *Convocatoria del Congreso de Panama*, in *Introduccion a Simon Bolivar* 190 (Miguel Acosta Saignes ed., 1983) (explaining the advantages of the Congress of Panama for the South American countries in their relations with "the universe," understood as the European political world).

n29. See Simon Bolivar, *Carta de Jamaica* (Sept. 6, 1815), in *Introduccion a Simon Bolivar*, supra note 28, at 72.

n30. See Simon Bolivar, supra note 28, at 189 (proposing the creation of a "sublime authority" responsible for ensuring the uniformity of the politics of the different governments).

n31. Carlos Pereyra, *Breve Historia de America* 521-22 (2d ed. 1946) (quoting Simon Bolivar and concluding that the Congress was a failure). Congresses for Latin American unity have continued until today, but more as an opportunity for reflecting on integration. See Cuauhtemoc Amezcua Dromundo, *Se Celebro el Cuarto Congreso Anfictionico Bolivariano de America Latina y el Caribe*, 10 *Unidad Regional* (Jan. - Apr. 2002), at <http://www.aunamexico.org/publicaciones/boletin/bol10/bol10ene02-amezcua.htm> (reporting on the IV Congreso Anfictionico Bolivariano in Buenos Aires, Argentina in 2002 and that the next Congress will take place in Mexico in 2003). For details about the goals and agenda of the V Congreso planned for November, 2003, see Alonso Aguilar Monteverde, *V Congreso Anfictionico de America Latina*, 13 *Unidad Regional* (Jan.-Apr. 2003), at <http://www.aunamexico.org/index.htm>.

n32. See Arauz, supra note 28, at 27-30 (describing the Congreso Anfictionico de Panama).

n33. Cf. Peter de Cruz, *Comparative Law in a Changing World* 10 (2d ed. 1999) (stating that "legal history is the vital precondition to the critical evaluation of the law and an understanding of the operation of legal concepts,

which is a primary aim of comparative law."); Stig Strömholm, *Comparative Legal Science – Risks and Possibilities, in Law under Exogenous Influences* 5, 13 (Markku Suksi ed., 1994) (emphasizing that "history ... is one of the most reliable tools of comparatists").

n34. See de Cruz, *supra* note 33, at 7 (mentioning "studies which compare the several stages of various legal systems" as one of the types of studies in comparative law today). But see John Henry Merryman, *The Loneliness of the Comparative Lawyer and Other Essays in Foreign and Comparative Law* 485–86 (1999) (acknowledging that the tradition of comparative law has been rule-centered). For Merryman, the emphasis on primary rules is not a theoretical necessity, but rather is explainable by the history of comparative law, which "has been dominated by European legal theory." *Id.* at 485. He proposed focusing on "legal culture, secondary legal rules, legal institutions, legal actors, and legal processes as the matter of comparison, and excludes primary legal rules." *Id.* at 486.

n35. See Paul, *supra* note 2, at 40–1.

n36. In addition to *Constitutional Studies*, two of Arosemena's works stand out for their breadth of analysis and subject matter: *Apuntamientos para la Introduccion a las Ciencias Morales y Politicas* (New York, Imprenta Juan de la Granja 1840) and *The Institution of Marriage in the United Kindgdom: being law, facts, suggestions and remarkable divorce cases* (London, Effingham, Wilson–Royal Exchange 1879) (writing under the pseudonym Philanthropus J.A., LL.D). Arosemena's works also include newspaper articles, laws and constitutional projects, legal opinions, essays, articles, letters, and speeches. Arosemena scholars agree that *Constitutional Studies* is his most important work. See, e.g., Jose Dolores Moscote & Enrique J. Arce, *La Vida Ejemplar de Justo Arosemena* 359–60, 365–66 (1956) (stating that *Constitutional Studies* is the most important of Arosemena's works and that he is one of the first in the Spanish-speaking world to use the comparative method in the analysis of constitutional institutions); Octavio Mendez Pereira, *Justo Arosemena* 345–46 (Panama, Editorial Universitaria 1970) (1919) (commenting that *Constitutional Studies* is a synopsis of Arosemena's previous writings).

n37. Cf. Annelise Riles, *Introduction: The Projects of Comparison, in Rethinking the Masters of Comparative Law* 5 (Annelise Riles ed., 2001) ("Precisely because the modernism of comparative law has a future, not simply a past, so to speak, the re-evaluation of this history has special purposes and effects.").

n38. Justo Arosemena, *Constituciones Politicas de la America Meriodinal, Reunidas y Comentadas* (Imprenta A. Lemale Aine, Havre 1870). Volume I is comprised of 442 pages and Volume II is comprised of 429 pages. *Id.*

n39. Justo Arosemena, *Estudios Constitucionales sobre los Gobiernos de America Latina* (2d ed., Libreria Española i Americana de E. Denne, Paris, 1878) [hereinafter *Estudios Constitucionales* 2d Edition]. In this edition, Volume I is comprised of 583 pages and Volume II is comprised of 524 pages. *Id.*

n40. Justo Arosemena, *Estudios Constitucionales sobre los Gobiernos de America Latina* (3d ed., A. Roger y F. Chernoviz, Paris 1888). In this edition, Volume I is comprised of 583 pages and Volume II is comprised of 570 pages. *Id.*

n41. Arosemena's selection criterion is justifiable given that his goal was to further Latin American integration.

If Mexico had become part of the United States, it would have been outside the political sphere of a Latin American community. See *Estudios Constitucionales* 2d Edition, *supra* note 39, at foreword ("At the beginning I thought that probably Mexico and Central America would fall within the assimilating whirlpool of the great Republic of the North, thus it was not important for the brothers of the South to study those countries as branches of the same family."). For an analysis of the United States expansionism see generally Efrén Rivera Ramos, *The Legal Construction of Identity: The Judicial and Social Legacy of American Colonialism in Puerto Rico* (2001).

n42. *Constitutional Studies*, *supra* note 1, at para. 41.

n43. One might ask why Arosemena did not consider both Mexico and Bolivia as two societies, given the large indigenous populations of these countries. The reason is that Arosemena considered the indigenous question in those countries as an issue of internal politics, while the possible integration of Haiti and the Dominican Republic was a question of foreign policy between two states. Cf., *Constitutional Studies*, *supra* note 1, at paras. 673–85 (analyzing the situation of the Indians, and insisting that the indigenous peoples must be recognized as full citizens). Arosemena denounced that in Peru, Bolivia, and Ecuador "there [were] two distinct people: the pure Indian and the rest of the races, pure or mixed. For the white people, the mixed and the mulatto, [there were] the Constitution and the laws; for the Indian, the work under the whim and the benefit of the other people." *Id.* at para. 685.

n44. After their independence from Spain, Colombia, Ecuador, Venezuela, and Panama formed La Gran Colombia, which existed until 1830. See 2 Manuel Antonio Pombo & José Joaquín Guerra, *Constituciones de Colombia* 669–868 (2d ed. 1911) (describing the rise and fall of La Gran Colombia). See also José María Samper, *Derecho Público Interno de Colombia* 99–132 (1982) (describing the same).

n45. See *Constitutional Studies*, *supra* note 1, at para. 1556. Arosemena states:

Although today divided into five independent states, the territory that includes Guatemala, El Salvador, Honduras, Nicaragua and Costa–Rica, formed one colony during the Spanish Empire ... constituted one nation at its independence from Spain ... and would form one nation again Thus, we will analyze this interesting region together.

Id. From 1821 to 1839, Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica formed the Federal Republic of Central America. See Joardana Dym, *City, State and Nation in Central America, 1810–1839: From Pueblos to Pueblo, Creating the National State*, at <http://www.bilkent.edu.tr/bilkent/academic/crts/paper/jordana.htm> (Apr. 16, 2001) (analyzing the Central American Federation of 1821–1839). See generally Ricardo Gallardo, *Las Constituciones de la República Federal de Centroamérica* (1958).

n46. See *Constitutional Studies*, *supra* note 1, at para. 1688. For a brief synopsis of the history of the Dominican Republic see Jan Knippers Black, *The Dominican Republic: Politics and Development in an Unsovereign State* 13–28 (1986); Michael J. Kryzaneck & Howard J. Wiarda, *The Politics of External Influence in the Dominican Republic* 21–35 (1988); Instituto de Derecho Público Comparado, Universidad Carlos III de Madrid, *Constitución de la República Dominicana*, at <http://www.uc3m.es/uc3m/inst/MGP/consdom.htm> (last visited Oct. 16, 2003).

n47. See *Constitutional Studies*, supra note 1, at paras. 17, 1590.

n48. See *id.* at paras. 95, 203–04, 389, 558–77, 895–96, 1504–05.

n49. See *id.* at paras. 593, 735, 1072–82.

n50. See *id.* at para. 1708.

n51. See *id.* at para. 17. In Arosemena's time, the British and American experiences represented the desirable level of political organization. For Arosemena, the British and American experiences were examples of the most desirable democratic governments, particularly because Great Britain became a constitutional monarchy, in which the monarchy had no authority and all the power was constitutionally vested in the Parliament. Similarly, the United States of America, after abolishing slavery, was an example of a successful democratic government. See *id.*, at paras. 1697, 1704–06.

n52. See *id.* at paras. 1690, 1698, 1705–06, 1708–10.

n53. See *id.* at paras. 1689.

n54. See *id.* at para. 1445.

n55. See *id.* at paras. 18–31. *Estado llano* literally translates as plain status or plain condition.

n56. See *id.* at para. 35. The dominance since independence of this military leadership was one factor that led to the general instability of the Latin American institutions. See *id.* at paras. 1695–96.

n57. See *id.* at para. 1446.

n58. See *id.* at paras. 116, 152–54.

n59. See *id.* at paras. 47–57, 1426–27.

n60. See *id.* at paras. 256–60.

n61. See *id.* at paras. 525–33.

n62. See *id.* at para. 1427. See also generally *id.* at paras. 1420–35.

n63. See *id.* at paras. 672–75, 681–82, 684–85, 1292–94, 1629.

n64. See *id.* at para. 526.

n65. *Id.* at para. 40.

n66. *Id.* at para. 39 (emphasis added).

n67. According to Arosemena, this was the role of Jean–Jacques Rousseau in his work *The Social Contract*, of Thomas Hobbes in his work *Leviathan*, and of Niccolo Machiavelli in his works *The Prince*. See *id.* at paras. 7, 13–14.

n68. See *id.* at paras. 3, 11–12.

n69. See *id.* at para. 4.

n70. See *id.* at paras. 8, 1411.

n71. See *id.* at paras. 9, 11.

n72. See *id.* at paras. 7–9, 1412.

n73. See *id.* at para. 1438.

n74. See *id.* at paras. 1436–37, 1439. To be sure, Arosemena's assumptions first systematized the analysis of existing political institutions. If, in a particular society, eliminating the monarchy would lead the society towards a dictatorship, this development had to be explained. For instance, Arosemena discusses how the monarchy and the aristocracy lost their influence in the new states after the states' independence from Spain. Republican forms of government did not follow after this loss of influence because the militaristic caudillo replaced them, slowing the foundation of democratic republics and the ascendancy of the rule of law. See *id.* at para. 35.

n75. See *id.* at para. 1618. Cf. Felix Markham, Introduction to Henri Saint-Simon, *Social Organization, the Science of Man and Other Writings* xlii, xlv (Felix Markham ed., Harpers, 1964) (1952) (commenting that "at the dawn of the nineteenth century, this vision of a new integral civilization was not so remote from reality as it would later appear to be. The idea of nationality was still balanced by the idea of the unity of a cosmopolitan Europe.").

n76. See *Constitutional Studies*, *supra* note 1, at para. 1618.

n77. See *id.* at paras. 826, 829, 831, 840, 844.

n78. See George A. Bermann, *Regulatory Cooperation Between the European Commission and U.S. Administrative Agencies*, 9 *Admn. L.J. Am. U.* 933, 950 (1996) (stating that the Maastricht Treaty "expresses a general E.C. law principle of "subsidiarity," meaning that the E.C. should not take legislative action within fields of concurrent E.C. and Member State jurisdiction if action at the Member State level could adequately accomplish the E.C.'s objectives."); Timothy L. Fort, *Corporate Makahiki: The Governing Telos of Peace*, 38 *Am. Bus. L.J.* 301, 328-29 (2001) (remarking that "in natural law terms, subsidiarity is a principle usually stating that problems ought to be solved at the smallest appropriate level... . This principle, Jeffersonian as well as Catholic, leaves significant autonomy and responsibility in the hands of particular communities."); Franz Xaver Perrez, *The Efficiency of Cooperation: A functional Analysis of Sovereignty*, 15 *Ariz. J. Int'l & Comp. L.* 515, 579 (1998) (commenting that "an example illustrating this relationship between cooperation and interdependencies is the principle of subsidiarity. Subsidiarity is a principle for determining at what level a regulation should be effected."); Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 *Am. J. Int'l L.* 489, 527 (2001) (stating that "the "subsidiarity principle" was incorporated with a view to confining Union action to instances where the member states cannot act effectively."). Joachim Jens Hesse and Johnson Nevil have indicated that in the relationship between the European Union and the nation states:

Subsidiarity is a principle intended to prevent excessive centralization of power, and expresses the basic notion that the Community should decide only in areas in which national governments could not regulate more effectively. In this sense, it is meant to serve as a guiding principle for allocating responsibilities between the two levels. By implication, it also holds that political decisions should be taken at the closest possible level to those actually affected by them.

Joachim Jens Hesse & Johnson Nevil, *The Agenda of Constitutional Change in Europe: Adaptation, Transformation, and Internationalization*, in *Constitutional Policy and Change in Europe* 373, 390 (Joachim J. Hesse & Nevil Johnson eds., 1995). See generally Denis J. Edwards, *Fearing Federalism's Failure: Subsidiarity in the European Union*, 44 *Am. J. Comp.* 537 (1996) (analyzing the subsidiarity principle).

n79. See *Constitutional Studies*, *supra* note 1, at para. 40.

n80. In the country commentaries of *Constitutional Studies* Arosemena addresses all the subject matter of constitutional law or "internal public law" as it was called at that time: fundamental rights and guarantees, forms of governments, the principle of the separation of powers, the organization of the legislature, executive and

judicial powers, the local government, the armed forces, judicial review and constitutional reform. Compare with the use of the phrase "internal public law" in the work by the Portuguese Silvestre Pinheiro Ferreira, *Curso de Direito Publico Interno e Externo* (1830), its French version, *Cours de Droit public interne et externe* (1830), and its Spanish translation, *Compendio de Derecho Publico Interno y Externo* (Bartolome Herrera trans. 1840) (indicating that Pinheiro Ferreira attempted to outline the principles of constitutional law - "princípios gerais do direito constitucional" - in his book and contrasted internal public law (constitutional law) with external public law (international law)).

n81. See *Constitutional Studies*, supra note 1, at para. 1590. Accordingly, Arosemena suggests that the chapters of a constitution should usually be divided into the following parts: the rights and guarantees to the habitants of the territory, citizenship or political rights, organization of the national public power, and organization of the local public power. *Id.* at para. 668. The first and second chapters should address individual rights, into which the public power should not infringe, and the third and fourth chapters should address the governmental powers. See *id.* at para. 668.

n82. See *id.* at paras. 106-07, 112-13, 196, 409.

n83. See *id.* at paras. 200, 411.

n84. See *id.* at paras. 335, 1450.

n85. See *id.* at paras. 548, 560.

n86. See *id.* at para. 551.

n87. See *id.* at paras. 325, 1212-20.

n88. See *id.* at para. 1041.

n89. See *id.* at para. 443.

n90. See *id.* at paras. 79, 159, 340-41.

n91. See *id.* at paras. 1065-68, 603-07.

n92. See *id.* at paras. 606-07, 1066.

n93. See *id.* at paras. 176, 423–433, 436–38, 1415, 1418.

n94. See *id.* at paras. 528–793.

n95. See *id.* at paras. 532, 534–36.

n96. See *id.* at paras. 1422, 1426–27, 1429–32.

n97. See *id.* at para. 304.

n98. See *id.* at paras. 38, 1638, 1700.

n99. See *id.* at paras. 319–20, 361, 370.

n100. See *id.* at paras. 538–40, 800, 850, 854.

n101. See *id.* at para. 346.

n102. See *id.* at paras. 1441, 1444, 1703–05, 1707.

n103. See *id.* at para. 1592, 1603.

n104. See *id.* at paras. 419–26, 433. Based on this criterion, Arosemena considered the Paraguayan Constitution of 1870 too anchored in the present. See *id.* at paras. 432–33, 1449. Arosemena considered that the Paraguayan government was essentially personal until 1870, first under Jose Gaspar de Francia, and later under Carlos Antonio Lopez. Under the dictator Francia, Paraguay did not have a constitution. Under the dictator Lopez, a pretense of a constitution was adopted. Lopez stayed in power until his death in 1862. His son, Solano, assumed power and ruled until his death in 1870, which was the result of a war against the neighboring countries, Argentina, Brazil and Uruguay. After this war, a Constitutional Convention adopted the Paraguayan Constitution of 1870. See *id.* at paras. 419–26. For a brief constitutional historical account of Paraguay, see Justo Jose Prieto, *El Sistema Constitucional Paraguayo*, in *Los Sistemas Constitucionales IberoAmericanos* 665, 667–68 (D. Garcia Belaunde et al. eds., 1992) (commenting that the Paraguayan Constitution of 1870 came into force after the 1865–1870 war between Paraguay and the Triple Alliance of Argentina, Brazil and Uruguay, in which Paraguay was destroyed. This Constitution, which is considered a summary of the liberal ideas at that time, ended more than 70 years of autocratic rule in Paraguay.). According to this criterion, the Mexican Constitution of 1857 was probably the most advanced of

the nineteenth century Latin American constitutions. For a historical account of the Mexican Constitution of 1857 see *Constitutional Studies*, supra note 1, at paras. 1374–80. For a brief account of Mexico's constitutional history see Jorge Carpizo & Jorge Madrazo, *El Sistema Constitucional Mexicano*, in *Los Sistemas Constitucionales Iberoamericanos*, supra, at 562–64 (explaining that the Mexican Constitution of 1857, which was an advanced and liberal constitution, was the result of the last constitutional convention of the nineteenth century in Mexico. Ignacio Comonfort, the President of the Republic, did not accept the new Constitution and organized a coup d'etat. Benito Juarez, President of the Supreme Court of Justice, organized the resistance against the coup d'etat and won the civil war).

n105. See *Constitutional Studies*, supra note 1, at paras. 802, 1286.

n106. See *id.* at paras. 374, 414–15, 1652, 1654.

n107. See *id.* at paras. 372, 530–31.

n108. See *id.* at paras. 1586–91, 1686.

n109. Robert J. Kolesar, *North American Constitutionalism and Spanish America: "A special lock ordered by catalogue, which arrived with the wrong instructions and no keys"?*, in *American Constitutionalism Abroad, Selected Essays in Comparative Constitutional History* 56 (George Athan Billias ed. 1990).

n110. See generally Jaime Jaramillo Uribe, *El Pensamiento Colombiano en el Siglo XIX* (3d ed. 1982).

n111. Arosemena mentions the following authors by name only: in the introduction, Platon, Fourier, Ciceron, Santo Tomas de Aquino, Bodin, Augusto Comte, Locke, and Montesquieu; in the discussion of Chile, Haeckel, B<um u>chner, Strauss, Darwin, Draper, Carpenter, Spencer, Bain, Lewes, Huxley, Fyndall, Renan, Littre, and Ribot; in the discussion of Paraguay, Bentham; in the discussion of Bolivia, Leibnitz, M. Turgot, M. Lally Tolendal, M. Boissy, D'Anglas, and Hamilton; in the discussion of Columbia, Washington, Jefferson, Adams, and Franklin; and in the conclusion, Bentham. *Constitutional Studies*, supra note 1.

n112. Arosemena cites the following authors and their works: in the introduction, Aristoteles, Politeia; Rousseau, *The Social Contract*; Hobbes, *Leviathan*; Machiavelli, *El Principe*; John Stuart Mill, *Considerations on the Representative Government*; Alexis de Tocqueville, *Democracy in America*; Richard Hildreth, *Theory of Politics*; in the discussion of Brazil, Silvestre Pinheiro Ferreira, *Observaciones a la Carta Portuguesa i a la Constitucion del Brasil*; Reybaud, *Breasil*; M. Block, *Dictionnaire general de la politique*; in the discussion of Chile, Ramon Brise<tild n>o, *Memoria historico-critica del derecho publico chileno*; Carrasco Albano, *Comentarios sobre la constitucion politica de 1833*; Jose Victorino Lastarria, *La constitucion politica de la republica de Chile comentada*; in the discussion of Argentina, Domingo F. Sarmiento, *Comentarios*; A. Nefftzer, *Dictionnaire general de la politique*; in the discussion of Uruguay, Manuel Colmeiro, *Derecho Constitucional de las Republicas Hispano-Americanas*; in the discussion of Paraguay, Santiago Arcos, *La Plata, Etude historique*; Cerbeleon Pinzon, *Juicio sobre la Constitucion de Rionegro*; Joseph Story, *A familiar Exposition of the United States*; and Manuel Pers, *Derechos i deberes de los jurados*; in the discussion of Bolivia, Edouard Laboulaye,

Estudios sobre la Constitución de los Estados Unidos; James Kent, *Comentarios*; John Adams, *Defensa de la constitución de los Estados Unidos*; John Stuart Mill, *El Gobierno Representativo*; M. D. Conway, *Republican Superstitions*; and Manuel Colmeiro; in the discussion of Peru, Agustín De la Rosa Faro, *Historia política del Perú*; John Stuart Mill; Laboulaye; and M. A. Beaure, *Democratie Contemporaine*; in the discussion of Ecuador, José Manuel Restrepo, *Historia de Colombia*; *Almanaque de la Academia del Ecuador*; John Stuart Mill; Laboulaye; Colmeiro; and Baralt i Diaz, *Historia de Venezuela*; in the discussion of Colombia, Felipe Pérez, *Geografía general de los Estados Unidos de Colombia*; and José Manuel Restrepo, *Historia de Colombia*; in the discussion of Venezuela, Baralt i Diaz, *Informe de Comisión Reformadora de la Constitución*; and Julian Viso, *Opusculo Inserto en el Federalista de Caracas*; in the discussion of Mexico, Lucas Alaman, *Historia de Méjico desde los primeros movimientos que prepararon su Independencia en el año de 1808 hasta la época presente*; Michel Chevalier, *Le Mexique ancien et moderne*; *Enciclopedia moderna*; Mesa i Leompart, *Compendio de la historia de América*; Francisco de Paula de Arrangoiz, *Méjico desde 1808 hasta 1867*; Juan de Dios Arias, *Reseña histórica*; Beaure; *Times de Londres*, artículo publicado en 1875; and *American Register de París* de 25 de marzo de 1876; in the discussion of Centroamérica, Miguel de Barra, *La América*; and in the discussion of Haití, Mesa i Leompart. Id.

n113. Cf. Alexis De Tocqueville, *Democracy in America* (Henry Reeve trans., Vintage Books 1945). The first volume of this work was published in 1835 and the second in 1840. It was an extraordinary success in Europe and in the United States, and influenced the institutional shaping of Latin American constitutions. See Hector Fix-Zamudio, *Algunos aspectos de la influencia de la constitución de los Estados Unidos en la protección de los derechos humanos en América Latina*, in *Constitución y Democracia en el Nuevo Mundo: Una visión panorámica de las Instituciones Políticas en el Continente Americano* 131, 144, 157-58, 166 (Hector Fix-Zamudio et al. eds., 1988) (commenting on Tocqueville's influence in Latin America). For a detailed account of the writing of *Democracy in America* see James T. Schleifer, *The Making of Tocqueville's Democracy in America* (1980); Drescher Seymour, *Tocqueville and England* 54 (1964). For Tocqueville's biography see André Jardin, *Alexis de Tocqueville 1805-1859* (1984). For an analysis and interpretations of *Democracy in America* by John Stuart Mill and James Bryce see generally J. P. Mayer, *Alexis de Tocqueville: Analytiker des Massenzeitalters* 30 (3d ed. 1972). See generally John C. Koritansky, *Alexis de Tocqueville and the New Science of Politics: An Interpretation of Democracy in America* (1986).

n114. Cf. Carlos Restrepo Piedrahita, *Constituyente y Constitucionalistas del Siglo XIX. Estudio Preliminar* in M. A. Pombo & J. J. Guerra, *Constituciones de Colombia* 90 (4th ed. 1986) (mentioning in general the influence of Tocqueville in Arosemena).

n115. See Tocqueville, *supra* note 113, at 15 ("I have attempted to show the distinction that democracy, dedicated to its inclinations and tendencies and abandoned almost without restraint to its instincts, gave to the laws the course it impressed on the government, and in general the control which it exercised over affairs of state."). For a French version, see Alexis de Tocqueville, *De la Democratie en Amerique* 49-50 (Jean-Claude Lamberti & Françoise Melonio eds., 1986).

n116. Tocqueville, *supra* note 113, at 6. See also Peter Augustine Lawler, *The Restless Mind: Alexis de Tocqueville on the Origin and Perpetuation of Human Liberty* 59 (1993) ("Tocqueville says, that 'God guides mankind'. God providentially directs the petty action of each individual toward a goal which transcends the perspective of each individual Tocqueville says that this divine force might, in truth, be either an 'inflexible providence' or 'a kind of blind fatality.'").

n117. Tocqueville, *supra* note 113, at 7.

n118. Id. See generally Dennis Bathory, *Moral Ties and Political Freedom in Tocqueville's New Science of Politics*, in *Tocqueville's Defense of Human Liberty, Current Essays* 21 (Peter A. Lawler & Joseph Alulis eds., 1993) (commenting that according to Tocqueville "to accomplish such education [of democracy] 'a new political science' would be needed.").

n119. Tocqueville, *supra* note 113, at 7. See also Edward T. Gargan, *De Tocqueville* (1965) (commenting on Tocqueville's method and passion).

n120. See Jean-Claude Lamberti, *Tocqueville and the two Democracies* 233 (Arthur Goldhammer trans., Harvard University Press 1989) (commenting that "Tocqueville's is a philosophical theory, but at the same time ... it is inductive and analytical, unlike the theories of Bentham and his disciples or those of the eighteenth-century philosophies"); Francois Bourricaud, *Foreword to Lamberti, Tocqueville and the two Democracies* ix-x (Arthur Goldhammer trans., Harvard University Press 1989) ("One snare that political "theory" does not always manage to avoid is that of essentialism. The theorist's weakness for classifications and abstractions dates perhaps from the Greeks... . One of Tocqueville's most invaluable contributions was to teach political philosophers how to remove their essentialist blinders.").

n121. See Bathory, *supra* note 118, at 23 (commenting that "Tocqueville strives in both the Democracy and the Old Regime to become an 'author' of a third sort. Neither a simple 'commentator' – a chronicler of detailed facts and events, nor a 'publicist' concerned primarily with general truths, he seeks rather to mediate between the two."). See generally Saguiv A. Hadari, *Theory in Practice: Tocqueville's New Science of Politics* 3–10 (1989) (remarking that Tocqueville's work blended several methodological goals and approaches such as the combination of causal or intentional explanations of human conduct, the formal and interpretative approaches, the positivism and hermeneutics approach, and micro and macro levels of analysis).

n122. See Bernhard Fabian, *Alexis de Tocqueville's Amerikabild. Genetische Untersuchungen <um u>ber Zusammenh<um a>nge mit der zeitgen<um o>ssischen, insbesondere der englischen Amerika-Interpretation* 110 (1957). See also Lamberti, *supra* note 120, at 103 (commenting that "[a] second possible reading of Tocqueville would emphasize the lessons that he thought France might draw from the American experience. This is the reading that Tocqueville encourages in the introduction to *Democracy in America*.").

n123. Lamberti, *supra* note 120, at 239. See also Whitney Pope, *Alexis de Tocqueville, His Social and Political Theory* 32–40 (1986) (commenting that "though seldom mentioning France, he did not write a page of *Democracy* without thinking about his native land"). Pope also notes that "Tocqueville often poses his analysis in comparative terms. Tocqueville's comparisons employed different units of analysis. Often he compared two or three nations, focusing particularly on France, England, and America... . Sometimes Tocqueville employed mutually supplementary inter- and intranational comparisons." Id. at 34–35; Michael Hereth, *Alexis de Tocqueville: Threats to Freedom in Democracy* 33–35 (George Bogardus trans., Duke University Press 1986) ("Tocqueville wrote about America but meant France.").

n124. See John Stone & Stephen Mennell, *Introduction to Alexis de Tocqueville, On Democracy, Revolution, and Society: The Heritage of Sociology* 26 (John Stone & Stephen Mennell eds., University of Chicago Press 1980).

n125. Tocqueville, *supra* note 113, at 14 ("Whoever should imagine that I have intended to write a panegyric would be strangely mistaken."). See also Stone & Mennell, *supra* note 124, at 26 (commenting on the same).

n126. Tocqueville, *supra* note 113, at 17.

n127. *Constitutional Studies*, *supra* note 1, at para. 12.

n128. Cf. Mary Ann Glendon, Michael Wallace Gordon, Michael & Christopher Osakwe, *Comparative Legal Traditions in a Nutshell X* (1982) (suggesting that scholarly objectivity and neutrality are necessary mental characteristics for studying comparative law).

n129. Richard Hildreth, *Theory of Politics: An Inquiry into the Foundations of Governments, and the Causes and Progress of Political Revolutions* (A.M. Kelley 1970) (1854) [hereinafter *Politics*]. *Politics* is one of Hildreth's major philosophical works, which were to include works on the theory of wealth, the theory of taste, the theory of knowledge, and the theory of education. Hildreth wanted to systematize those inquiries under the general title *Rudiments of the Science of Man*. Yet, only *Theory of Morals* and *Politics* were completed; the others were left unfinished. See Martha M. Pingel, *An American Utilitarian, Richard Hildreth: as a Philosopher* (1948) (analyzing Hildreth's works and stating that Hildreth may be remembered for his translation of Etienne Dumont version of Bentham's *Theory of Legislation* (London, K. Paul, Trench, Tr<um u>bner 7th ed. 1891) and as the author of the six-volume work about American history).

n130. The methodological foundation of *Politics* is found in Richard Hildreth, *Theory of Morals, An inquiry Concerning the Law of Moral Distinctions and the Variations and Contradictions of Ethical Codes* 14–5, 29, 38, 58–9, 135–36, 263, 269 (A.M. Kelley 1971) (1844) [hereinafter *Morals*].

n131. *Id.* at 14.

n132. *Constitutional Studies*, *supra* note 1, at para. 872.

n133. *Politics*, *supra* note 129, at 16. See also *id.* 15–20.

n134. *Constitutional Studies*, *supra* note 1, at para. 9.

n135. *Politics*, *supra* note 129, at 16. See also *id.* at 31–46, 40–68.

n136. Constitutional Studies, supra note 1, at paras. 8-9.

n137. Politics, supra note 129, at paras. 16-17.

n138. Constitutional Studies, supra note 1, at paras. 8, 628 (referring to the political laws of domination and veneration).

n139. Politics, supra note 129, at 230.

n140. Id. at 253.

n141. Id. at 255.

n142. Id. at 261 (stating that except in so called "civic aristocracies," "in other forms of government ... the great mass of people are cut off from all pretensions to knowledge, to taste, and to wealth").

n143. Although less evident, there is also a similarity between Hildreth's moral foundation of politics and law and that of Arosemena. Compare *Morals*, supra note 130, at 14-5, 29, 38, 44, 58-9, 135-36, 263, 269 with Constitutional Studies, supra note 1, at para. 1707.

n144. Cf. Richard Hildreth, *Despotism in America: An Inquiry into the Nature, Results, and Legal Basis of the Slave-Holding in the United States* (Negro Universities Press 1968) (1854). In addition, Hildreth wrote the novel *Archy Moore* (Negro Universities Press 1969) (1832), later called *The White Slave*, which Pingel considers "a forerunner of all antislavery novels in this country." Pingel, supra note 129, at 4.

n145. Cf. Francois Bourricaud, supra note 120, at ix-x. Bourricaud states:

The comparative lack of success of the second volume, published in 1840, was due to the difficulty of a work which asked not just about the future of American democracy but about the future of democracy in modern society generally. Nevertheless, it is superficial to see the first volume as a monograph on American institutions and the second as a sequel composed of timeless and moralizing reflections on the 'essence' of democracy.

Id. See also Sheldon S. Wolin, *Tocqueville Between Two Worlds: The Making of a Political and Theoretical Life* 59 (2001) ("Tocqueville was the first political theorist to treat democracy as a theoretical subject in its own right.").

n146. See Politics, supra note 129, at 263 (criticizing Tocqueville for focusing on America to analyze democracy,

when it was also possible to trace the democratic spirit in Europe).

n147. See Politics, *supra* note 129, at prologue; Pingel, *supra* note 129, at 3–8. Cf. Richard Hildreth, *The History of the United States of America, from the Discovery of the Continent to the Organization of Government under the Federal Constitution* (Harper 1970) (1849).

n148. John Stuart Mill, *Considerations on Representative Government* (Regnery 1962) (1861) [hereinafter *Considerations*]. In the introduction to *Constitutional Studies*, Arosemena mentioned *Considerations* as a valuable contribution to political science. *Constitutional Studies*, *supra* note 1, at para. 12. In the chapter on Bolivia, Arosemena uses *Considerations* to bolster the need for an elected aristocracy in a second legislative chamber to moderate the lower democratic legislative chamber, *id.* at para. 579, and to support the advantages of the indirect election of the president, *id.* at paras. 589–92. In the chapter on Peru, Arosemena uses *Considerations* to endorse the need for the representation of minorities, in order to avoid the despotism of parliamentary majorities, and to achieve proportional electoral vote. *Id.* at paras. 729, 732. Moreover, in the chapter on Ecuador, Arosemena adopted John Stuart Mill's concept of suffrage. *Id.* at para. 869.

n149. Arosemena used the Spanish version of *Considerations*. See John Stuart Mill, *El Gobierno Representativo* (Florentino Gonzalez trans., Imprenta y Libreria del Mercurio de S. Tornero e Hijos 1865). The use of Gonzalez's translation speaks to the Latin American intellectual background surrounding *Constitutional Studies*. Gonzalez, one of the most recognized Colombian liberal intellectuals in the nineteenth century, was an unabashed anglophile. See Jaramillo Uribe, *supra* note 110, at 34, 199. For instance, in the foreword of Gonzalez's translation, he suggests following the Anglo-Saxon example for a good government and he decries the influence of French theories on Latin American youth because he believed that, in France, except for Tocqueville and Laboulaye, whimsical publicists abounded. See Florentino Gonzalez, *Foreword to John Stuart Mill, El Gobierno Representativo*, *supra*, at 5–6. Cf. Florentino Gonzalez, *Constituciones de Algunos de los Estados de la Union Americana* 3–4 (Buenos Aires, Impr. y Libreria de Mayo 1872). Gonzalez argues for seeking adequate models for the political organization of Latin American countries, and contends that the adoption of wrong models has resulted in unsuitable constitutions. In short, some of Gonzalez's concerns about the constitutional organization of Latin American countries are similar to Arosemena's concerns in *Constitutional Studies*. Gonzalez, *Foreword to El Gobierno Representativo*, *supra*, at 13–14. See also Florentino Gonzalez, *Lecciones de Derecho Constitucional* (2d. ed., Libreria De Rosa y Bouret, 1871) (expressing similar ideas).

n150. See R. J. Halliday, *John Stuart Mill* 39–40 (1976).

n151. See John Stuart Mill, *M. de Tocqueville on Democracy in America*, in *2 Dissertations and Discussions: Political, Philosophical, and Historical* 1–83 (Haskell House Publishers 1973) (1875) (stating that "it is not risking too much to affirm of these volumes, that they contain the first analytical inquiry into the influences of Democracy"). See also Wolin, *supra* note 145, at 59 (remarking that "Democracy in America represents the moment when democracy first came into focus as the central subject of a political theory" and that John Stuart Mill was right when he hailed Democracy as "the first philosophical book ever written on Democracy, as it manifests itself in modern society.").

n152. John Stuart Mill, *M. de Tocqueville on Democracy in America*, *supra* note 151, at 3 ("[Democracy in America] constitutes the beginning of a new era in the scientific study of politics.").

n153. Mill notes:

The value of [Tocqueville's] work is less in the conclusions, than in the mode of arriving at them. He has applied to the greatest question in the art and science of government, those principles and methods of philosophizing to which mankind are indebted for all the advances made by modern times in the other branches of the study of nature.

Id. at 4-5.

n154. John Stuart Mill, *Autobiography and Other Writings* 115 (Jack Stillinger ed. 1969) (1873). See also Bruce Mazlish, *James and John Stuart Mill: Father and Son in the Nineteenth Century* 233 (1975) (commenting on John Stuart Mill's change on the subject of democracy).

n155. See Geraint L. Williams, *Introduction to John Stuart Mill, On politics and Society* 9-10, 13, 28-29 (Geraint L. Williams, ed. 1976). Cf. James Mill, *Political Writings* (Terence Ball ed., 1992); Halliday, *supra* note 150, at 3, 15, 29, 35.

n156. See Mill, *Autobiography*, *supra* note 154, at 80-110. In his autobiography, Mill writes:

If I am asked, what system of political philosophy I substituted for that which, as a philosophy, I had abandoned, I answer, no system: only a conviction that the true system was something much more complex and 'many-sided' than I had previously had any idea of, and that its office was to supply, not a set of model institutions, but principles from which the institutions suitable to any given circumstances might be deduced.

Id. at 97. See also Mazlish, *supra* note 154, at 205-30 (analyzing John Stuart Mill's mental crisis). Among the events that contributed to Stuart Mill's intellectual transformation was the attack of the Whig historian Thomas Babington Macaulay against his father's, James Mill's, *Essay on Government*, which made John Stuart Mill reflect on the foundations of Bentham's theory. Macaulay argued that the deductive method is not applicable to politics, in which only the scientific inductive method could warrant a progress comparable to other sciences. See Williams, *supra* note 155, at 14, 22. Cf. Terence Ball, *Introduction to James Mill, Political Writings* xiv-xxvi (1992) (commenting about Macaulay's criticism of Mill). Also, the reading of Tocqueville's *Democracy in America* contributed to John Stuart Mill's ideological departure from Bentham's theory. See Williams, *supra* note 155, at 14-15.

n157. See *Constitutional Studies*, *supra* note 1, at paras. 1-2.

n158. Cf. Rafael Nuñez, *El sentido político y la esencia de la política*, in *1 Antología del Pensamiento Político Colombiano* 221 (Jaime Jaramillo Uribe ed. 1970) (discussing Macaulay's maxim and Great Britain's virtues). Cf. Jaramillo Uribe, *supra* note 110, at 201 (stating that Nuñez and the Samper brothers used to repeat Macaulay's maxim in Colombia, which signaled a British-influenced liberalism).

n159. See Williams, *supra* note 154, at 23–34. See also Mill, *Autobiography*, *supra* note 154, at 97 (stating "that all questions of political institutions are relative, not absolute, and that different stages of human progress not only will have, but ought to have, different institutions").

n160. See Richard K. P. Pankhurst, *The Saint Simonians, Mill and Carlyle: a Preface to Modern Thought* 6–28 (1957) (describing the exchange of ideas between Mill and the Saint Simonians); Markham, *supra* note 75, at xlii (saying that "to trace the effects [of St. Simonian ideas] would indeed, mean nothing less than writing the intellectual history of nineteenth-century Europe... . Through John Stuart Mill and Carlyle, St. Simonian ideas modified English individualism."). See generally, *French Utopias: an Anthology of Ideal Societies* 283 (Frank E. Manuel & Fritzie P. Manuel eds. 1966) (describing the tenets of Saint Simonians' movement and reproducing some of their writings). For an account of Saint Simon's ideas and life see generally Frank E. Manuel, *The New World of Henri Saint-Simon* (1956) and Henri Saint-Simon, *Selected Writings on Science, Industry, and Social Organization* (Keith Taylor ed., 1975).

n161. See Mill, *Autobiography*, *supra* note 153, at 98–99. Further, Mill offered examples: "The period of Greek and Roman polytheism ... was an organic period, succeeded by the critical or sceptical period of the Greek philosophers. Another organic period came in with Christianity. The corresponding critical period began with the Reformation" *Id.* at 99. Mill point outs that "these ideas ... were not peculiar to the St. Simonians; on the contrary, they were the general property of Europe, or at least of Germany and France, but they have had never, to my knowledge, been so completely systematized as by these writers," *Id.*

n162. Iris Wessel Mueller, *John Stuart Mill and French Thought* 58 n.37 (1956) (quoting John Stuart Mill's letter to d'Eichthal of November 7, 1829). Mueller warns, however, that Mill did not share the notion of the progress of history as uniformly pre-determined as the Saint Simonians did: "[Mill] held, on the contrary, and in a more empirical spirit, that 'different nations, indeed different minds, may and do advance to improvement by different roads.'" *Id.* at 59. See also Halliday, *supra* note 150, at 26–27. Halliday states that for the Saint Simonians:

The first step in the investigation of practical political truths ... [was] to ascertain what ... [was] the state into which, in the natural order of the advancement of civilisation the nation in question will next come; in order that it may be the grand object of our endeavors, to facilitate the transition to this state.

Id.

n163. See Dennis F. Thompson, *John Stuart Mill and Representative Government* 136–173 (1976) (explaining that for Mill a general theory or philosophy of politics assumes a previous theory about human progress). According to Thompson, "although Mill never elaborates a theory of this kind in *Representative Government*, he implicitly relies on one at many crucial points in his argument, and he sometimes explicitly appeals to one as well." *Id.* at 136. The author points out, however:

It would be misleading to call Mill's theory a philosophy of history, as he sometimes does himself, were it not that 'history' fails to capture Mill's emphasis on the future course of human development. More appropriate is the term

"development," which is somewhat more neutral than 'progress' and more general than "history."

Id. at 136-37.

n164. Considerations, supra note 148, at 5.

n165. See id.

n166. Id. at 10.

n167. Id. at 11 (emphasis added).

n168. Id. at 11-12.

n169. Id. at 12.

n170. Edouard de Laboulaye, *Estudios sobre la Constitucion de los Estados-Unidos* (Joaquin Guichot trans., E. Perie y Compañia 1869). In the introduction to *Constitutional Studies*, Arosemena mentions this book as a valuable contribution to the political sciences. *Constitutional Studies*, supra note 1, at para. 12.

n171. For instance, in the chapters on Brazil and Bolivia, Laboulaye's book is used to support the advantages of having two legislative chambers. *Constitutional Studies*, supra note 1, at paras. 95, 558-68. In the chapter on Bolivia, it is quoted to praise the American Senate as an elected aristocracy that assures a balanced government. Id. at para. 578. In the same chapter, the book is used to compare judicial review with the review of laws (control de legalidad) in France. Id. at paras. 605-06. In the chapter on Peru, Laboulaye's book is used to support the recommendation that minorities should be represented in each electoral district, id. at para. 730, and in the chapter on Ecuador, it is quoted to reinforce the idea that an effective constitution has to be accepted by the people. Id. at para. 859. There is also a paraphrase from Laboulaye regarding the risk of drafting whimsical constitutions. Compare Laboulaye, *Estudios*, supra note 170, at 12 with *Constitutional Studies*, supra note 1, at para. 800. In the same chapter, Laboulaye is quoted to support women's right to vote, and to support the advantages of an indirect election, at least for one legislative house. *Constitutional Studies*, supra note 1, at paras. 875, 887.

n172. Laboulaye's book is a compilation of lectures given in 1864 at the College de France, where Laboulaye began to teach comparative law in 1849 at a catedra (professorship) created in 1832 under the title *Legislation Comparee*. See Michael Stolleis, *Nationalität und Internationalität: Rechtsvergleichung im öffentlichen Recht des 19. Jahrhunderts* 10-11 (1998).

n173. See O. Motte, Laboulaye, Edouard-Rene Lefebvre de (1811-1883), in *Michael Juristen: Ein Biographisches Lexikon von der Antike bis zum 20 Jahrhundert*, supra note 2, at 367.

n174. Explaining his reasons for studying the United States, Laboulaye said:

I thought, above all, in my country, in this beloved France. Countries have not been organized to exist in isolation; they need to know and esteem each other What I want is that France becomes the model of the nations in politics, as it is in other fields. Many times, we have been the first in arms, in literature and in art: why we would not be also the first in liberty.

2 Laboulaye, *Estudios*, supra note 170, at 281-83.

n175. See *id.* at vii.

n176. *Id.* at 12-13.

n177. *Id.*

n178. Laboulaye, *Estudios*, supra note 170, at ii.

n179. *Id.*

n180. *Id.* at iii.

n181. *Id.*

n182. *Id.* at v-vi.

n183. *Id.* at vi.

n184. Laboulaye, *Estudios*, supra note 170, at 281.

n185. See *Constitutional Studies*, supra note 1, at para. 411.

n186. See *id.* at para. 283.

n187. See *id.* at paras. 395–400.

n188. See *id.* at para. 233.

n189. See *id.* at para. 234.

n190. See *id.* at para. 460.

n191. Arosemena also understood the political weight of the size of the territory and the population. Although the size of the population in itself does not bring recognition as an international power, the combination of size and organization of the population can be a source of a country's influence. See Rainer Munz, *Mehr Kinder, mehr Macht*, *Die Zeit*, Mar. 2003, available at <http://www.zeit.de/2003/03/Demographie>.

n192. Manuel Colmeiro, *Derecho Constitucional de las Republicas Hispano–Americanas* (A. Calleja 1858).

n193. For example, Colmeiro's work is used in the chapter on Uruguay for a brief historical account of the relation between the church and the state. *Constitutional Studies*, *supra* note 1, at paras. 376–80, 382–83. It was also used in the chapter on Bolivia to explain that the election method and the tenure of the members of the legislature should correspond to the existing division of the legislature in two chambers. See *id.* at paras. 573–77. Finally, Colmeiro's work was used in the chapter on Ecuador to maintain that in order to be effective, a constitution must take into account the real political forces in a society. *Id.* at para. 898.

n194. See Colmeiro, *supra* note 192, at vii–viii (analyzing the constitutions of Chile, Peru, Mexico, the Confederation of Argentina, Buenos Aires, and Nueva Granada, now known as Columbia).

n195. See *id.* at xii–xiv, 75, 383–84.

n196. See *id.* at 199 (commenting that "having exposed the theory of elections, we will proceed to examine how it is understood and applied by the Hispano–American Republics that the subject of our study") (author translation).

n197. *Constitutional Studies*, *supra* note 1, at para. 40.

n198. See *id.* Harmonization refers to the process by which laws and institutions are standardized, or at least made compatible, among different legal orders. There is a difference of degree between harmonization and unification. While harmonization aims to bring together two or more legal institutions, unification aims for to uniformity legal institutions. See, e.g., Thomas Weimer, *Grundfragen Grenzüberschreitender Rechtsetzung* 21–25, 86–90 (1995) (distinguishing between *Rechtsangleichung* (harmonization) and *Rechtsvereinheitlichung* (unification) of law). *Rechtsangleichung* is a kind of incomplete unification, when institutions of legal orders become coordinated and more similar, but not yet unified. *Rechtsvereinheitlichung* aims, ideally, for a full unification of previously differentiated legal institutions. *Id.* at 21–24. In the United States, uniform laws such as the Uniform Commercial Code and the Restatements of Law are examples of harmonization efforts. See *id.* at 86–90. Furthermore, in Europe:

the founding fathers of the Community correctly foresaw that some measure of unification, or at least of harmonization or coordination, of the members' national laws in certain fields would be necessary, if serious distortions of the competitive process within the Community were to be avoided. Accordingly, they inserted into the Treaty of Rome a number of special provisions for the approximation of members' legislation in certain fields.

Rudolf B. Schlesinger et al., *Comparative Law: Cases, Text, Materials* 32 (5th ed. 1988). See also James Gordley, *Comparative Legal Research and Its Function in the Development of Harmonized Law: An American Perspective*, in *Towards Universal Law: Trends in National, European and International Law Making* 53 (Nils Jareborg ed., 1995) (indicating that "the harmonization that is worth having, in my view, is the development of a common transnational legal science"). But cf. Hein Kötz, *Comparative Legal Research and Its Function in the Development of Harmonized Law. The European Perspective*, in *Towards Universal Law*, *supra*, at 27 (warning that unification could add unnecessary complexity to a legal system). For a brief history of legal harmonization see generally Günther Philipps, *Erscheinungsformen Und Methoden Der Privatrechts-Vereinheitlichung* 63–69 (1965).

n199. Cf. James Kent, *Commentaries on American Law* (New York, 3d ed. 1836); Joseph Story, *A familiar Exposition of the Constitution of the United States* (Regnery Gateway 1986) (1859).

n200. See generally Story, *supra* note 199, at 233–239. Explaining the powers and jurisdiction of the judiciary, Story states:

The Judicial department is authorized to exercise jurisdiction to the full extent of the Constitution, laws and treaties, of the United States, whenever any question respecting them shall assume such a form, that the judicial power is capable of acting upon it. When it has assumed such a form, it then becomes a case; and then, and not till then, the judicial power attaches to it. A case, then ... arises, when some subject ... is submitted to the court by a party, who asserts his rights in the form prescribed by law.

Id. at 237. For a contemporary analysis of the case and controversy requirement see generally Gerald Gunther & Kahleen M. Sullivan, *Constitutional Law* 28–29 (13th ed. 1997). Gunther and Sullivan quote Justice Rutledge's opinion in *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947) regarding the policies behind judicial restraint:

The case and controversy limitation itself ... it is one of the rules basic to the federal system and this Court's appropriate place within that structure. [The] policy's ultimate foundations [lie] in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality.

Id. at 29.

n201. See, e.g., Hein Kötz, Comparative Law in Germany Today, in *L'avenir du Droit Compare: Un Defi pour les Juristes Du Nouveau Millenaire* 17, 19 (2000) ("German comparatists have increasingly come to incline toward the functional approach first developed by Ernst Rabel. It is recognized generally today that the basic methodological principle of all comparative law is that of functionality.") (emphasis added); John C. Reitz, How to Do Comparative Law, 46 *Am. J. Comp. L.* 617, 620 (1998). For an assessment of the question of method in comparative law see de Cruz, *supra* note 33, at 228–239 (describing the comparative method, including the test of functionality and the presumption of similarity of results); Hiram E. Chodosh, Comparing Comparisons: In Search of Methodology, 84 *Iowa L. Rev.* 1025, 1032–57 (1999). But see Mark Van Hoecke & Mark Warrington, Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law, 47 *Int'l & Comp. L.Q.* 495–96 (1998) (favoring a broader approach to comparative law beyond rules). For Van Hoecke and Warrington, the focus of comparative law should be "legal discourse, the way lawyers work with the law and reason about it." Id. at 495. Further, "the more modest approach of present comparative law limits the context to the function of the law. This functional approach has most prominently been advocated by Zweigert and Kötz." Id. at 495. In addition, Van Hoecke note that "several authors have recently advocated broader approaches to comparative law, and in doing so they attempt to move away from a 'law as rules' concept by using concepts such as 'tradition', 'mentalite' and 'culture.'" Id. at 496.

n202. Reitz, *supra* note 201, at 622.

n203. Id. at 623. See also G.-R. de Groot & H. Schneider, Das Werturteil in Der Rechtsvergleichung. Die Suche Nach Dem Besseren Recht, in *Comparability and Evaluation* 62 (F.W. Grosheide et. al. eds., 1994) (discussing the function of tertium comparationis); Mauro Cappelletti, In Honor of John Henry Merryman, in *Comparative and Private International Law: Essays in Honor of John Henry Merryman on His Seventieth Birthday* 6 (David S. Clark ed., 1990) ("What must be similar to provide the proper basis for valuable comparative research is only the problem itself that demands a solution in terms of law.").

n204. See generally Rodolfo Sacco, One Hundred Years of Comparative Law, 75 *Tul. L. Rev.* 1159 (2001) (emphasizing that "comparative legal science triumphs because we are indebted (that is to say, mankind is indebted) to its masterpieces: harmonization, uniformity, and unification of the law."). Cf. Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 *Yale L.J.* 1225, 1238 (1999) (arguing that sometimes "judges can find licenses for looking to constitutional experience elsewhere in interpreting the U.S. Constitution").

n205. See 1 Konrad Zweigert & Hein Kötz, Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts 13, 31–41, 51 (2d ed. 1984). See also Leontin-Jean Constantinesco, Der Rechtsbegriff in der Makro-Vergleichung, in *B80 Zeitschrift für Vergleichende Rechtswissenschaft* 177 (1981); Heinz Hubner, Sinn und Möglichkeiten retrospektiver Rechtsvergleichung, in *Festschrift für Gerhard Kegel* 235 (Kegel et al. eds., 1987).

n206. Cf. Andrew Harding, *Comparative Public Law: A Neglected Discipline?*, in *Comparative Law in Global Perspective* 114–15 (Ian Edge ed., 2000) (asserting that the Zweigert and Kötz formulation of the functional method "represents a kind of a rough authorised current version of comparative legal method"). Harding does not see major differences between the comparative method in public and private law. *Id.* at 118–19. For an assessment of the functional method see generally David J. Gerber, *Sculpting the Agenda of Comparative Law: Ernst Rabel and the Facade of Language*, in *Rethinking the Masters of Comparative Law* (Annelise Riles ed., 2001). Gerber comments that the function/context method "developed by Ernst Rabel for the comparative study of law has acquired the status of orthodoxy in much of the world." *Id.* at 190. Further, Gerber asserts,

[Rabel's] methods represented an exceptionally important conceptual breakthrough, and we dare not to forget how important they have been and continue to be. They provide a powerful tool of analysis that has been used to create an extensive and invaluable body of comparative law materials dealing with how legal systems treat specific problems.

Id. at 207. For a critical assessment of the functionalist method see Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, in *Comparative Law. An Introduction* 7 (Vivian Grosswald Curran ed., 2002) Curran notes that "the functionalist approach, developed by Ernst Rabel, has been the hallmark of contemporary comparative legal analysis." *Id.* at 14 n.76. She also indicates that functionalism "operates at the most manifest level of society and allows a maximum of latitude for deemphasizing the differences in legal mentality that frequently underlie practical resolutions to legal questions." *Id.* at 11. It also "tends to disguise the fact that a given question will itself mean some thing different in different legal cultures." *Id.* See also Pierre Legrand, John Henry Merryman and *Comparative Legal Studies: A Dialogue*, 47 *Am. J. Comp. L.* 3 (1999). In response to criticism of rule comparison, Merryman said: "It seems so obvious that comparison based on statements of rules of law, which is the dominant mode of comparative law scholarship, is a relatively trivial kind of enterprise." *Id.* at 4. Merryman suggests that the alternatives are to compare legal cultures and "the underlying reality of the legal system, the institutions, actors, and processes." *Id.* at 25.

n207. Cf. Karl-Peter Sommermann, *Die Bedeutung der Rechtsvergleichung für die Fortentwicklung des Staats und Verwaltungsrechts in Europa*, Heft 24 *Die Öffentliche Verwaltung: Zeitschrift für öffentliches Recht und Verwaltungswissenschaft* 1017, 1017 (1999). Sommermann indicates that comparison is only possible when the comparatist takes the role of external observer: "At any rate, the comparison strictu sensu is only possible, when the comparatist first steps out of his/her familiar system and takes the role of an external observers in relation to the compared legal orders." *Id.* (author translation). See also Grosswald Curran, *supra* note 206, at 118. Curran states that:

[The contribution that American legal theories such as feminist and critical race theory had made] to the constitution of our legal system stem in part from the greater facility than outside observer may have in detecting features of a legal culture so entrenched and unquestioned as to be taken for granted by the insiders. Noting to signal the triumphs of the exiled, Edward Said has referred to "an ascetic code of willed homelessness," and Julia Kristeva has evoked exile as an opportunity "to make love with absence," and as a "weightlessness in the infinity of cultures and legacies [that] gives [the exile] the extravagant ease to innovate." This perhaps is the condition to which the comparatist should aspire.

Id.

n208. 1 Francois R. Dareste & P. Dareste, *Les Constitutions Modernes, Recueil des Constitutions en Vigueur Dans Les Divers Etats D'Europe, D'Amerique et Du Monde Civilise*. Traduites sur Les Textes et accompagnees de Notices historiques et de notes explicatives xxiv (2d ed., Augustin Challamel 1891).

n209. Id.

n210. See id. (stating that the translations of some constitutions in M. E. Laferriere & M. A. Batbie, *Les Constitutions d'Europe et d'Amerique* (1869), contained several inaccuracies).

n211. See 2 F. R. Dareste & P. Dareste, *supra* note 208, at 510, 515, 547-48.

n212. Francisco Bauza, *Estudios Constitucionales* (1887).

n213. Cf. Basil S. Markesinis, *Foreign Law and Comparative Methodology: A Subject and a Thesis* 45 (1997) (stating in a different context that the comparatist lawyer must endure criticism both from his countrymen for being disloyal "as his criticisms of their law strike closer to the bone," and from his foreign colleagues "who may treat him - often, but not always, rightly - as a superficial outside observer of their systems").

n214. Bauza, *supra* note 212, at 426.

n215. *Constitutional Studies*, *supra* note 1, at para. 356 ("Uruguay is a country born out of the transaction of two powers that disputed over it, and the English intervention that sought only peace and markets.").

n216. Bauza, *supra* note 212, at 426-28.

n217. Id. at 429-31.

n218. Id. at 431, 434-435.

n219. For an interpretation of the history of the Uruguay by twentieth century Uruguayan scholars see Julio Barreiro, *Die Entwicklung des Verfassungsrechts von Uruguay*, in *20 Jahrbuch des <um o>ffentlichen Rechts der Gegenwart* 573-616 (1971). See generally Hector Gross Espiell, *Las Constituciones de Uruguay* (2d. ed. 1978).

n220. *Constitutional Studies*, *supra* note 1, at paras. 361-72.

n221. See *id.* at paras. 371–72.

n222. See *id.* at paras. 373–75. Arosemena notes that the Constitution of Uruguay, as well as the constitutions of Brazil, Chile, Argentina and the constitutions of most other Catholic countries, except those of Belgium and Colombia, gave special protection to Roman Catholicism, the same way that Great Britain protected "la religion episcopal." *Id.* at para. 375.

n223. See *id.* 376–84. In this historical account Arosemena quotes Colmeiro, *supra* note 192, at 190, extensively.

n224. Constitutional Studies, *supra* note 1, at para. 384 ("A pure, truthful and self-confident, does not need help from the government. A legitimate government, just and protector of liberty, does not need more to gain the love and respect of its citizens.").

n225. See Const. of Uruguay 1830 art. 134.

n226. See Rodrigo Miro, Justo Arosemena, *Interprete y Vocero de la Nacionalidad*, in *Significacion Historica y Filosofica de Justo Arosemena* 11–17 (1958) (commenting that Justo Arosemena is caught in a net of eulogistic comments, without being thoroughly studied, and noting that Arosemena's thought remains unexamined, although he is a spiritual and intellectual national treasure). See also Mendez Pereira, *supra* note 36, at 345–46; Moscote & Arce, *supra* note 36, at 359–60, 365–66.

n227. See, e.g., Ricaurte Soler, *Pensamiento Panameño y Concepcion de la Nacionalidad durante el Siglo xix* 68–74 (1954) (considering Constitutional Studies less interpretative than other works by Arosemena after only examining its introduction to infer a concept of history); Nils Castro, *Introduction to Justo Arosemena, Patria y Federacion* 37–8 (Nils Castro ed., 1982) (dismissing Constitutional Studies as an example of the most that the liberal ideology could have produced at that time).

n228. For an account of the theory that Panama was created solely as a result of U.S. interest in the Panama Canal see Sol M. Linowitz & Martin Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* 69–70 (1994) (stating that Cromwell, a lawyer, "would put together the plan that led to the surgery on Colombia that produced Panama and the agreement to build a Panama Canal"). For a more rigorous historical account see David McCullough, *The Path Between the Seas: The Creation of the Panama Canal 1870–1914*, at 361–86 (1977). McCullough notes:

[Even] if American sea power had settled the issue on the instant, made Panama an immediate *fait accompli*, it is equally obvious that belief in an American involvement far in excess of reality was for the actual conspirators the vital sustaining force: what Amador and his compatriots believed the situation to be – their mistaken impressions as a result of the arrival of the Nashville – was far more important than were the facts of the situation.

Id. at 385.

n229. See Carlos Manuel Gasteazoro, *Presentacion Historiografica de Octavio Mendez Pereira*, in Mendez Pereira, *supra* note 36, at xviii. Mendez Pereira participated with Justo Arosemena. See *supra* note 36. Also prepared on the occasion of that competition was the biography by Moscote & Arce, *supra* note 36. The first general history of Panama emphasizing the distinct Panamanian nationality from the Colombian nationality was also prepared around this time. Cf. Juan B. Sosa & Enrique J. Arce, *Compendio de Historia de Panama* (Editorial Universitaria 1977) (1911).

n230. Carlos Manuel Gasteazoro, *Presentacion Historiografica de Octavio Mendez Pereira*, in Mendez Pereira, *supra* note 36, at xix-xx.

n231. Justo Arosemena, *Fundacion de la Nacionalidad Paname* (Ricaurte Soler, ed., 1982) (this compilation includes only the historical part of some chapters of *Constitutional Studies*).

n232. See Rodrigo Miro, *Alcance a las Ediciones Paname* as de 'El Estado Federal' de don Justo Arosemena, in *12 Loteria 47* (2[su'a] epoca 1967). See also Argelia Tello Burgos, *Estudio Introductorio to Escritos de Justo Arosemena* lii (1985). Burgos explains, in her introductory study, that Justo Arosemena, as member of the Colombian Representative Legislative Chamber in 1852 and of the Senate in 1853-1855, "promoted from Bogota with enthusiasm and perseverance federalism for Panama, as a solution to weak administration and particularly to guard against foreign threats ... [Arosemena] presented his already known project of constitutional amendment erecting a Federal State in Panama." *Id.* at lii and liii. For an analysis of the argument in the *Estado Federal*, see Moscote & Arce, *supra* note 36, at 231-42. In 1855, Panama was erected as a Federal State within Colombia through an amendment to the Colombian Constitution of 1853. See Pombo & Guerra, *supra* note 44, at 1044.

n233. See Ricaurte Soler, *Prologo to Justo Arosemena, Fundacion De La Nacionalidad Paname*, *supra* note 231, at xvii. Likewise, the only book written about Arosemena's constitutional thought in Panama is by Adolfo Benedetti, who based his analysis on this patriotic literature. Without giving any reasons, Benedetti asserts that *Constitutional Studies* is a magnificent and original work. Cf. Adolfo A. Benedetti, *El Pensamiento Constitucional de Justo Arosemena* 4, 140 (1962) (considering *Constitutional Studies* merely an application of a positivistic philosophy).

n234. See A.J. Cadavid, *Foreword to Jose Vicente Concha, Apuntamientos de Derecho Constitucional para uso de los estudiantes de Derecho* 11 (3d ed. 1923).

n235. *Id.* at 11-12.

n236. See Restrepo Piedrahita, *supra* note 114, at 88.

n237. *Id.* at 90-91.

n238. Id. at 92-93, 95 n.145.

n239. *Constitutional Studies*, supra note 1, at paras. 1065-68.

n240. See id. at para. 1068.

n241. See supra text accompanying note 197.

n242. See Restrepo Piedrahita, supra note 114, at 100.

n243. Ernesto de la Torre Villar and Jorge Garcia Laguardia mention Arosemena as a precursor of their comparative work, and use *Constitutional Studies* to explain the composition of the Senate in the 1824 Federal Constitution of Central America. Ernesto De la Torre Villar & Jorge mario Garcia Laguardia, *Desarrollo Historico del Constitucionalismo Hispanoamericano* 143-44 (1976). De la Torre Villar and Garcia Laguardia warn that their work is neither a complete history of Hispano American constitutionalism nor a detailed study of the Constitutions. See id. at Advertencia. Rather, their work is a sketch of constitutional developments in Mexico, Central American, and some Caribbean countries that attempts to determine general trends. Then, in the sense that Arosemena's work can be also read as an effort to outline general constitutional developments in Latin America, de la Torre Villar and Garcia Laguardia's comments are correct. Their work, however, neither seeks harmonization of the Latin American legal orders nor formulates policy recommendations.

n244. See, e.g., *Constitutional Studies*, supra note 1, at paras. 108-13 (analyzing individual rights in the Brazilian Constitution).

n245. For instance, although using an analysis of the Spanish Constitution of Cadiz to show that the Constitution of Brazil is the most progressive among the monarchical constitutions seems justifiable from an associative point of view, it does not follow a strict line of argument. See id. at paras. 82-85.

n246. Cf. David S. Clark, *Nothing New in 2000? Comparative Law in 1900 and Today*, 75 *Tul. L. Rev.* 871, at 873 (2001) (commenting that in the nineteenth century comparative law works were published in Europe and America mainly by French and German scholars). See also de Cruz, supra note 33, at 14. De Cruz indicates that "the impetus for the modern methods of comparative law came around the middle of the nineteenth century, when the intellectual movement we now associate with Evolution and Darwinism caught the imagination of intellectuals and scientists across Europe." Id. Further, he notes that "only in the second half of the nineteenth century comparative law gained recognition as 'an approved method for the study of different legal systems.'" Id. See also Christian Starck, *Rechtsvergleichung Im <um O>ffentlichen Recht*, 21 *Juristen Zeitung* 1021, 1021-1023 (1997) (stating that the nineteenth century was a century of comparison and that nineteenth century goals and methods are also ours). But see Sommermann, supra note 207, at 1018-19 (pointing out that the comparative method of the nineteenth century was mostly deductive).

n247. See Rene David, *Einführung in die großen Rechtssysteme der Gegenwart. Rechtsvergleichung* 1-2 (Günther Grasmann trans. 1966). See also 2 Zweigert & Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* 64 (2d ed. 1984); Sommermann, *supra* note 207, at 1020-21 (mentioning examples of comparative law works for rechtspolitische Zwecke such as Montesquieu's 1748 work *De l'esprit des lois* and John Locke's 1690 work *The Second Treatise of Government*); Robert Launay, *Montesquieu: The Specter of Despotism and the Origins of Comparative Law*, in *Rethinking the Masters of Comparative Law* (Annelise Riles ed., 2001). Launay argues that "[a] brief comparison of Montesquieu's approach to those of his immediate as well as his somewhat more distant predecessors sheds light on his choice to resurrect, rather than to invent, a comparative stance." *Id.* at 23. Further, Montesquieu's *The Spirit of Laws* shows elements that "were directly formulated by the sixteenth century French thinkers: the doctrine of legal relativism; the historical quest for the origins of the French monarchy and its legal basis; and the comparative study of legal and social institutions, explicitly including those of non-European." *Id.* at 24. See also Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* v (1999) (indicating that "comparative constitutional law is both a very old and a relatively new subject"). See generally Leontin-Jean Constantinesco, *Rechtsvergleichung. Einführung in die Rechtsvergleichung* (1971) (offering a brief history of comparative law).

n248. Gottfried Achenwall, *Staatsverfassung der heutigen vornehmsten Europäischen Reiche und Völker im Grundrisse* (5th ed. 1768) (1749).

n249. Cf. also Fritz Münch, *Einführung in die Verfassungsvergleichung* 33 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 128 (1973) (discussing Achenwall's work).

n250. See 1 Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland-Reichspublizistik und Policeywissenschaft 1600-1800*, 316-317 (1988).

n251. Johann Heinrich Gottlieb von Justi, *Vergleichungen der Europäischen mit den Asiatischen und andern vermeintlich barbarischen Regierungen* (1978) (1762).

n252. See *id.* at 2-4.

n253. See *id.* at 493-94. Gottlieb von Justi states that he did not make any comparative analyses in the case of Peru and the Incas and that he took the materials about the Incas from Garcilaso de La Vega. *Id.* at 497. See also 1 Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, *supra* note 250, at 379-82 (commenting that Gottlieb von Justi's contribution consisted of his differentiation between state and society and administration and administrative law).

n254. M. De la Croix, *1 Constitutions des principaux etats de L'Europe et des Etats-Unidos de L'Amerique* (2d ed. 1791).

n255. See Zweigert & Kötz, *supra* note 205, at 60. See also David, *supra* note 247, at 2; Stolleis, *Nationalität und Internationalität: Rechtsvergleichung im Öffentlichen Recht des 19. Jahrhunderts*, *supra* note 172, at 5-6, 8; Walther Hug, *The History of Comparative Law*, 45 *Harv. L. Rev.* 1027,

1069 (1932) (stating that "the first half of the nineteenth century witnessed the beginning of studies in comparative law on a larger scale"); Adolf F. Schnitzer, *Vergleichende Rechtslehre* 7 (2d ed. 1961) ("Die Vergleichung hat sich als besonderer Zweig in der Rechtswissenschaft erst im XIX. Jahrhundert entwickelt.").

n256. P. A. Dufau et al., *Collection des Constitutions, Chartes et Lois Fondamentales des Peuples de L'Europe et des deux Amerique: avec des Precis Offrant L'Histoire des Libertes et Institutions Politiques chez les Nations Modernes* (1821).

n257. See 6 P. A. Dufau et al., *Collection des Constitutions, Chartes et Lois Fondamentales des Peuples de L'Europe et des deux Amerique; avec des Precis Offrant L'Histoire des Libertes et Institutions Politiques chez les Nations Modernes* 235-40 (Chez Bechet Aine, Libraire-Editeur 1823).

n258. 1 Karl Heinrich Ludwig Pözlitz, *Die Europäischen Verfassungen seit dem Jahre 1789 bis auf die neueste Zeit - mit geschichtlichen Erläuterungen und Einleitungen* (2d ed. 1832). Pözlitz's works appeared with the initial constitutional debates in Europe. See 2 Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland - Staatsrechtslehre und Verwaltungswissenschaft 1800-1914* 101-02, 165-66 (1992). These kind of constitutional compilations appeared also around the initial constitutional debates in South America. See, e.g., Florentino Gonzalez, *Constituciones de algunos de los Estados de la Union Americana* (1872) (compiling some American state constitutions to support the constitutional debate in South America).

n259. See Pözlitz, *supra* note 258, at xi.

n260. See *Id.* at xiv.

n261. M. E. Laferriere & M. A. Batbie, *Les Constitutions d'Europe et d'Amerique* (1869).

n262. There are also two previous works that make descriptive comparative remarks about Hispano-American constitutions. The first is Vicente Rocafuerte, *An Analysis of the First Constitutions of America*, 72 *Revista de Historia de America* 419 (Jaime E. Rodriguez, trans. 1972) (1825-1827). Rocafuerte published his study in several articles in the newspaper *Ocio de los Españoles Emigrados*. He wanted to show the superiority of the federalism and political ideas of the Spaniards of both worlds. He took the Constitution of Cadiz (Spain) and contrasted its provisions with the provisions of the constitutions of Mexico, Guatemala, Gran Colombia, Peru, and Chile. Occasionally, he made commentaries. His work is neither a constitutional compilation nor a properly comparative work. Its organization was determined by the subject matter of the Cadiz Constitution; therefore, Rocafuerte reached only a limited descriptive level in contrasting constitutional provisions. The other is the Juan Bautista Alberdi, *Bases y Punto de Partida para la Organizacion Politica de la Republica de Argentina* (Impr. del Mercurio 1852). Although Alberdi made comparative constitutional observations in order to guide the constitutional convention of Argentina in the adoption or rejection of particular institutions, his work differs in its extent, in its goal, and in its method from the lineage of comparative works indicated by Dareste.

n263. See, e.g., Schnitzer, *supra* note 255. Commenting on the conceptual requirements for the emergence of comparative law, Schnitzer says:

Die Rechtsvergleichung als selbständiger Zweig der Rechtswissenschaft entsteht also – und kann erst entstehen – nachdem Naturrecht und historische Rechtsschule vorangegangen waren. Aus dem Naturrecht entnimmt die neue Wissenschaft zunächst den Begriff der allgemeinen Rechtsidee, aus der historischen Schule den Sinn für die Feststellung des konkreten Geschehens, das als Unterlage der Vergleichung dienen kann. Aus der Naturwissenschaft wird der Begriff des Gesetztes übernommen, aus der Philosophie der Begriff der Entwicklung.

Id. at 19. See also 3 Leontin–Jean Constantinesco, 3 Rechtsvergleichung: Die rechtsvergleichende Wissenschaft 44 (1983) (indicating that based on the predominant nineteenth century scientific notions about progress, development, and the use of natural science–like methods for social sciences, the comparativist believed that "der Gegenstand der Rechtsvergleichung liege darin, die "Gesetze" zu entdecken, die die Entwicklung der Gesellschaften und der Völker und die Entwicklung der Rechtsinstitute und des Rechts beherrschten"); Rolf Kreimer, Josef Kohler, in *Rechtsvergleichung – Verkannt, Vergessen, Verdrängt* 145, 146 (Bernhard Groff ed., 2000) ("In Deutschland beschäftigten sich zunächst nur Juristen mit der ethnologischen Rechtsforschung. Sie meinten, alle Völker hätten Normen, die man als Gesetze erfassen könne."). Further, Kreimer mentions that in 1872, the Bremer Richter Albert Hermann Post (1839–1895) published the "Einleitung in ein Naturwissenschaften des Rechts," which aimed to establish the evolution of the law with a natural sciences–like accuracy. Id. at 146. See also John H. Merryman et al, *The Civil Law Tradition: Europe, Latin America, and East Asia* 2 (1994) (commenting that "legal science, an invention of German legal scholars, was an attempt to make law a science in the way that chemistry and physics are sciences.").

n264. See Markku Kiikeri, *Comparative Legal Reasoning and European Law* 19 (2001) (stating that "nineteenth century comparative law had two basic features. Firstly, comparative law had gained a relatively independent status as methodology and science, and, secondly, the task of comparison was to construct, scientifically, common rules at the international level.").

n265. Riles, *supra* note 37, at 11. Riles also notes that "equally important to the comparative lawyer from the outset were the projects comparative law as a discipline might serve – the unification of law, the development of a 'universal common law' for transnational business and other relations, the uses of comparative information about foreign legal systems for legal reforms projects." Id.

n266. See Ferreira, *supra* note 80.

n267. See, e.g., Jose Victorino Lastarria, *Elementos de Derecho Publico Constitucional Teorico, Positivo i Politico. Arreglados i adaptados a la enseñanza de la Juventud Americana* xviii (2d ed. 1848). Lastarria wrote his book for teaching purposes, recognizing that he took the philosophical notions of constitutional law for the Spanish America mainly from these works: Heinrich Ahrens, *Curso de Derecho Natural o de Filosofia del Derecho* (P. Rodriguez Hotelano and M. Ricardo de Asensi trans., 6th ed. 1839); J. C. L. Simonde de Sismondi, *Etudes sur les Constitutions des Peuples Libres* (1836); Ferreira, *supra* note 80; and Bentham, *supra* note 129.

n268. See Vicente Barretto, *Introdução ao pensamento politico de Silvestre Pinheiro Ferreira*, in *Silvestre Pinheiro Ferreira, 7 Ideas politicas: Cartas sobre la Revolução do Brasil, Memorias politicas sobre os abusos gerais, Manuel do cidadão em um governo representativo* 11, 11–12 (1976).

n269. Cf. Benjamin Constant, *Curso de Política Constitucional* (Marcial Antonio Lopez trans., 2d ed. 1823).

n270. Cerbeleon Pinzon, *Tratado de Ciencia Constitucional* (1839).

n271. Pinzon acknowledged having used Albert Fritot, *Science du Publiciste* (1820-1821). The prevailing view in Colombia was that Constant's work was not appropriate for a republic. See generally Antonio Del Real, *Elementos de Derecho Constitucional seguidos de un examen critico de la Constitucion Neo-Granadina* (1839).

n272. See Gonzalez, *Lecciones de Derecho Constitucional*, supra note 149.

n273. Eduard Laboulaye, *Avertissement de la Presente Edition to Benjamin Constant, Course de Politique Constitutionnelle* (Arno Press, Inc. 1979) (1872) ("His Course of Constitutional Politics is the most complete manual, the most reliable guide for the student, the publicist, and the legislator. In Benjamin Constant's school, one always teaches oneself; one never distances oneself from him with impunity.") (author translation). For the influence of Constant in Mexico compare M. L. Macarel, *Curso Completo de Derecho Publico General* 17-20 (D. A. Sanchez Bustamante trans. 1835) (consulting Constant and Fritot). Cf. Luis Palma, *Forward to Constitucion de 1857, Edicion Facsimilar Nahuatl-Español* (1994) (1888) (mentioning Macarel and Tocqueville as influences in the ideas of the Mexican nineteenth century).

n274. See Benjamin Vargas Peña, *Estudio preliminar to Dardo Ramirez Braschi, La Guerra De La Triple Alianza a Traves De Los Periodicos Correntinos 1865-1870* 5, 6 (2000) (referring to the period 1865-1870 during the War of the Triple Alliance, in which Brazil, Argentina, and Uruguay fought Paraguay, and commenting that it was a time of national affirmation at the popular level, while the leaders attempted to keep a continental unity: "Estabamos creando nuestros precedentes propios fundamentados de nuestras Patrias, sobre desentendimientos de egoistas. En el pensamiento de lo comun y vulgar, mientras los lideres que nos conducian a la libertad pretendieron mantener la unidad continental.").

n275. Cf. Bernhard Groff, *Macht Und Ohnmacht Der Rechtsvergleichung* 75 (1984) (quoting Alan Watson, *The Making of the Civil Law* 183 (1981), on the "transplant bias" in comparative law that results when institutions from one legal order are transferred into another, a bias that is not only based on the institutions' technical virtues, but on the cultural status or power of the societies). For a discussion about the transplantation of legal institutions, compare *Adapting Legal Cultures* (David Nelken & Johannes Feest eds., 2001). See also Aldo Ferrer, *El MERCOSUR En Un Mundo Global*, in *La Dimension Cultural Del MERCOSUR* 11-12 (Hebe Clementi ed., 1996) (saying that the point of references for Argentina and Brasil were Europe and the United States, and that Europe and the United States have little contact between them if any).

n276. See Lastarria, supra note 267, at xiii.

n277. See Gonzalez, *Lecciones de Derecho Constitucional*, supra note 149, at xiv-xv.

n278. See Alberdi, *supra* note 262, at 39-52.

n279. *Id.* at 53. See also Luis L. Varela, *Estudios sobre la Constitucion de Buenos Aires* 16 (1868) (saying that the American republics made a mistake seeking doctrines and institutions in Europe because the American Revolution brought new public law doctrines only applicable to the American societies).

n280. See generally *Introduccion a Simon Bolivar*, *supra* note 28.

n281. See generally Carl Schmitt, *Der Nomos der Erde. Im Völkerrecht des Jus Publicum Europaeum* 163, 256 (3d ed. 1988) (1950) Schmitt comments that "the recognition of a big power by another big power is the highest form of recognition in international law." *Id.* at 163 (author translation). For example, Russia and Prussia in the eighteenth century and Italy in the nineteenth century were recognized as big powers by other large powers of their time. See *id.* According to Schmitt, the recognition of the United States as a big power around 1865 presented a unique problem because the 1823 Monroe doctrine implicated the rejection of that recognition by European powers. In other words, the new order of the western hemisphere called into question the European geopolitical organization of the globe. See *id.* at 256. Cf. Robert Kagan, *Power and Weakness*, 113 *Policy Review Online* (Jun. & Jul. 2002) at <http://www.policyreview.org/JUN02/kagan.html>.

n282. For a chronology of the life and work of Arosemena see Justo Arosemena, *Fundacion de la Nacionalidad Panameña*, *supra* note 231, at 337-505.

n283. *Estudios Constitucionales* 2d Edition, *supra* note 39, at foreword.

n284. Cf. Stolleis, *Nationalität und Internationalität: Rechtsvergleichung im Öffentlichen Recht des 19. Jahrhunderts*, *supra* note 172, at 5.

n285. Twining, *supra* note 26, at 89.