The original jurisdiction of the Argentine Supreme Court and of the Supreme Court of the United States: a comparative law study

La competencia originaria de la Corte Suprema Argentina y de la Suprema Corte de los Estados Unidos: un estudio de derecho comparado

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Resumen

Este artículo compara la competencia originaria de la Corte Suprema de Argentina y la Suprema Corte de los Estados Unidos. Las razones para la comparación son tanto históricas como normativas: los padres fundadores de Argentina se apoyaron en gran medida en el diseño constitucional de los Estados Unidos y en la estructura su poder judicial federal; y la competencia originaria de la Corte Suprema no fue una excepción. Se analizan las normas que otorgan dicha competencia a cada Corte Suprema, así como la interpretación que cada tribunal ha realizado de esas normas.

Palabras clave: Competencia Originaria - Estados Unidos - Argentina.

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El presente artículo se presenta en idioma inglés por haber sido concebido en el marco de una maestría en derecho en la Universidad de Virginia, gracias a una beca de la Fundación Fulbright. El trabajo se gestó en el seminario "Constitutionalism: History and Jurisprudence" dirigido por A. E. Dick Howard.

Agradezco a Diego Dolabjian y a Mariano Vitetta por sus comentarios, correcciones y entusiasmo. También agradezco a Diego Hammerschlag, Juan Jorge y Alfredo Urteaga por sus comentarios y devolución a una versión anterior de este trabajo. Los errores que subsisten me pertenecen.

Abstract

This article compares the original jurisdiction of the Supreme Court of Argentina and the Supreme Court of the United States. The reasons for comparison are both historical and normative: Argentina's founding fathers relied heavily on the constitutional design of the United States of America and on the structure of its federal judiciary; and the Supreme Court's original jurisdiction was no exception. The rules that grant such a jurisdiction to each Supreme Court are analyzed, as well as the construction that each court has made of those rules.

Keywords: *Original Jurisdiction - United States- Argentina.*

I. Introduction

This is a work of comparative law. Its purpose is to present a portrait of the original jurisdiction of two tribunals: the Supreme Court of the United States of America and the Supreme Court of Argentina.

Such a comparison is relevant for historical and normative reasons: Argentina's founding fathers heavily relied on the constitutional model of the United States to design the system of government in the nascent Argentine nation. Specifically, and relevant for this work's purposes, they imitated the structure of the judicial branch, as will be shown in Sections I and II.

After a brief historical introduction, the paper addresses the link between the Argentine constitutional system and the one established in the United States (Section II). Section III compares normative aspects of the original jurisdiction: what do the rules granting original jurisdiction say, how they interact with each other in their respective jurisdictions. Some procedural aspects of an original-jurisdiction suit are also presented in Section III.

Sections IV through IX deal with comparative case law. The choice of cases to compare was guided by a sense of balance; in order to preserve that balance, some aspects of the Argentine original jurisdiction are purposely left out. These sections are divided thematically: Standing (Section IV), Interstate Disputes (Section V), Foreign ambassadors, consuls and ministers (Section VI), "Civil" cases (Section VII), The Power of Congress and the Original Jurisdiction (Section VIII), and The Enforcement of Rulings Against Provinces or States (Section IX). Some final remarks in Section X summarize the similarities and differences between both original jurisdictions and present avenues for future research.

Given that the business of comparative law is inevitably done from a certain perspective, it must be pointed out that this article is written from an Argentine lawyer's point of view. Such a starting point is relevant for two reasons. The first reason is a matter of legal translation: many rules, precedents, and legal institutions were translated from Spanish to English by the author. The second reason is related to the former, and it has to do with the legal culture behind the language, a more subtle aspect that this paper does not study in depth, but hopes to acknowledge. This legal-perspective cultural aspect is mitigated by reference to U.S. commentators of Supreme Court precedents and federal jurisdiction, when appropriate.

II. Argentine constitutional origins

1. Nineteenth-century Argentina in a nutshell

For more than forty years, the territory that was later to be known as the Republic of Argentina existed without a steady constitutional text and without a permanent national structure of government. After the May Revolution of 1810 and the Declaration of Independence of 1816 that sealed independence from Spanish rule, internal disputes arose as to the form of government that was to be adopted; this culminated in the division between "unitarians" and "federalists". Unitarians favored the unification of the country with a tendency towards a more prominent role of the city of Buenos Aires in the governmental structure. Federalists opposed unification and favored local autonomism subject to little control. Unitarians represented the cities' elites' liberal ideas; federalists were closer to the rural areas' customs and ideology.

In 1852, Juan Manuel de Rosas, the Governor of Buenos Aires, was defeated in battle. This favored the sanctioning of a National Constitution for the Argentine Confederation in 1853. The Province of Buenos Aires —highly relevant then and now— did not participate in the national convention that culminated with the Constitution.

Finally, in 1860 a National Constitution that included the Province of Buenos Aires was achieved. Sarmiento's criticisms triumphed, given that the final version of the Constitution was a closer imitation to the United States Constitution than its 1853 predecessor.

Juan Bautista Alberdi was a crucial figure during that period of Argentine constitutional history. He was one of the dissident intellectuals that exiled the country due to persecution by Governor Juan Manuel de Rosas. During his exile he published a fundamental study for the concretion of the Argentine Constitution of 1853, which was an extensive and systematic approach to the form of government that best suited Argentina.[1] Alberdi's seminal work outlined a system of government that imitated the one that had triumphed in the United States, but adapting it to the realities and the history of the Argentine territory. There is some discussion as to the degree of Alberdi's influence in the 1853 Constitution, but there is consensus as to the fact that his ideas were indeed influential.[2]

Another important figure of the time was Domingo F. Sarmiento, a big admirer of the American form of government — someone who pushed for a more limited federal government than Alberdi did. One of Sarmiento's main attacks

[1] Alberdi, Juan Bautista, "Bases y Puntos de Partida para la Organización de la República Argentina", en *Organización de la Confederación Argentina*, vol. 1, Madrid, El Ateneo, 1913.

[2] García-Mansilla, Manuel J. and Ramírez Calvo, Ricardo, *Las Fuentes de la Constitución Nacional. Los principios fundamentales del derecho público argentino*, 1st ed., Buenos Aires, LexisNexis, 2006. Chapter 2 is devoted to Alberdi's influence.

to the Argentine 1853 constitution was the fact that it imitated the United States Constitution but innovated on some respects that perverted the federal model adopted by the northern country.[3]

2. Constitutional systems and the federal judiciary

Argentina's legal traditions have led to it being described as "a civil-law jurisdiction with a common-law touch".[4] First, it is important to remember that Argentina was a Spanish colony before independence. Its civil or continental law heritage is also reflected in the French influence on the first Civil Code, in French, Spanish, German and Italian influence on administrative law, and in Spanish and Italian influence on commercial and procedural law.[5]

Despite this mixed heritage, the influence of James Madison's ideas in the Argentine constitutional system was significant. It is possible to single out the federal system, the separation of powers (coupled with checks and balances between branches), the bill or declaration of rights and the federal government of limited and enumerated powers.[6] In order to get closer to this article's object, let us compare the power vested in the federal judiciary by both constitutions.

The Constitution of the United States establishes the following:

Article III.

Section 1.

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2.

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which

[3] For a comparison between the ideas of Alberdi and Sarmiento, *see* Jensen, Guillermo E., "Una constitución, dos repúblicas: federalismo, liberalismo y democracia en el pensamiento constitucional de D. F. Sarmiento y J. B. Alberdi", Trabajo y Sociedad. Sociología del trabajo - Estudios culturales - Narrativas sociológicas y literarias XX, n.o 33 (Invierno de 2019).

[4] Legarre, Santiago and Handy, Christopher R., "A Civil Law State in a Common Law Nation, a Civil Law Nation with a Common Law Touch: Judicial Review and Precedent in Louisiana and Argentina", 95 TUL. L. REV. 445 (March 2021).

[5] Garay, Alberto F. "A doctrine of precedent in the making: the case of the Argentine Supreme Court's case law", Southwestern Journal of International Law 25:2, 2019, p 268.

[6] García-Mansilla, Manuel J. and Ramírez Calvo, Ricardo, *Las Fuentes de la Constitución Nacional*, p 39.

> shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

> On the other hand, the Argentine Constitution establishes:
> Article 116: The Supreme Court and the lower courts of the Nation are empowered to hear and decide all cases arising under the Constitution and the laws of the Nation, except as provided in Article 75.12, and under the treaties made with foreign nations; all cases concerning ambassadors, public ministers and foreign consuls; cases related to admiralty and maritime jurisdiction; matters in which the Nation shall be a party; actions arising between two or more Provinces, between one Province and the inhabitants of another Province, between the inhabitants of different Provinces, and between one Province or the inhabitants thereof against a foreign state or citizen.
> Article 117: In the aforementioned cases the Supreme Court shall have appellate jurisdiction, with such regulations and exceptions as Congress may prescribe; but in all matters concerning foreign ambassadors, ministers and consuls, and in those in which a Province shall be a party, the Court shall have original and exclusive jurisdiction.

The main difference between both sets of constitutional provisions as far as the original jurisdiction of the Supreme Court goes, lies in the "exclusivity" mentioned in the Argentine Constitution. This will be referred to in Section II, below.

Furthermore, the whole structure of the federal judiciary in the Argentine Constitution is very similar to the one designed by Article III, § 1 of its American counterpart.[7] In this respect, the laws that determined the scope of federal jurisdiction were directly influenced by Section XXV of the Judiciary Act of 1789 —the Argentine

[7] Constitución de la Nación Argentina, Artículo 108: "The Judicial Power of the Nation shall be vested in a Supreme Court and in such lower courts as Congress may establish in the territory of the Nation."

government even sent a lawyer to the U.S. in 1860 to study how the Act operated.[8]

Argentina's federal judiciary was shaped by two laws. The first one is law No. 27, which regulates the organization of the federal courts, and its Articles 1 and 2 attempted to import the "case or controversy" doctrine from the U.S. legal system.[9] The second one is law No. 48, which regulates the jurisdiction of the Supreme Courts and lower federal courts.[10] Its Article 1 further clarifies original jurisdiction, while its Article 14 specifies the limited number of cases in which the Court will review the highest provincial courts.

With regards to the role that the U.S. Constitution gives to the Supreme Court's original jurisdiction, one could refer to The Federalist Papers Nos. 80 and 81. In those sections, Hamilton refers to disputes that involved States of the Union and the role of the Supreme Court as an impartial arbiter contributing to national peace.[11]

Alberdi also referred to the need for keeping the peace within the nascent Argentine nation; though he claimed that the federal judiciary as a whole was in charge of solving conflicts between provinces—which should not take justice into their own hands. Additionally, Alberdi also referred to the need for the federal judiciary to intervene in cases where foreign diplomats were involved, so as to prevent the nation from being involved in an international conflict.[12]

III. Laws and statutes that grant original jurisdiction

As mentioned in the previous section, Argentina's constitution grants original jurisdiction to its Supreme Court with a very similar text to the American one;

[8] Garay, Alberto F. "A doctrine of precedent in the making: the case of the Argentine Supreme Court's case law", p 263, see especially footnote No. 5.

[9] Ley 27 de Organización de la Justicia Nacional, sancionada el 13/10/1862 y promulgada el 16/10/1862. "Article 1: The National Judiciary will always proceed applying the Constitution and the national laws to the decision of cases in which interests, acts or rights of Ministers, public agents, simple individuals, Provincial or National, are at stake. Article 2: It never proceeds *ex officio* and only exercises jurisdiction in the contentious cases in which it is required to do so by a party." (Translated by the author).

[10] Ley 48 de Jurisdicción y Competencia de los Tribunales Nacionales, República Argentina, sancionada el 25/8/1863 y promulgada el 14/9/1863.

[11] Hamilton, Alexander, Madison, James and Jay, John, *The Federalist Papers* (New York: The New American Library of World Literature, 1961), p 475: "The power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is perhaps (…) essential to the peace of the Union (…)"; p 487: "Public ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation."

[12] Alberdi, Juan Bautista, "Derecho Público Provincial Argentino", in *Obras Selectas*, XI, Buenos Aires: Librería «La Facultad» de Juan Roldán, 1920, pp 25-26.

the most relevant textual distinction is that the Argentine original jurisdiction is granted "exclusively".[13] Jorge Gondra has traced the inclusion of that word to earlier attempts at a national constitution in the territory: the texts of the Constitutions of 1819 and 1826 both referred to the "exclusiveness" of the original jurisdiction.[14] The theory makes sense once we remember that both attempted constitutions designed unitarian forms of government, a structure that had only one system of courts: the national one. Hence, in that author's view, the "exclusivity" referred to the other branches of the national government: the Executive and Congress.[15]

A somewhat relevant provision of the Argentine Constitution that grants jurisdiction to the Court is Article 127. The article states that "No province may declare nor make war to another province. Their complaints must be brought before the Supreme Court and settled by it. Its *de facto* hostilities are acts of civil war, qualified as sedition or riot, that the federal Government must extinguish and suppress according to the law." Upon close examination, the provision does not explicitly say that the provinces have to resort to the Supreme Court at a trial level, but coupled with Article 117 it seems that they have no other court to resort to in order to seek relief. This provision is seldom invoked by parties, but the Court sometimes claims to be exercising the power given by the provision. The Court has referred to it as a special type of dispute-settlement jurisdiction,[16] but whether such a type of original jurisdiction exists separate from the one granted expressly by Article 117 is open for debate.[17]

The provisions that specify the scope of original jurisdiction in Argentina are Article 1 of Law No. 48[18] and Article 24 of Decree-Law No. 1285/1958.[19] The former

[13] The text of Article 101 (current 117) of the Argentine Constitution and Article III, § 2 of the U.S. Constitution are transcribed in Section I above.

[14] Neither of those constitutions came into effect.

[15] Gondra, Jorge M., *Jurisdicción Federal*, Buenos Aires, Edición de la Revista de Jurisprudencia Argentina S.A., 1944, pp 367-369.

[16] For an extensive study of the role of the Court in interstate disputes, see Laplacette, Carlos J. *El Tribunal de la Federación. Los conflictos subnacionales y la competencia originaria de la Corte Suprema*, Buenos Aires, EDIAR, 2024.

[17] Ramírez Calvo, Ricardo "¿Existe una competencia dirimente especial de la Corte Suprema en los conflictos interprovinciales?", *LA LEY*, n.o 2018-A (2018).

[18] Ley 48, Artículo 1: "The National Supreme Court will know in the first instance: 1º Cases between two or more Provinces, and civil cases between a Province and a neighbor of another Province or a person subject to a foreign State. 2º Cases between a Province and a foreign State. 3º Cases concerning Ambassadors or other foreign diplomats, persons within the legation, members of their family, or their domestic employees, in such a way that a Court of Justice may proceed according to public international law. 4º Cases that deal with privileges and exemptions of Consuls and Viceconsuls in their public character." (Translated by the author).

[19] Decreto-Ley 1285/1958, B.O. 7/2/1958, Artículo 24: "The Supreme Court of Justice will know: 1º) Original and exclusively, in every case dealing between two or more provinces and civil cases between a province and a neighbor/s of another province or foreing subjects; in cases between a

says that the Court will exercise its original jurisdiction "In cases between two or more Provinces, and civil cases between a Province and a neighbor of another Province or of a foreign State (…)." Article 24 of Decree-Law No. 1285/1958 repeats the words quoted above and adds criteria to determine when someone is a "neighbor of another Province."[20] In this respect, what is most relevant about these provisions is the fact that they both seem to require determination of a person's vicinity as a threshold condition for suing a province in all "civil cases". After reading these provisions, the fact that the Argentine Provinces cannot be sued by any plaintiff and in any possible case seems to be self-evident. But cases show that the Court has not always been clear as to the limits of its original jurisdiction.[21]

The U.S. Congress directly intervened in the "exclusivity" of the Supreme Court's original jurisdiction. 28 United States Code § 1251 only gives the Court exclusive jurisdiction over disputes between States, and concurrent jurisdiction with lower federal courts in cases between a State and the Federal government, cases involving foreign ambassadors or consuls, and cases between a State and a citizen of another State.[22]

A brief note on "Acordadas" and Supreme Court Rules

In Argentina, the Supreme Court issues instruments called "Acordadas"[23] on a regular basis, in additions to judgments and resolutions. They have been issued since the Court's inception in 1863 and govern a wide spectrum of matters. For example, they can relate to various organizational aspects of the Court; they create offices within the Court or increase salaries within the federal judiciary, and they have

province and a foreign State; in cases concerning ambassadors or other foreign ministers (…).

For the first subsection aforementioned, neighbors are: (a) Physical persons domiciled in the country for 2 (two) or more years prior to the lawsuit's commencement, whatever their nationality; b) legal public entities according to national law; c) other legal persons constituted and domiciled in the country; d) corporations and asociations without legal personhood, when all of their members are in the situation foreseen by subsection (a)." (Translated by the author).

[20] Notably, the article refers to physical persons (as opposed to corporations) and their domicile in the country, and not in a certain province. The other three criteria are for different types of corporations, but they will not be explored in depth in this article.

[21] Section IV.a) below will analyze two Argentine cases that illustrate this lack of clarity: "Domingo de Mendoza", and "Avegno".

[22] United States Code, United States (1926). 28 U.S.C. §1251 "(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States. (b) The Supreme Court shall have **original but not exclusive** jurisdiction of: (1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties; (2) All controversies between the United States and a State; (3) All actions or proceedings by a State against the citizens of another State or against aliens." (Emphasis added).

[23] The literal translation of "Acordada" into English would be something like *agreed upon*; in this context, "Acordada" appears to stem from the consensual nature of the Supreme Court's weekly meetings, called "Acuerdos de Ministros" (a suitable translation to English can be *agreements among Justices*).

even regulated the way of filing an appeal[24] for the Court to hear a case.[25] A notable "Acordada" was issued in 1952 and it established rules for Argentina's federal courts.[26]

The sources for these normative powers are twofold: the Argentine Constitution and Law No. 48. Article 113 of the Constitution provides that "The Supreme Court will issue its internal rules and will appoint its employees".[27] In turn, Law No. 48 establishes that "The Supreme Court will be able to establish the necessary rules for the orderly conduct of proceedings, insofar as they do not contradict the Law of Procedure."[28]

In the United States, litigation before the Court is mainly governed by the Supreme Court Rules. The power to issue these rules stems from the Rules Enabling Act, where Congress delegated its rulemaking function to the Supreme Court and to lower federal courts created by Congress itself under Article III of the U. S. Constitution. The delegated matters are "rules of practice and procedure and rules of evidence for federal courts."[29]

One of the greatest differences between the Argentine court's "Acordadas" and the Rules is that the Rules are regularly updated by the U.S. Supreme Court and issued in a single normative body.[30] On the other hand, "Acordadas" are issued on an individual basis and are not compiled in such a unified manner.[31]

IV. The decision to hear an original-jurisdiction case

These types of cases are filed at the trial level with the Supreme Court and, if the Court decides to hear the case, decided by it. Every aspect of an adversarial judicial process takes place in the Supreme Court.

In the U.S. Supreme Court, filing of these suits is governed by Supreme Court Rule 17,[32] which stipulates that a "motion for leave to file" and an initial pleading

[24] In Argentina —as in many Spanish-speaking countries— it is common to refer to "recursos". Broadly speaking, a "recurso" is the procedural mechanism to appeal of a decision in court or other branches of government.

[25] "Acordada" 4/2007 regulated formal requirements for the filing of writs to require the Supreme Court's intervention such as number pages, number of lines per page, among others. Many petitions are denied yearly on the basis of non-compliance with any of those requirements. CSJN, Acordada No. 4/2007, (16 March 2007).

[26] In Spanish, "Reglamento para la justicia nacional."

[27] Constitución de la Nación Argentina, "Artículo 113: La Corte Suprema dictará su reglamento interior y nombrará a sus empleados".

[28] Ley 48, artículo 18.

[29] 28 U.S.C. § 2072 (a).

[30] The latest version of the Rules became effective on January 1 2023. Previous versions are available at https://www.supremecourt.gov/ctrules/scannedrules.aspx..

[31] However, they can be searched on an individual basis at the Argentine Supreme Court's internet site, under the headline "Decisiones": https://www.csjn.gov.ar/decisiones/acordadas.

[32] Supreme Court Rules (effective since 1 January 2023), Rule 17: "Procedure in an original

have to be filed with the clerk. The decision to hear a case has been described by the Court to be within its discretionary power. An important case in the matter is "Ohio v. Wyandotte Chemicals Corp."[33], where the Court explained the reasons for refusing to hear a case that fell squarely within the constitutional grant of original jurisdiction. Ohio had brought the case in order to stop pollution in an interstate river. The majority of the Court based its refusal to hear the case on two main reasons: (1) the huge fact-finding burden that the case would impose on the Court would affect its appellate function, which society (and the Court) considered to be more important, and (2) the suit was a "nuisance" case grounded on state law, and Ohio could sue defendants in state courts.[34]

But the "Ohio v. Wyandotte" way of proceeding has its critics. Whether an original-jurisdiction case is a decision that is within the Court's discretion or not was heavily contested by the dissenting vote on the "Nebraska *et. al*. v. Colorado."[35] The majority of the Court disallowed without further explanation the plaintiffs' motion to file an original-jurisdiction suit based on federal law against Nebraska. Although dissenting Justices Thomas and Alitto recognized that, as a matter of precedent, the decision to hear an original-jurisdiction case was within the Court's discretion, they made a textualist argument against it. They distinguished the statutes granting jurisdiction to the Court: while §1254(1) established that cases from appellate courts "may be reviewed" by the Supreme Court, §1251(a) stated

action: 1. This Rule applies only to an action invoking the Court's original jurisdiction under Article III of the Constitution of the United States. See also 28 U. S. C. § 1251 and U. S. Const., Amdt. 11. A petition for an extraordinary writ in aid of the Court's appellate jurisdiction shall be fled as provided in Rule 20. 2. The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules and the Federal Rules of Evidence may be taken as guides. 3. The initial pleading shall be preceded by a motion for leave to file, and may be accompanied by a brief in support of the motion. forty copies of each document shall be fled, with proof of service. Service shall be as required by Rule 29, except that when an adverse party is a State, service shall be made on both the Governor and the Attorney General of that State. 4. The case will be placed on the docket when the motion for leave to file and the initial pleading are fled with the Clerk. The Rule 38(a) docket fee shall be paid at that time. 5. No more than 60 days after receiving the motion for leave to file and the initial pleading, an adverse party shall fle 40 copies of any brief in opposition to the motion, with proof of service as required by Rule 29. The Clerk will distribute the fled documents to the Court for its consideration upon receiving an express waiver of the right to file a brief in opposition, or, if no waiver or brief is fled, upon the expiration of the time allowed for fling. If a brief in opposition is timely fled, the Clerk will distribute the fled documents to the Court for its consideration no less than 10 days after the brief in opposition is fled. A reply brief may be fled, but consideration of the case will not be deferred pending its receipt. The Court thereafter may grant or deny the motion, set it for oral argument, direct that additional documents be filed, or require that other proceedings be conducted."

[33] "Ohio v. Wyandotte Chemicals Corp." 401 U.S. 493 (1971).

[34] "Ohio v. Wyandotte Chemicals Corp.", 401 U.S., 505.

[35] "Nebraska et al. v. Colorado", 577 U.S. 1211 (2016).

that the Court "shall have" jurisdiction over controversies between States.[36]

Once the U. S. Supreme Court decides to hear a case under its original jurisdiction, it tends to appoint a "Special Master" to deal with the process of fact-finding and recommend possible solutions. In practice, the Special Master "gathers evidence, conducts a trial-like proceeding and evidentiary submissions from the parties."[37]

Returning to original jurisdiction in Argentina, the Supreme Court issued "Acordada" No. 51 in 1973 to create the Original-Jurisdiction Clerk's Office, a permanent office within its chambers, in order to handle the daily procedure of these cases. The Court expressed that the "Acordada" was issued for two main reasons: (a) original jurisdiction cases had not been subject to "adequate regulation" until then,[38] and (b) the "single instance" feature of such cases coupled with the collegiate nature of the Supreme Court contradicted the provisions of the Federal Code of Civil Procedure.

The "Acordada" allocates power between the Clerk's Office and the Court. The Court kept for itself the following decisions: on precautionary measures, on its jurisdiction to hear a case, on the distribution of fees after a case is finished, on parties' appeals against the Clerk's decisions or orders,[39] on the need for joint treatment of cases[40] and on third-party requests for intervention.[41] The Clerk has a status equivalent to a federal trial judge"[42] and has authority to decide on some matters without the Court's intervention.[43] No "Acordada" has been issued in order to regulate the procedure of an original-jurisdiction suit,[44] which has led the Court to use the Federal Code of Civil Procedure for most procedural issues.

[36] "Nebraska et al. v. Colorado", 577 U.S. 1212.

[37] Pfander, James E., *Principles of Federal Jurisdiction*, 3rd ed., St. Paul (MN), West Academic Publishing, 2017, p 88.

[38] The Court offered no reason as to why that precise moment was an appropriate one to do so, or why it had delayed such a regulation for more than one hundred years since its establishment.

[39] Point No. 2.b) refers to two different routes that the National Procedural Code offers to parties for appealing simple orders or judgments (articles 238 and 242 of said Code).

[40] In Spanish, "litisconsorcio". The Argentine Federal Code of Civil Procedure regulates this vehicle for joint multiple plaintiffs and/or defendants in a single procedure (Articles 87 to 89). An analog mechanism, in the United States, is the institution of joinder.

[41] CSJN, Acordada No. 51/1973, República Argentina (10 July 1963), point 2. Point 3 delegates some decisions to the Court's president or the substitute judge (generally, the Court's vice president): designation of experts before the Court, imposition of disciplinary measures to lawyers, orders for money transfers, and the final say on cases "abnormally" finished (according to the language of the Procedural Code's Title V).

[42] Point 4.

[43] Acordada No. 51/1973, point 5.

[44] This point must be nuanced: Acordadas Nos. 64/1973 (31 July 1973), 45/1984 (5 July 1984), 4/1987 (21 April 1987), 28/1993 (1 June 1993), 36/2013 (1 October 2013) dealt with some issues arising before the Court's original jurisdiction, but their scope is limited.

The Clerk's Office recommends decisions on the jurisdiction and the merits to the Justices, although the Court, when deciding a case, speaks through its own voice — without referring to what the Secretariat recommended. The Court usually issues at least two separate decisions: one on its jurisdiction and, if it decides that it has the power to decide the dispute brought to it, another on the merits.

Despite their importance, the Argentine Court rarely references the "Acordadas" that regulated its original jurisdiction.[45] Regarding the decision to hear a case, it is unclear whether it is a matter of the tribunal's discretion or not. Something is certain: if it exercises discretionary power, the Argentine Court is not as explicit as its U.S. counterpart is. Upon analyzing a province's standing to sue[46] and the concept of a "civil case"[47] some aspects of the question of discretion will be touched upon.

V. Standing

1. States and provinces as parties

Two cases from the early periods of each Court are useful to illustrate the different starting points of both original jurisdictions: "Chisholm v Georgia"[48] and "Domingo de Mendoza c. San Luis".[49] Whereas the latter case set the foundations for a more limited original jurisdiction in the United States Supreme Court, the "Domingo de Mendoza" decision might have released the Argentine Court from the constraints imposed on its original jurisdiction.

In "Chisholm", the American Court allowed the plaintiff to sue the state of Georgia —a State different from her own— through a writ of assumpsit.[50] However, this decision was nipped in the bud: Congress intervened before the Court reached the

[45] The "Administración de Parques Nacionales c/Neuquén" case is an exception worth mentioning. The defendant, when answering the plaintiff's complaint, presented a type of "cross-claim"; after the Original-Jurisdiction Clerk decided to notify the plaintiff of such a claim, the defendant opposed on the grounds that such a decision belonged to the Court as a whole — not to the Clerk's Office. The Court remembered the reasons behind the "Acordadas" that shaped the original jurisdiction, and ultimately upheld the Clerk's decision. CSJN, "Administración de Parques Nacionales c/ Neuquén, Provincia del y otros s/ ordinario", 10 December 2013, available at https://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumentoByIdLinksJSP.html?idDocumento=7074611.

[46] Section IV.a).

[47] Section VII.

[48] "Chisholm v. Georgia", 2 U.S. 419 (1793).

[49] CSJN, "Domingo de Mendoza y Hermano c. Provincia de San Luis s/derechos de exportación-cuestión de competencia", 3 May 1865, Fallos: 1:485.

[50] Such a writ is defined by Black's Law Dictionary as: "1. An express or implied promise, not under seal, by which one person undertakes to do some act or pay something to another (…). 2. A common-law action for breach of such a promise or for breach of a contract (...)." *Black's Law Dictionary*, 12th ed., St. Paul (MN), Thompson Reuters, 2024.

merits and amended the Constitution to make clear that State parties to a dispute for original jurisdiction purposes did not mean States as defendants in that jurisdiction. The Eleventh Amendment has been since construed to mean that a private party cannot sue a State before the original jurisdiction of the U.S. Supreme Court.

In a way, the Argentine Court's understanding of its original jurisdiction was frozen in time before the enactment of the Eleventh Amendment in the U.S. This was evidenced in the "Domingo de Mendoza c. San Luis" and "Avegno"[51] cases. The former was the first original jurisdiction case in the history of the Court: it involved a provincial tax that the plaintiff had paid under protest due to its unconstitutionality (by alleging it was an export tax to be collected by the Federal Government). Domingo de Mendoza brought suit before the Argentine Court in order to recover the amount that it had paid. The Court expressly mentioned "Chisholm" as a valid precedent for assuming jurisdiction, but it also pointed towards the absence of an Eleventh Amendment-like text in the Argentine Constitution.

An interesting feature of this case is the Court's treatment of the jurisdictional question. Although Article 1 of Law No. 48 specified that a Province could be brought before the Court by a "neighbor of another Province", there was no inquiry as to the plaintiff's domicile or place of residence.[52] The Court even said that "in the present case the nature of the parties doesn't have to determine the venue, so even if the circumstance of the plaintiffs being domiciled in San Luis [the defendant Province] was proven, *it would not be sufficient to deny federal jurisdiction*."[53] Further, the Court explains that, since the plaintiff's ground to sue is Article 17 of the Constitution[54], and Article 100 [current Article 116][55] granted it jurisdiction over "*all* cases arising under the Constitution and the laws of the Nation" without exception.

The argument seems to be that if the Court could have heard the case under its appellate jurisdiction, then it would not bother too much with jurisdictional boundaries because of the subject matter of the dispute. This way of reasoning

[51] CSJN, "Don José Leonardo Avegno c. Provincia de Buenos Aires s. reivindicación de una finca", 11 April 1874, Fallos: 14:425.

[52] It was, nonetheless, claimed by the representative of the Province of San Luis before the Court, along with the argument that the case dealt with a local question, and not one of a federal subject matter. Fallos: 1:489.

[53] "Domingo de Mendoza c/ San Luis", point 8 (emphasis added). (Translated by the author).

[54] Constitución de la Nación Argentina, Artículo 17: "Property may not be violated, and no inhabitant of the Nation can be deprived thereof except by virtue of a judgment based on law. Expropriation for reasons of public interest must be authorized by law and previously compensated. Only Congress levies the taxes mentioned in Section 4. No personal service can be required except by virtue of a law or sentence based on law. Every author or inventor is the exclusive owner of his work, invention, or discovery for the term granted by law. The confiscation of property is hereby abolished forever from the Argentine Penal Code. No armed body may make requisitions nor demand assistance of any kind."

[55] Section I.(2) above.

represents a larger idea that survives to this day: one can litigate a case before the Court's original jurisdiction not only due to the nature of the parties to a dispute, but mainly when the case is of a federal subject matter.

Nine years later, the doctrine of the "Domingo de Mendoza" case was further elaborated in the "Avegno" case. The Court referred to the difference between the text of the Argentine Constitution of 1853 and the final text of the Constitution of 1860, and said that if the founders had decided not to include the Eleventh Amendment's text into the Constitution, they must have had a reason for doing so.

The lack of an 11th Amendment in the Argentine system and a broader acceptance of federal subject matter to assert original jurisdiction has led the Court to elaborate other doctrines to limit the cases in which the Provinces can be brought as defendants. One of these tools is the doctrine that requires a Province to be "substantially a party to the dispute" in order to be sued directly in the Supreme Court.[56]

The 11th Amendment to the U.S. Constitution, however, did not bar states to from being parties to an original jurisdiction suit; it merely prohibited a private party to sue a state directly in the Supreme Court. The Argentine doctrine mentioned in the previous paragraph —a province has to be "substantially a party to a dispute"— has its counterpart in the United States Supreme Court's "real party in interest rule", which denies States standing to sue "when it is merely sponsoring the claims of a small number of citizens."[57] This doctrine is the perfect introduction for a more difficult line of cases, the *parens patriae* one.

2. 'Parens patriae' as a basis for original jurisdiction

The doctrine's origins are rooted in the English common law, where the State would take on the legal guardianship of people without natural guardians.[58] In the context of federal courts in the United States, the term came to describe the interest of a State in representing the interests of its citizens as a plaintiff to a case.[59]

Some cases can be easily distinguished from *parens patriae* ones: when a State exercises a proprietary right, or when it attempts to settle a border dispute or an

[56] The doctrine goes back to the "Walker" case of 1892 and it has been used as recently as 2007, in the "Lanari" case (Fallos: 49:74; 330:5095).

[57] Fallon, Richard H. Jr. *et al*., *Hart and Weschsler's The Federal Courts and the Federal System*, 7th ed., University Casebook Series, St. Paul (MN), Foundation Press, 2015, p 279.

[58] Unsigned, "The Original Jurisdiction of the United States Supreme Court", *Stanford Law Review* 11, n.o 4 (1959): 665-719. Footnote 47: "*Parens patriae* under the original jurisdiction is a broad application of the term traditionally used to describe a government's legal position as guardian of persons not *sui juris* or without natural guardians."

[59] "*Hart and Weschler's Federal Courts*…", p 281: "The basic notion, however, seems to be that the state is suing to protect public interests that concern the state's citizens at large." These have also been referred to as "quasi-sovereign interests", see p 280.

interstate river one through litigation. In such cases, the State is either asserting its own right or it is bringing a suit that no other party could bring. But in other situations, a State may seek that a Court render a judgment in favor of its citizens. And this begs the question: can a State assert the interests of its citizens in court?

The United States Supreme Court has not been too clear about the convenience of this basis for State standing in original-jurisdiction cases. For example, in the "Maryland v. Louisiana" case, the Court recognized that, in cases when each individual citizen's claim would be so small as to discourage private litigation, it would be desirable to allow State standing to sue in the name of those citizens.[60] Such a language and reasoning resemble the world of aggregate litigation in the United States,[61] where it is clearer that citizens' future suits would be barred by the rules governing preclusion.[62]

In Argentina, provinces rarely invoke this doctrine in an explicit manner to justify standing to sue. Recently, the Argentine court rejected the Province of La Rioja's claim to represent the interests of its citizens at large.[63] The suit challenged an executive decree issued by the Executive Power in December 2023; one of La Rioja's claims sought to prevent the effects of the executive decree on its population.[64] However, the Court was not persuaded, so it rejected La Rioja's claims. Specifically, with regards to its *parens patriae* arguments for standing, the Court said that "[the Province] has not defined an interest that belonged to it [as a legal person distinct from its own citizens] that was harmed in an actual and concrete manner."[65]

[60] "Maryland v. Louisiana", 451 U.S. 725 (1981).

[61] An example is Rule 23 of the Federal Rules of Civil Procedure, which regulates class actions. Rule 23.a.3) establishes that "One or more members of a class may sue or be sued as representative parties on behalf of all members only if:… the representative parties will fairly and adequately protect the interests of the class." Federal Rules of Civil Procedure, United States (December 1st 2024).

[62] Nagareda Richard *et al., The Law of Class Actions and Other Aggregate Litigation*, 2nd ed., St. Paul (MN), Foundation Press, 2013, p 45: "One might say in colloquial terms that claim preclusion operates on the intuition 'You already had your chance,' whereas issue preclusion operates on the notion 'Been there, done that.' Stated less colloquially, claim preclusion prevents a party from splitting up a single dispute into more than one lawsuit, whereas issue preclusion prevents a party from relitigating an issue that has already been litigated and determined. Thus, claim preclusion can bar new legal causes of action and remedies that were never raised as long as they *could* have and *should* have been raised in the first suit (…). Issue preclusion, by contrast, bars litigation of only those issues that were actually raised, litigated, and determined in a previous suit."

[63] CSJN, "La Rioja, Provincia de c/ Estado Nacional s/ acción declarativa de certeza", 16 April 2024, Fallos 347:321.

[64] Point VII.7 of La Rioja's suit, available at https://scw.pjn.gov.ar/scw/viewer.seam?id=BtUMzCjtszKgygztLJmLZSmVYGqAAUvQgIEJ8ylIPZI%3D&tipoDoc=despacho.

[65] Fallos: 347:321, point 4.

VI. Interstate disputes

1. Disputes between states or provinces

Before thinking about this category of cases it is useful to remember the purpose envisioned by both the United States and Argentina's founding fathers for the original jurisdiction: to have a tribunal keep the national peace. Such a concern is typically present in cases of natural resources that affect more than one state or province. This subsection will compare the "Kansas v. Nebraska" decision of 2015 (U.S.)[66] and the "La Pampa c/ Mendoza" of 2017 (Argentina)[67], two cases that deal with disputes over interstate rivers.

In the "Kansas" decision, the U.S. Court described its power to adjudicate as "equitable in nature" and accepted the Master's recommendation: partial disgorgement of Nebraska's gains by its violation of the Settlement in favor of Kansas, and a reformation of the measurement of water mechanism in favor of Nebraska. The Court justified the remedies adopted by construing the Compact of 1943 as federal law;[68] the dissent construed it as something closer to a contract by arguing that water apportionment was still within the power of the States, and it accused the majority of construing its equitable powers too broadly.[69]

Meanwhile, the Argentine Court claimed to exercise the jurisdiction as regulated by Article 127 of the Constitution[70] in the "La Pampa c/ Mendoza" case. The Court

[66] "Kansas v. Nebraska", 574 U.S. 445 (2015). The *Kansas* decision goes back to a 1940's agreement between Kansas and Nebraska, which had been consented by Congress (as required by the Constitution's Art.I, §10, cl.3). In that compact, water that originated in the Republican River Basin was apportioned between Kansas, Nebraska and Colorado. In 1998, Kansas brought an original jurisdiction suit alleging that Nebraska's activities were in violation of the pact; the Court agreed with the Special Master's recommendation. In 2002, a settlement was reached between the contending States, establishing mechanisms for compliance with the 1943 Compact. Kansas brought the lawsuit under analysis before the Court alleging that Nebraska was now breaching the Settlement agreed upon in 2002, thus affecting its rights under the Compact.

[67] CSJN, "La Pampa, Provincia de c/Mendoza, Provincia de s/uso de aguas", 1 December 2017, Fallos: 340:1695.

[68] "Kansas v. Nebraska", note 27, at p 455: "Two particular features of this interstate controversy further distinguish it from a run-of-the-mill private suit and highlight the essentially equitable character of our charge. The first relates to the subject matter of the Compact and Settlement: rights to an interstate waterway. The second concerns the Compacts status as not just an agreement, but a federal law."

[69] *Id.* at 476: "Kansas, Nebraska, and Colorado have presented us with what is, in essence, a contract dispute. In exercising our original jurisdiction in this case, we have a responsibility to act in accordance with the rule of law and with appropriate consideration for the sovereign interests of the States before us."

[70] Constitución de la Nación Argentina, Artículo 127: "No Province shall declare or make war against another Province. Their claims must be submitted to and settled by the Supreme Court.

inquired as to "the legal meaning of 'basin'" in order to determine the scope of the jurisdiction it was exercising,[71] and it decided that its essential concept was of "unity". This recommended, in the majority's eyes, the need for an "Integral Management of the Basin". With this idea in mind, it exhorted the Provinces involved in the case and the National Government (which had been summoned as a third party) to give life to a preexisting Interprovincial Committee of the Atuel River and present an appropriate flow of water in the basin to "recompose the affected ecosystem in La Pampa Province."

The U.S. Court broadly construed its equitable power to fashion a remedy for a violation of federal law, while recognizing the need for adapting the measurement mechanisms. Conversely, the Argentine case had a different configuration, and the Court was looking more broadly at the environmental impact of the use of water in the Atuel River basin. What seems to be common between both solutions is the care with which they tell States what to do: while the U.S. Court gave something to each party, the Argentine Court ordered the parties to negotiate while maintaining control over what was being settled.

2. Disputes between states or provinces and the federal government

The Argentine Supreme Court accepts to hear these cases because it concludes that it is the only way "to reconcile the prerogative that the Federal Government has to litigate before federal courts with the provinces' right to litigate before the Supreme Court's original jurisdiction", as it has claimed in many cases.[72]

In the United States, the United States Code provides for original but not exclusive jurisdiction over disputes between a State and the United States.[73] In order for the Court to hear a case brought by a State against the Federal Government, the latter has to give its consent.[74]

Their de facto hostilities are acts of civil war, considered as sedition or rebellion, which the Federal Government must suppress and punish in accordance with the law". See also Section II above.

The La Pampa Province brought suit alleging that Mendoza breached: its obligation to negotiate the uses of the Atuel River established in a 1987 Supreme Court precedent, its obligations under agreements of 1989 and 1992, and to other constitutional and international norms that it deemed applicable to the legal relationship between the two Provinces. La Pampa also alleged environmental damages and reparations.

[71] *Id.* at point 13, 3rd paragraph.

[72] CSJN, CSJ 2394/2022, "Estado Nacional (Ejército Argentino) c/ Gobierno de la Ciudad de Buenos Aires s/ impugnación de acto administrativo" 16 April 2024, TR LALEY AR/JUR/39152/2024.

[73] 28 United States Code, § 1251, (b).2.

[74] Shapiro, Stephen M., *et al*. (2010): *Supreme Court Practice*, pp 630-631.

VII. Foreign ambassadors, consuls, and ministers

As described in Section I, we already know that the original jurisdiction was designed with the idea of keeping the peace. The jurisdiction arising for cases related to "ambassadors, foreign consuls and ministers" is important to keep that peace between the country and other foreign powers. Both the Federalist Papers[75] and Alberdi's ideas[76] reflect this concern.

In the United States, however, the role of the Supreme Court's original jurisdiction in this respect seems to have waned over time. Evidence of this is that nowadays, cases involving foreign ambassadors, other public ministers and consuls, belong to the Court's non-exclusive original jurisdiction.[77] This means that parties can choose to file suit before the Supreme Court's original jurisdiction or a federal district court.

On the other hand, Argentina's Law No. 48 provides in its article 1.3 that the Court will hear as a trial court: "cases concerning Ambassadors or other foreign diplomats, people that are part of the Diplomatic Legation, members of their family, domestic household, in a way that a Court of Justice may proceed in accordance with the Law of Nations"; article 1.4 refers to "cases that deal with the privileges of Consuls and Viceconsuls in their public character." All cases pertaining to the "private business" of Consuls and Viceconsuls are to be presented in federal district courts, according to article 2.3.

As is evident from the previous comparison, the statutes that precise the original jurisdiction in both Courts differ significantly. As a practical matter, rulings on the merits of these cases are rare in the Argentine court's case, given the time that it tends to invest on the jurisdictional question.[78]

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[75] Footnote 12 above.

[76] Footnote 13 above.

[77] See 28 United States Code, § 1251, (b).1: "The Supreme Court shall have original but not exclusive jurisdiction of: All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties…"

[78] See, for example, the "Medal", "Espeche" and "Elsouri" cases. CSJN, CIV 12908/2013/CS1, "Medal, Ana Claudia y otro c/ Embajada de los Estados Unidos y otros s/ daños y perjuicios (acc. trán. c/ les. o muerte)", 23 August 2016, available at: https://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumentoByIdLinksJSP.html?idDocumento=7328182&cache=1756993785315; CSJN, CSJ 41/2010 (46-E)/CS1 "Espeche, Oscar Luis Wo1fgang s/ despido", 14 March 2017, available at: https://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumentoByIdLinksJSP.html?idDocumento=7362731; CSJN, CSJ 221/2014 (50-E)/CS1 "Elsouri, Mahmoud Gaafar Elsharif Order s/ defraudación por retención indebida -causa n° 12532/2014", 6 November 2018, available at: https://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumentoByIdLinksJSP.html?idDocumento=7485801.

VIII. "Civil" cases

In order to understand what a "civil case" is for each original jurisdiction, we must first make reference to the Judiciary Act of 1789 in the United States, to Law No. 48 and Decree-Law No. 1285/1958 in Argentina.

The first Judiciary Act in the United States provided that the original jurisdiction of the Supreme Court would include "all controversies of a civil nature".[79] That wording echoes the Argentine grant of jurisdiction of Article 24 of Decree-Law No. 1285/1958, and can be explained by the influence of American constitutional law for Argentina's founding fathers.

Criminal cases under the Argentine Court's original jurisdiction are unusual. They are not usually handled by the Original-Jurisdiction Clerk's Office, but by the office that deals with criminal law cases before the Supreme Court. "Acordada" No. 28/1993 established that the initial stage of these criminal law cases are within the Supreme Court's presiding Justice's power, though the President can delegate that function to one of the Clerks of the Court.[80]

Article 1 of Law No. 48 established that the Court would hear in the first instance "cases between two or more Provinces, and *civil cases between a Province and a citizen or citizens from another Province, or foreign subjects*".[81] Early in its establishment, the Court defined a "civil case" for original jurisdiction purposes as one arising from contract, but it later expanded the concept to all cases related regulated by private law; as Gondra pointed out, however, the concept was never defined by a simple, straightforward rule.[82]

Central to the Court's current understanding of "civil case" are the "Barreto"[83] and "Mendoza, Silvia Beatriz"[84] cases, both decided in 2006. The first one was brought by plaintiffs domiciled in the city of Buenos Aires, against the Province of Buenos Aires because their daughter had been accidentally shot by the provincial police and died; they sought damages under the Civil Code. The case appeared

[79] Judiciary Act 1789, United States (September 24th 1789), § 13. In *Hart and Weschler's Federal Courts*…, authors note that the first Judiciary Act preceded "Marbury v. Madison", where the Court held that the original jurisdiction derived directly from the Constitution (p 24).

[80] CSJN, Acordada No. 28/1993, (1 June 1993).

[81] Added emphasis. Ley 48, Artículo 1, inciso 1: "La Suprema Corte de Justicia Nacional conocerá en primera instancia: 1. De las causas que versan entre dos o más Provincias, y las civiles que versen entre una Provincia y algún vecino o vecinos de otra o ciudadanos o súbditos extranjeros."

[82] Gondra, J. *Jurisdicción Federal*, p 390.

[83] CSJN, "Barreto, Alberto Damián y otra c/ Buenos Aires, Provincia de y otro s/ daños y perjuicios", 21 March 2006, Fallos: 329:759.

[84] CSJN, "Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/ daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza - Riachuelo)" 20 June 2006, Fallos 329:2316.

to fall squarely in the definition of a civil case between a Province and citizens of another Province, as regulated in Law No. 48. But the Court chose this case to reshape its original jurisdiction: after recognizing that it was departing from a line of precedents where it decided similar cases on the merits, it said that this class of original-jurisdiction cases had grown steadily since 1992.[85] Ultimately, the reference to its increasing workload as a consequence of the number of "civil cases" and the expressed need to preserve its scarce resources may remind us of the "Ohio v. Whyandotte" decision, where the U.S. Supreme Court also referred to the preservation of its proper function —the appellate one.[86]

The "Mendoza, Silvia Beatriz" case was also key for the development of the concept of "civil case". Its biggest consequences for the original jurisdiction were two-pronged. First, it accepted to hear the plaintiffs' environmental claims under its original jurisdiction; second, it decided against jurisdiction in the damages claims resulting from environmental contamination, directed against the Province of Buenos Aires and the Federal Government and grounded in the Civil Code. The case came to be known as a leading case in environmental law due to the remedies it created in a complex, multi-party case of environmental law. But it was also important in the second aspect mentioned: it continued to shape the concept of a "civil case" for the purpose of the original jurisdiction of the Supreme Court.

As practitioner Pablo Perrino said, both cases are better understood as part of a larger trend in the Supreme Court. Given the changes in the Court's membership between the years 2002 and 2006, the "new" Court thought its current workload affected the quality of its constitutional functions, so it proceeded to reform certain aspects of its organization. Along with "Barreto" and "Mendoza", Perrino mentions the "Acordada" No. 4/2007, which regulated the filing of extraordinary appeals before the Court, and other rulings from its appellate docket.[87]

IX. The power of congress and the original jurisdiction

Both constitutional texts distinguish between the appellate and the original jurisdiction of each Supreme Court in a very similar way, as was shown in Section I (2) above. Article 116 and Art. III § 1 respectively grant Congress the power to regulate the appellate jurisdiction of each country's highest court. However, neither text mentions the relationship between the power of Congress and the original

[85] "Barreto", point 5.

[86] See Section III above.

[87] Perrino, Pablo E., "Alcance actual de la competencia originaria de la Corte Suprema de Justicia de la Nación en las causas en que son partes las provincias", in *Cuestiones de Control de la Administración Pública - Administrativo, Legislativo y Judicial,* Buenos Aires, Ediciones RAP, 2010.

jurisdiction. This was an important point developed in the classic "Marbury v Madison"[88] and in the Argentine Court's "Sojo"[89] case.

The facts of "Marbury v Madison" are well known. William Marbury was appointed as a "midnight judge" by the outgoing Federalist administration, but the commissions containing his appointment were never delivered, so he presented a writ of mandamus asking the Supreme Court to order Secretary of State Madison to do so.[90] The ruling's backstage was the dispute between Federalists and Jeffersonian Republicans over the power of the federal judiciary after Congress had stalled the sessions of the Supreme Court, and after Republicans voted to impeach a Federalist District Judge.[91] The political struggle between Federalists and Republicans is central to the understanding of "Marbury".

Relevant for this section's purposes, the opinion of the Court famously asserted that Congress could not expand the cases of original jurisdiction established by Art. III, §2 cl. 2 of the U.S. Constitution, and thus deemed § 13 of the Judiciary Act of 1789 void. Such a claim has been referred to as the case's "statutory ruling."[92]

The "Sojo" case of the Argentine Supreme Court of 1887 is illustrative of the influence that American practice had during that period of its constitutional history. A cartoonist had been imprisoned by Congress for publishing a cartoon making fun of members of Congress, which led to the filing of a *habeas corpus* petition directly in the Supreme Court. The Court seized the opportunity to assert its power to review the constitutionality of laws and say that Congress could not expand the Tribunal's original jurisdiction.

However different the context for both decisions was,[93] the Argentine court expressly recognized it was importing the "Marbury" doctrine. According to Miller, this is explained by the fact that the Argentine Supreme Court felt bound by the U.S. practice: "In holding that it lacked jurisdiction to hear the case, the Argentine Supreme Court followed U.S. practice because it felt obliged to follow U.S. law,

88 "Marbury v. Madison", 5 U.S. 137 (1803).

89 CSJN, "D. Eduardo Sojo, por recurso de Habeas Corpus, contra una resolución de la H. Cámara de Diputados", 22 September 1887, Fallos: 32:120.

90 Mandamus is defined by *Black's Law Dictionary* as: "A writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, usually to correct a prior action or failure to act."

91 Feldman, Noah R. and Sullivan, Kathleen M, *Constitutional Law*, 20th ed., United States of America, Foundation Press, 2019, pp 9-16.

92 *Hart and Weschler's Federal Courts*, p 268.

93 First, "Sojo" was not ruled in the midst of a power struggle for control over the federal judiciary, as *Marbury* was. Moreover, there was precedent in Argentina where Congress had been ordered to release a journalist it had imprisoned. Instead of reaffirming its power over the national Congress with the facts presented by *Sojo*, the Argentine Court chose to use the "Marbury" mold and assert the supremacy of the Constitution, the power of the Court to have the final say on its meaning, and dismiss the case for lack of subject matter jurisdiction.

not because political convenience dictated avoiding jurisdiction."[94]

But, as we have seen in previous sections of this article, both the Argentine and the United States Congress have not remained silent with regards to the original jurisdiction. In the United States, the United States Code's regulation of original jurisdiction has been described as "specifying" it.[95] Conversely, the Argentine court tends to refer more to the constitutional origin of its original jurisdiction than to the rules that Congress enacted; though those legal requisites resurface from time to time, like in the "Barreto" and "Mendoza" cases.[96]

X. Enforcement of rulings against states or provinces

To render a decision in an original-jurisdiction case is one thing. But the enforcement of such a decision on a reluctant party is a different matter.

In the United States, it has been said that "the power of the Court to enforce its decisions against a state has been questioned almost since its inception".[97] A 1918 decision in "Virginia v West Virginia"[98] reflects some of the problems that the Court faces when a State refuses to comply with one of its orders. The Court had already issued a decision against West Virginia in 1915,[99] but the state was refusing to comply; so Virginia —the plaintiff— asked the Court to impose on the uncompliant party the obligation to collect a tax in order to obtain the money Virginia was entitled to. The Court was faced with the problem of affecting property devoted to public purposes, so it heavily justified its power to enforce its decisions, also warning as to the dangers that lay behind not complying with them.[100] In the

[94] Miller, Jonathan M., "The Authority of a Foreign Talisman: a Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith", *The American University Law Review* 46, n.o 4, 1997, 1483-1572, p 1557. *See* also p 1547: "In 'Sojo', U.S. practice was followed solely because the Argentine Supreme Court considered itself bound by the U.S. model".

[95] Shapiro, Stephen M. *et al*., *Supreme Court Practice*, 10th ed., Arlington, VA, Bloomberg BNA, 2013, p 621.

[96] Section VII above.

[97] Unsigned, "The Original Jurisdiction of the United States Supreme Court", Stanford Law Review 11, No.4, July 1959, 665–719.

[98] "Virginia v. West Virginia", 246 U.S. 565 (1918).

[99] "Virginia v. West Virginia", 238 U.S. 202 (1915).

[100] "Virginia v. West Virginia", 246 U.S. 599. "(…) the conferring on this Court of original jurisdiction over controversies between states, the taking away of all authority as to war and armies from the states and granting it to Congress, the prohibiting the states also from making agreements or compacts with each other without the consent of Congress at once makes clear how completely the past infirmities of power were in mind and were provided against. (…) since it must be patent that the provisions written into the Constitution, the power which was conferred upon Congress and the judicial power as to the states created, joined with the prohibitions placed upon the states, *all combined to unite the authority to decide with the power to enforce* – a unison which could only

end, however, West Virginia complied shortly after the 1918 decision, so the Court did not have to seek a way to enforce the 1915 one.[101]

On the other hand, in Argentina, this issue is regulated in the Federal Civil Procedural Code, which dedicates a whole chapter to the enforcement of a decision.[102] However, the Code does not provide for a specific way to enforce a judgment against a province or the Federal Government and the procedural vehicles that the Code offers seem better suited to litigation between private parties. This sort of mismatch between the Procedural Code and original jurisdiction echoes the Supreme Court "Acordada" that created the Original-Jurisdiction Clerk's Office, where the Court made explicit reference to the lack of appropriate regulation for original-jurisdiction cases.[103]

In cases where money is owed by a province, the Original-Jurisdiction Secretariat tends to be deferent to each province's way of regulating their debts to the public. For that reason, it provides provinces with several opportunities for voluntarily paying its debts in the context of a case before the Court. If the non-compliance with the order persists, the Court sometimes orders the National Bank ("Banco de la Nación Argentina") to legally withhold a sum of money and transfer it to a court-supervised bank account. Generally, the withheld sums are a part of the complex system of distribution of money between the federal government and the provinces.[104]

XI. Final remarks

The justification for the comparison, as was explained in Section I, lies in the influence that the United States constitutional system had in the design of Argentina's. Both constitutions grant the Supreme Court power to act as a trial court in certain cases, and the structure of the federal judiciary is significantly alike.

Sections II and III dealt with the normative structure for both original jurisdictions. Although the constitutional texts are remarkably similar, the reference to the "exclusivity" of the Supreme Court's original jurisdiction in the Argentine case and the way in which both congresses intervened highlighted some of the differences. Additionally, the distinct way in which each Supreme Court handles the procedure of an original jurisdiction suit was shown to be very different.

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have arisen from contemplating the dangers of the past and the unalterable purpose to prevent their recurrence in the future." (Emphasis added).

101 Unsigned, "The Original Jurisdiction of the United States Supreme Court", p 691.

102 Código Procesal Civil y Comercial de la Nación, B.O. 7/11/1967. Articles 499 to 516.

103 Section III above.

104 A possible translation to English is *system of federal co-participation*. In Spanish: "sistema de coparticipación federal".

Both Courts give some importance to the discretionary nature of its original jurisdiction. In the U.S., as the "Ohio v Whyandotte" decision points out, the exercise of discretion tends to pull towards restricting the original-jurisdiction docket —that is, to hear less original-jurisdiction cases. The most immediate consequence of the "Chisholm" case was the Eleventh Amendment to the Constitution, and this might have set the tone for the Court's reluctance to hear every case filed under its original jurisdiction, even if the norms conferring such jurisdiction indicate otherwise.

Meanwhile, the gates of the Argentine Court's original jurisdiction seem to have been "opened" by the "Domingo de Mendoza" case, where the Court quite explicitly said that it would not be limited by statutory requirements to hear a case if a federal question appeared. Such a statement acquired a new dimension after the "Barreto" and "Mendoza, Silvia Beatriz" cases; both decisions, by changing the meaning of a "civil case", reshaped the Argentine Court's original jurisdiction. It is noteworthy that the discretionary aspect of the original-jurisdiction decision is a lot more explicit in the case of the United States than in the Argentine one.

One of the historical purposes of the original jurisdiction of the Supreme Court was to keep the peace, both on an internal and an international dimension. Internally, both Supreme Courts operate similarly when they deal with interstate disputes, as the "Kansas" and "La Pampa" cases revealed. The inclusion of the National Government in the proposed remedy by the Argentine Court can be interpreted as another manifestation of the pervasiveness that the federal government still has in the relations between the Provinces. As far as the international aspect goes, the constitutional grant of original jurisdiction referred to "foreign ambassadors, ministers and consuls." The United States Congress intervened to make this grant of jurisdiction non-exclusive, so these cases could be brought before federal district courts; the Argentine Supreme Court does not seem too keen, as a practical matter, to swiftly adjudicate these types of cases.

The "Sojo" case was the Argentine vehicle for importing the "Marbury" doctrine of judicial review. The comparison of these cases showed how much influence the American understanding of its Constitution had during Argentina's first two decades as a nation, a time when it was more common for the Argentine Court to quote American precedents than to quote Juan Bautista Alberdi's works. Perhaps it was Sarmiento's advocacy in favor of adopting the American system that was indirectly embraced by the Court during this period.

Some elements were left out of the article's comparison. A richer portrait of the Argentine original jurisdiction would include recent and important decisions. Some examples are: the protection of the "republican form" in provincial elections,[105] the

[105] CSJN, "Unión Cívica Radical de la Provincia de Santiago del Estero c/ Santiago del Estero, Provincia del s/ acción declarativa de certeza", 22 October 2013, Fallos 336:1756.

constitutionality of provincial taxes,[106] the status of the City of Buenos Aires for original-jurisdiction purposes,[107] and the Court's intervention in the distribution of taxes between provinces and the federal government,[108] among others. These topics were left out for probable lack of comparative value and are here presented for future investigation.

Furthermore, the picture of both original jurisdictions depicted is certainly incomplete due to the absence of each court's appellate jurisdiction. A feature that both legal systems share is that their Supreme Courts —notwithstanding dissents— speak with one voice, so there is no "appellate Court" separate from an "original-jurisdiction Court". There is only one Supreme Court. The original jurisdiction does not exist nor operate in a vacuum.

Nevertheless, the comparison undertaken allows us to see that the struggles of each court with the constitutional text, the decisions on how to allocate their resources, and the interpretation of their role in the legal system are especially present in original-jurisdiction cases. For such reasons, the comparison should be worthy of attention by legal scholars and practitioners alike — and, more broadly, by anyone interested in the exercise of power.

[106] CSJN, "Bayer S.A. c/Santa Fe, Provincia de s/ acción declarativa de certeza", 31 October 2017, Fallos: 340:1480.

[107] CSJN, "Gobierno de la Ciudad Autónoma de Buenos Aires c/ Córdoba, Provincia de s/ ejecución fiscal", 4 April 2019, Fallos: 342:533.

[108] CSJN, "Gobierno de la Ciudad de Buenos Aires c/ Estado Nacional s/ acción declarative de inconstitucionalidad – cobro de pesos", 21 December 2022, Fallos: 345:1498.

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