The Constitutional Economy of dynamism and inclusion.

An inquiry into the causes of Argentine economic decadence.

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Introduction: Is it the Constitution's fault?

The purpose of this paper is to determine the Constitutional structures that favour economic dynamism and inclusion in a society; making a separation between Constitutional rules and other norms or traditions including laws and regulations. The main obstacle to economic dynamism and inclusion are the constitutional structures and traditions that promote corporatism.[2] The methodology includes the comparison between Constitutional Economics and Constitutional cultures and its influence in economic dynamism and at the same time the applicability of the contractarian view on social inclusion in the Constitutional legal discourse. There is a Constitutional economy of corporatism as there is a Constitutional economy of dynamism. As a main example of constitutional corporatism the paper analyses the particular case of Argentina and its case of 'reversal development'. The causes of Argentina's 'reversal development'[3] are varied but we shall argue that bad incentives in the Constitutional economy and a bad Constitutional culture are most important ones. The Constitution could be described as a long-term contract between the government and the governed where the correct incentives established in its text and practice could transform it into a relational contract where efficient outcomes could result.[4] In that sense the Argentine constitution has been a huge failure since ill interpreted and cryptic norms have created incentives that favour concentrated government and an inefficient distribution of public and private

[2] In the description of Edmund S. Phelps. *A corporatist economy today is a private-ownership system with some contrasting features: It is pervaded with most or all of the economic institutions created or built up by the system called corporativismo that arose in interwar Italy: big employer confederations, big labor unions and monopolistic banks – with a large state bureaucracy to monitor, intervene and mediate among them. Yet without some knowledge of the purposes for which the system was constructed it cannot be understood at all adequately. I think it is fair to say that the core function of the distinctive corporatist institutions is to give voice and levers of power to a variety and range of social …so that they might be able to have a say or even a veto in market decisions that would harm them. The individualism of free enterprise is submerged in favor of these entities and the state.* Edmund S. Phelps Corporatism and Keynes: His Views on Growth.

[3] To take the expression from Carlos H. Waisman, Reversal of Development in Argentina: Postwar Counterrevolutionary Policies and Their Structural Consequences. Princeton Univ Press, 1987 which remains a classic description of Argentina's decadence.

[4] In this model judges and in particular the Supreme Court are the structure of governance of the Constitution.

goods,[5] these failures evolved in the creation of a 'rent seeking Constitution'. The analysis of Constitutional cultures also indicates that the political system has developed a strong corporatist culture that has influenced the economic and political rules in a way that frustrates the objectives of economic dynamism and inclusion. As a result the Argentine economy is stagnant, with only agriculture as a dynamic sector, which at the same time has developed a vast class of social outcasts in the last twenty years.

I. Constitutional Economics.

James Buchanan introduced the term 'Constitutional economics' to designate a distinct branch of economics to study the 'Constitutional decision' as opposed to the 'legal decision' which is the main object of study of Public Choice.[6] In the 1990s, the focus of public choice discussion was shifted away from ordinary political choices to the institutional-Constitutional structure within which politics takes place.[7]

Constitutional economics is 'the economic analysis of Constitutional law' because it uses the economic method to analyze consequences of Constitutional rules, but at the same time Constitutional economics attempts to explain the working properties of alternative sets of institutional and Constitutional norms that constrain the choices and activities of economic and political agents. The emphasis is on the rules that define the framework within which the ordinary choices of economic and political agents are made. It examines the choice of constraints as opposed to the choice within constraints. It is aimed at offering guidance to those who participate in the discussion of Constitutional change, which must include not only Constitutional assemblies as is generally imagined by Buchanan but also judicial decisions, since judicial precedents are the main basis

[5] 'Ill interpreted' because some well intended rules were transformed into monopolies and tax privileges, as the case of the 'Welfare Clause' originally intended to promote economic growth by some government spending and was later interpreted to include economic subsidies and tax privileges. 'Cryptic' because some regulations are in a way hidden to the public since they are approved by lesser officials through delegation.

[6] James M. Buchanan, Explorations into Constitutional Economics, Texas A&M University Press, December 1989; Constitutional Economics, Blackwell, 1991.

[7] Ludwig Van den Hauwe Constitutional economics, in The Elgar companion to law and economics, p 223.

of Constitutional reform. Constitutional economics has also an element for normative advice in Constitutional decisions.

Thus Public Choice, in its non-Constitutional aspects of inquiry, concentrates attention on analyses of alternative political choice structures and on behaviour within those structures. Its focus is on predictive models of political interactions, and is a preliminary stage in the more general Constitutional inquiry.

A. The metaphor of Ulysses and the sirens.

The common conflict in traditional Constitutional law and in Constitutional economics is the contra majoritarian argument. Are the limits to democratic governments established in an ancient document legitimate?[8] Jurgen Habermas argued that on the contrary, decisions taken by judges in agreement with the Constitution are legitimate in application of democratic theory through the application of the dialogical concept of law[9]. Constitutional systems apply self-limitation for governments, introducing separation of powers and checks and balances into an otherwise monopolistic concentration of power. Self limitation has an ancient tradition, going back to the Odyssey and in Benedict Spinoza.

In the Odyssey, Ulysses faced a problem of time inconsistency in his optimal plan. His optimal plan was to listen to the sirens and then continue his journey. But this was time- inconsistent because, once he had embarked on the plan by listening to the sirens; he would not have been able to implement the later part of the plan, the rest of his journey. The time inconsistency arises because the sirens affect Ulysses' preferences. His perception of the best action changes in the middle of the plan and this leads him to deviate from the original version. Ulysses implemented his optimal plan by denying himself freedom at the later

[8] This is an argument used both by rightist and leftist commentators, depending of the sympathies with the present government. New dealers considered the Supreme Court illegitimate, and during the Earl Warren days the same arguments were made by more conservative scholars. Leonard W. Levy, Original Intent and the Framer's Constitution. New York: Macmillan. 2000. Raoul Berger, Government by Judiciary, Liberty Fund 1997.

[9] Habermas considers that what legitimizes law is that it is self applicable; before it is to be imposed to a person it has to transform from an hypothetic rule into a concrete one through the debate in a legal case. Law is dialogical since it is the product of a debate in a case, and that includes the participation of the interested parties. Cf. Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy.

stage of the plan. Having instructed his men to tie him to the mast and to ignore any orders to do anything other than sail past the rocks, he told them to plug their ears and row. Thus, Ulysses established for himself a private constitution, a set of more or less binding rules that constrain his future choices. By exploiting elements of his natural and social environment, Ulysses was able to subvert certain inclinations of his future self, inclinations that he knew would be destructive of his overall interests but which would nevertheless prove irresistible when they arose.[10] The use of the metaphor of Ulysses and the sirens as an explanation of the need of self limitation of power was mentioned originally in Benedict Spinoza although is developed by Jon Elster.[11] Ulysses' self limitation is specially relevant in cases when statesmen act with the temptation to over regulate as a quick response to a popular or journalistic pressure which may result in 'legislation by anecdote'.[12] Both because the government does not use a technical method to obtain information or if influenced by rent seeking interest groups; or they confront circumstances of Knightian uncertainty. As Hayek indicated information is in 'dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess'[13] which requires prudence and self-limitation from legislators and regulators.

Corporatist policies on the contrary are based on the agreement between big companies, centralized trade unions and the government to face uncertainty. Since the agreement is seen as the representation of the organized society, no self-limitation is accepted or needed.

But how can constitutions be designed and interpreted so that public officials serve the 'public interest'? Or if they serve the 'public good' how can they survive in doing so?

[10] Ludwig Van den Hauwe. Constitutional economics, in The Elgar companion to law and economics, p 224.
[11] Jon Elster, Ulysses and the Sirens: Studies in Rationality and Irrationality. Cambridge University Press 1984
[12] Cass R. Sunstein. The Cost-Benefit State. University of Chicago Law School, John M. Olin Law & Economics, Working Paper No. 39 May 1996.
[13] Friedrich von Hayek, The use of knowledge in Society, American Economic Review 35 (1945) 519, quoted in Cass Sunstein. Infotopia. How many minds produce knowledge. Oxford University Press, 2006, 119.

B. Constitutions and agency problems.

Human beings are not bound by nature to pursue rules: they will not comply with rules unless it is profitable to do so. Accordingly, we must search out rules which so order individuals' behaviour that it is individually profitable for most people to keep and enforce those rules most of the time. The gains from violation should be lower than the gains for obeisance.

Wicksell called attention to the significance of the rules within which choices are made by political agents, and he recognized that efforts at reform must be directed towards changes in the rules for making decisions rather than towards modifying expected results through influence on the behaviour of the actors. [14]

Buchanan answers Wicksell's question in the contractarian tradition. He considers that contractarian institutions have three characteristics: [15]

1. Each individual interests and values are the criteria against which the desirability of alternative rules is to be evaluated.
2. There is the fundamental distinction between actions taken within the Constitutional rules, and changes in the rules themselves.
3. Actions taken in the second stage of the political process should be effectively constrained by the rules written in the first, Constitutional stage, and this is true, not only for the individual citizen, but also for the elected representatives, and the bureaucrats and jurists who administer the system.

Buchanan's idea centers mainly to constitutional reforms by assemblies, however, the Constitutional debate is only occasionally performed through those means, but it is done in judicial decisions. Therefore the reform of the constitutions is done through precedents.[16] Thus no Constitutional decision is taken without a debate that can be initiated by the individual activity of a citizen. Jurgen

[14] Wicksell, K. (1896), *Finanztheoretische Untersuchungen* [Investigations into the Theory of Finance], Jena: Gustav Fischer. In *Ludwig Van den Hauwe* Constitutional economics *The Elgar companion to law and economics. Ch 13, p. 223.*
[15] Buchanan and Tullock, *The Calculus of Consent. 1962.* The image of political activity as a two-stage process as a normative yardstick by which to measure the quality of a community's political institutions.
[16] Bruce Ackerman, We the People, vol. 2 Transformations. Belknap Press. 1993. p 312. The missing amendments.

Habermas considers this possibility the justification of a Constitutional system since all legitimate system of rules must be self-imposed.[17]

The Constitution being essentially a long-term contract intended to secure the mutual gains from social cooperation and to avoid the dominant defective strategy in the prisoner's dilemma game that leads to a socially inefficient Nash equilibrium solution. But even when it is supposed that the agreement on appropriate rules can be achieved at the stage of Constitutional contract formation, it should be recognized that individuals and interest groups inevitably would attempt to engage in post-contractual opportunism. This mainly consists of rent seeking and special interest plundering which ultimately reduces the value of post contractual cooperation and undermines the constitution itself. Groups of individuals have an incentive to seek to capture the instruments of state power and to use them as vehicles to enrich themselves in ways that are not possible for private citizens. 'Rent seeking' is the word used to describe actions taken by individuals and groups to alter public policy in order to gain personal advantage at the expense of others.[18] The pure transfer involved in the creation of tariffs or other privileges will lead market participants to expend resources in lobbying and political activities these expenditures are purely wasteful from the standpoint of society as a whole; they are spent not in increasing wealth, but in attempts to transfer or resist transfer of wealth.

Constitutional economics tries to ensure the self-enforcing character of a Constitutional contract, to obtain this it must successfully constrain the power of those who rule the state. There are types of constitutions that enhance the highhandedness of rulers, promoting a secret process for the creation of legislation, the over regulation of the economic actors and finance, and by instituting government as an arbitrator of every important economy activity or conflict. We may call these the 'Corporatist Constitutions.'

[17] Jurgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy. The MIT Press. 1998.
[18] The term 'rent seeking' was invented by Anne Kruger.

1. Substantive restraints versus procedural rules

Substantive constraints on government have been dismissed as ineffective precisely because of the wide latitude they allow for reinterpretation. Even if a Constitution describes very precisely a civil or economic liberty, these rights will necessarily conflict with others and require interpretation. One solution is the one taken by the German constitution, a centralized judicial review and the Constitutionalization of values as much as norms. This is risky because values change. In the case of economic liberties US Supreme Court took the view of substantive values during the subsistence of the 'economic due process of law' in particular in the case *Lochner vs. New York* of 1905.[19]

The alternative is the establishment of procedural rules that provide effective mechanisms for self-enforcement and therefore impose restraints on government. The US Court precedent in ***Carolene Products*** and the literature based in it like John Hart Ely's classic book, *Democracy and Distrust* describe this procedural interpretation of the Constitution.[20]

II. A Constitution of incentives or Constitutional Cultures?

Buchanan has emphasized that institutional constraints are important determinants of the actual workings of economic systems, and Constitutional economics studies are the properties of alternative sets of institutional rules. [21]

Constitutional economics focuses on the crucial distinction between rules and outcomes. The main argument is that social interactions are conditioned not only by resource constraints but also by the set of rules or institutional arrangements that govern the choices of individual actors. Rules define the framework within which these ordinary choices are made, and shape the structure of incentives and

[19] Lochner v. New York, 198 U.S. 45 (1905)
[20] The view of *Carolene Products* is that the Supreme Court has to have a more strict analysis in cases referring to 'discrete and insular minorities'. Ely considers that the judicial review acts as a 'reinforcement of representation'. As opposed by Lawrence Tribe. 'The puzzling persistence of Process-based Constitutional Theories' quoted in The Invisible Constitution, op. cit. 192.
[21] *Explorations into Constitutional Economics James M. Buchanan College Station: Texas A&M University Press, 1989, 437 pp*

therefore have an important influence on outcomes. This analysis implies that if the limits to individual behavior are well defined and the rights are recognized and accepted, social interaction will proceed in an orderly fashion. An order will emerge within which the interdependent behavior of separately motivated individuals is reconciled to generate patterns of outcomes that are tolerable to the participants. Mutual agreement on defined rights facilitates voluntary exchanges that coordinate specialized activities and enhance the individual welfare of all parties to the agreement.

A Constitution is always a normative document, but that does not describe the wider conception of Constitution as the fundamental political document. This is an Aristotelian view in the Athenian Constitution[22]. Following this double identity of Constitutions, the normative and the positive, there is a strong and european Constitutional vision, both on the left with Ferdinand Lasalle in the XIX century and Hermann Heller in the Weimar Republic and on the right with Carl Schmitt.[23] Heller wrote of an open constitution that permitted life to go through. Schmitt made a distinction between the 'fundamental decision' of the people and the lesser 'constitutional laws'. In a natural law tradition Constantino Mortati distinguished between a 'formal' constitution that was the written document and a 'material constitution' where values, culture and political and economic ideas of a society would be included.[24] This constitutional debate originated and is still active in Europe where no judicial control existed until after World War II and since then, only in a centralized manner. Judicial decisions mainly in the United States and countries that have widespread judicial review[25] permit a non-interpretativist view that allows both the normative and positive interpretation of the Constitution.[26] In Germany the solution was the

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[22] Aristotle. The Athenian Constitution. Written 350 B.C. Translated by Sir Frederic G. Kenyon.

[23] Carl Schmitt, Verfassungslehre., 1993. Constitutional Theory, Duke University Press 2007, Hermann Heller, Staatslehre, Duncker & Humblot, Teoría del Estado. Fondo de Cultura Económica.

[24] '*La costituzione effettivamente vigente non le singole regole della costituzione formalmente in vigore;' cf.* Augusto Barbera. Dalla Costituzione di Mortati alla Costituzione della Repubblica. Introduzione al volume "Una e indivisibile", Milano 2007

[25] Including Argentina since 1862.

[26] Non interpretativism is in Alexander Bickel, The least Dangerours Branch. The traditional pragmatist view of law was initiated by Oliver Wendell Holmes in The Path of law, and latter in Benjamin Cardozo. The nature of Judicial Decisions. See also Philip Bobbit, Constitutional Fate. More recently, Lawrence Tribe. The Invisible Constitution. Oxford 2008.

Constitutionalization of values that were defined as permanent and whose reform is not permitted.[27] During the Weimar Republic Carl Schmitt sustained in a polemic with Hans Kelsen that the guardian of the constitution could not be the courts but the president.[28]

The problem of drafting and interpreting a Constitution that would impede dictatorships and prevent rent seeking and corruption subsists, and even more so if we intend to create a Constitution that promotes economic dynamism and inclusion. Two conflicting visions appear in Constitutional Economics:

1. One view is to create a Constitution with the correct incentives for both citizens and rulers. It could be called the 'Strategic Constitution.'[29]
2. The second is that it is the existing Constitutional culture what creates the economic organization of a nation. Culture influences the preferences of citizens and governments.

The idea of a 'strategic constitution' is that if the Constitution could be considered a long-term contract with a structure of governance by the Supreme Court, it can be transformed it into a relational contract, where there is mutual acknowledgement of the gains from the relationship. In that case, the Constitution would be a contract that has all the right incentives and where non-compliance would be minimal. This possibility is desirable but incomplete for it is extremely difficult to find all the correct incentives and include them in a Constitution due to incomplete and asymmetric information. The framers are also politicians and they may feel insecure about the future since the present majority in the Constitutional convention could no longer be in the future government. But they are not completely insecure since normally the majority the framers could be in government in the future and even in the worst scenario they

[27] See Donald P. Kommers. The Constitutional Jurisprudence of the Federal Republic of Germany. Chicago 1997.
[28] Carl Schmitt. Der Hüter der Verfassung. Duncker & Humblot, 1996.
[29] Robert D. Cooter. The Strategic Constitution. Princeton University Press, 2002. Cooter argues that Constitutional theory should trouble itself less with literary analysis and arguments over founders' intentions and focus much more on the real-world consequences of various Constitutional provisions and choices.

could also participate in government as a minority.[30] Therefore the difficulties to create Constitutional incentives for republicanism, economic dynamism and social inclusion require of the study of Constitutional cultures.

The study of Constitutional cultures could be associated with Hayek's idea of law as a spontaneous order. Hayek reminds us that a spontaneous order can have no purpose although its existence may be very serviceable to the individuals that move within such order. But at the same time very complex orders comprising more particular facts than any brain could ascertain or manipulate, can be brought about only through forces inducing the formation of spontaneous orders.[31] We can draft a Constitution with the best incentives and establish a Supreme Court to act as its structure of governance but we may not manage the forces that induce the formation of future spontaneous orders.

III. The political logic of bad Constitutional economics: the Argentine case.

If the normative and imperative rules in Constitutions change both incentives and culture, some questions appear: How to design Constitutional rules that have economic logic? Can bad economics, as is the case of a corporatist economy, be the politics that government officials want because it allows their perpetuation in government? A corporatist economy could be the basis of a perverse political culture where utility-maximizing leaders will embark on destructive economic policies to enhance their own personal power unless they are appropriately constrained. But the constraint must come from a Constitution that reduces transaction costs to limit political power. [32] Since the coordination costs for the opposition are extreme and sometimes create a barrier that prevents creating limits to corrupt and authoritarian regimes.

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[30] This idea was originally developed in the United States in John Calhoun, The Concurrent Majority, but was developed in European parliaments with proportional electoral systems. The expression 'government of parties' 'partitocrazia' in Italian refers to this method of government when no political party is completely out of power.
[3131] Friedrich von Hayek. Law, legislation and Liberty. Vol I Rules and Order. Chicago 1973, p 38.
[32] Thrainn Eggertsson. Imperfect Institutions. University of Michigan Press, 2005, p. 59.

The time horizon.

Incentives that could be determined by the 'time horizon' have two elements:

1. Rulers discount the future and have an incentive to spend available resources and ignore the long-term growth. That is the case of Argentine economic policy since 1946 and particularly during the 50's to the 70's.

2. Since political power is not eternal, leaders want to build a political and personal wealth base that will allow them to survive politically and otherwise when they are out of government. This situation has developed in Argentina since 1989 and has a particular importance since 2003.

The size of the support group.

The other group of incentives is based on the 'size of the support group': rulers who rely on small support groups thrive politically by transferring resources to their small party of supporters even during economic decline. In the Argentine case the group of politicians directly associated with power has reduced considerably. The leader, in Spanish '*conductor*', extends his power through a small base of immediate followers. There is no strict negotiation with political leaders in Congress, only the governors of important provinces have a possibility to influence the president's decisions.[33] The reason for rulers to prefer a small coalition to a larger one is that larger groups would demand a bigger participation of the government budget. Smaller groups permit a bigger part for each political actor and an even greater one for the president's pet projects. The doctrine of a 'unitary executive' is the legal basis of the reduction of transaction costs for the president, reducing the participation in decisions of cabinet ministers, Congress and the Courts, [34] this doctrine is also called 'hyperpresidentialism'. A

[33] This situation is influenced by both the electoral and tax systems that make legislators dependent from the governor or political leader of the province and, in turn, the governors financially dependent from the president.
[34] For a description of the doctrine of the unitary executive in the United States see: Steven G. Calabresi, Gary Lawson. The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: a textualist response to justice Scalia. Columbia Law Review May 2007. 107 Colum. L. Rev. 1002.

hyperpresidential system is built by the introduction of parliamentarian institutions into a division of powers Constitution. Two are generally used: the wide delegation of powers by Congress directly to the President and not to executive agencies, and the permission of 'legislative executive orders'.[35] The paradox is that these parliamentary institutions were introduced in the Constitutional reform of 1994 in order to limit presidential power no to enhance it.

Constitutional Economy limits for government.

The Constitutional Economy requires at least three elements for good government:

1. Protect capital assets against arbitrary seizure by private and public actors. Although there is a traditional legal protection against takings it is insufficient against 'regulatory takings'. These occur when government regulation diminishes the value of an asset in order that it could be bought later for a lesser price by the state itself or by members of the presidential group.

2. Support institutions that lower transaction costs in productive activity. To do this, a clear definition and the protection of property rights are usually mentioned. The use of the judicial system to lower transaction cost in claims against the government could be added, including the use of class actions, amicus curiae and a strict use of *stare decisis*.

3. Provide macroeconomic stability and essential public or merit goods and encourage the production of pure and applied knowledge. The desire of rulers to accept inflation in order to obtain resources and the use of exchange rates for political reasons limits macroeconomic stability.

[35] The term used in the Constitutions for the legislative executive orders' is '*decretos de necesidad y urgencia*' literally 'executive orders of need and urgency', which is ironic since there are hundreds of them and nor need or urgency were required in establishing them.

Leaders and winning coalitions.

Bueno de Mesquita[36] indicates that the political life of a leader depends on the loyalty of a winning coalition. A government buys support from his winning coalition in exchange for very generally defined public or merit and private goods. In this case the 'private goods' are grants and privileges to friends and represent a drawback to economic growth. Different strategies are appropriate for buying support from small winning coalitions than from large ones. The supply of growth friendly merit goods by the government is an increasing function of the size of the winning coalition. On the contrary the supply of private goods is in inverse function of the coalition size. A president who relies on a small number of political friends minimizes costs if he buys their support mainly with private goods, gifts and privileges. But that is impossible if he depends on a very large winning coalition, because he would have to minimize costs.

Eggerston, following Bueno de Mesquita, suggests that economic stagnation is inversely related to the size of a regime winning coalition. Therefore small winning coalitions, generally dictatorships would tend to perform poorly. [37] But small winning coalitions are not limited to non democratic governments and could include some elected systems where due to high transaction costs for other possible coalitions the government does not need to widen its political partners. This is the case of Argentina where the proportional electoral system[38] tends to fracture the representation in Congress of the most populated provinces. It also creates a tendency that political leaders including presidents come from under populated provinces where representation is less fractured, and that are over represented in Congress.[39] At the same time the characteristics of the tax system allows the federal government to collect taxes and distribute among the provinces following an established rule based in numerous criteria but not

[36] Quoted by Eggerston, Imperfect Institutions, op. Cit. P. 62.
[37] Eggertsson, Imperfect Institutions, op. Cit. P. 64.
[38] Argentina has party-list proportional representation and uses the D'Hondt a highest averages method for allocating seats.
[39] That is the case of Presidents Menem (1989-1999) which came from the small province of La Rioja, Nestor Kirchner (2003-2007) and Cristina Fernandez de Kirchner (2007…) who come from the even less populated province of Santa Cruz.

exclusively on the origin of the funds centralizes the 'power of the purse' in the presidential will. Since not all taxes are distributed, that being the case of export taxes recently established, the President could, following very general rules included in the budget, distribute funds among friendly governors and punish those who oppose him. This situation allows the President to govern with a minimal political coalition and following the model described by Eggerston, limit the country's economic growth.[40]

IV. Constitutional cultures.

The idea that a Constitutional use or convention could be considered a custom and therefore obligatory has an ancient tradition in Roman law[41] and was described by Dicey as a way to limit the sovereignty of parliament without a written constitution.[42] Although Dicey thought that 'Constitutional conventions' were not binding or had a similar power than an act of legislation, he considered they were part of political ethics. The distinction between what is binding and what is purely a political habit is critical to avoid the 'naturalistic fallacy'.[43]

Both Constitutional law and culture are locked in a dialectical relationship, so that Constitutional law both arises from and in turn regulates culture.[44] We can identify, for example, a specific subset of culture that encompasses extrajudicial and therefore not binding beliefs about the substance of the Constitution. This subset could be called 'Constitutional culture'; the legitimacy of Constitutional law depends in part upon what extrajudicial actors explicitly believe about the Constitution. Judges construct the separation between Constitutional law from

[40] Eggerston describes a model originally developed by Bueno de Mesquita in 2000.
[41] For a common usage be considered a custom and therefore binding it requires two elements, a continuous practice, the material element, and a conviction that it is obligatory, the moral element.
[42] The *"conventions of the constitution," which consisting (as they do) of customs, practices, maxims, or precepts which are not enforced or recognized by the Courts, make up a body not of laws, but of Constitutional or political ethics;'* A. V. Dicey. An Introduction to the Study of the Law of the Constitution (1885)
[43] The naturalistic fallacy or the is-ought problem was raised by David Hume , who noted that many writers make claims about what ought to be on the basis of statements about what is. In book III, part I, section I of his A Treatise of Human Nature.
[44] Robert C. Post, Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law. Harvard Law Review November, 2003 The Supreme Court, 2002 Term.

Constitutional culture but normally they allow this membrane to remain quite porous, facilitating a free and continuous exchange between Constitutional law and Constitutional culture. The courts can stiffen the membrane dividing Constitutional law from Constitutional culture whenever it perceives that Constitutional culture threatens Constitutional values that courts wish to protect. This occurs typically, but not exclusively, in the context of Constitutional rights. Even when safeguarding precious Constitutional rights, however, Constitutional law will nevertheless both reflect and regulate Constitutional culture, because rights protect Constitutional values that are themselves rooted in Constitutional culture. Constitutional law could not conceivably advance without incorporating the values and beliefs of nonjudicial actors. A necessary consequence is that Constitutional law will be as dynamic and as contested as the cultural values and beliefs that inevitably form part of the substance of Constitutional law. If Constitutional law emerges from an ongoing dialectic between Constitutional culture and the institutional practices of Constitutional adjudication, it is neither autonomous nor fixed. Judges and lawyers will continue to appeal to the autonomy of Constitutional law, however, precisely to the extent that they believe that an independent and determinate Constitutional law is the necessary foundation for judicial authority to constrain democratic legislation. Courts can neither create Constitutional law that is indistinguishable from culture, nor create Constitutional law that seeks unilaterally to subordinate Constitutional culture to the independent dictates of legal practice. But apart from these extreme positions, the courts must be guided by both practical tact and judgment, which has been called statesmanship[45]. Debate about how much weight should be assigned to rule of law virtues, as opposed to Constitutional culture, is a persistent feature of Constitutional adjudication.

But can a judicial decision change a strong economic culture? Because some Justices evidently do not place a high legal value on the Constitutional objective of protecting economic liberty, they viewed potential public criticism of the Court as a reason to abandon substantive due process doctrine.[46]

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[45] By Justice Brandeis.

[46] John Harrison, Substantive Due Process and the Constitutional Text, 83 Va. L. Rev. 493, 494-95 (1997) (suggesting that because substantive due process comes from beyond the text of the Constitution, its "precedential authority ...is less than it might seem")

Juan Bautista Alberdi[47] writing on the new and liberal Argentine Constitution of 1853 said it had 'abrogating power' over the existing legal system that was inherited from the colonial Spanish legislation, including a state monopoly of foreign trade.[48] Although great efforts were made between 1862 and 1930 to establish an open economy, a mercantilist economic culture prevailed since the 1930s when a corporatist Constitutional culture began which was sustained by a strong Keynesian normative economic discourse since the 40's onwards.[49]

V. The corporatist Constitution.

In strict terms corporatist Constitutions appeared in the midst of de 1930's as an alternative to presidential and parliamentarian constitutions, establishing a the 'functional' political representation as opposed to the democratic. There were no citizens but members of corporations that elected their representatives which by indirect voting schemes ended in corporatist chambers. The main example is the Portuguese Constitution of 1933 under the influence of Salazar that created the 'Estado novo'.[50] Under Fascism in Italy, all economic classes were organized into 22 guilds, or associations, known as "corporations" according to their industries, and these groups were given representation in a legislative body known as the *Camera dei Fasci e delle Corporazioni.* Although 'Corporatist' Constitutions in this strict view were basically extinct after World War II, much of the ideology and some institutions persisted.[51] Corporatist Constitutional culture has had a long

[47] Argentine publicist (29 August 1810 - 19 June 1884), he wrote several books that influenced the drafting of the Constitution of 1853.
[48] Juan Bautista Alberdi. Sistema Económico y Rentístico de la Constitución Argentina de 1853. Published originally in 1857. The Spanish colonial legal system was established in the Recopilación de Leyes de Indias (1688) see also, Juan de Solórzano y Pereyra. Política Indiana. (1640)
[49] Keynes influence in legal discourse was mainly due to the widespread influence of the last chapters, 23 and 24 of the General Theory. Expressions like the 'euthanasia of the rentier' and the call for a new mercantilism were widely quoted by economists and politicians. Cf. Raúl Prebisch. Introducción a Keynes. Fondo de Cultura Económica. 1947.
[50] António de Oliveira Salazar, prime minister of Portugal from 1932 to 1968 was a professor of economics at the University of Coimbra.
[51] As the Economic and Social Councils, particularly in France, 'Conseil Economic et Social' and in the organization of international institutions, United Nations, OAS, and particularly in the International Labour Organization.

intellectual tradition that subsists in many countries with deleterious economic effects, the unwanted consequences of good intentions.

The origins of corporatist culture could be extended to the debate of social rights that appeared as a reaction to the appalling social conditions in factories in the midst of the XIX century. The image of child labour, sweatshops and slums were a nightmare of Victorian times. The first reaction was the socialist movement in particular the publication of the Communist Manifesto in 1848 and its more formidable sequel in The Capital volumes between 1867, 1885 and 1894. One of the reactions to socialism was the idea of creating a humane system where workers and employers would be part of the same enterprise. Pope Leo the XIII in the Encyclical letter *De Rerum Novarum* described this idea of an enterprise which includes workers. The worker was no longer selling his energy for a pay in the market but was part of a joint organization for the creation of wealth. The Pontiff's description expressed the idea that the problem of capitalism was that the worker no longer was the owner of the product of his work, and that was a negative situation in relation with the work of the artisan, who was the owner of his own tools and of the product of his work. He was creative and at the same time enjoyed his task since he could see the results of his efforts because he controlled the whole of the productive process. In the mind of some the artisan was associated with the medieval society[52], this was an idealized and imaginary world where a respect existed for the artisan and his work.[53] The view of a new medievalism that would replace capitalism was inside the corporatist state. The idea to establish corporations and medieval organization is visible in Fascism and Nazism, and more obvious in Franquist Spain perhaps because it lasted longer.

Curiously enough the creative power of artisans is not medieval but from the Renaissance where the whole power of creation unfettered by the strict medieval regulations of guilds. Guilds were finally abolished in the French revolution by

[52] Georges Duby. Les trois ordres ou l'imaginaire du féodalisme. Gallimard, 1978; Johan Huizinga The Waning of the Middle Ages: A Study of the Forms of Life, Thought and Art in France and the Netherlands in the XIVth and XVth Centuries. Doubleday, 1954.

[53] Richard Sennet. The Artisan. For an idealized view of the manners of the Middle Ages see Sir Harold Nicholson. Good Manners. C.S. Lewis. The Allegory of Love: A Study in Medieval Tradition. Oxford University Press, 1958

the law Le Chapelier and were in a way the start of modern capitalism. This abolition was to be criticized by corporatist and socialist thought, the former because they considered guilds like the family to be a natural organization of society; and the latter because they considered that they were a predecessor of trade unions.

A debate was established in the first part of the XXth. century between corporatist and socialist views that reserved for themselves the defence of 'modernity' and 'social progress' as opposed to the reactionary image of capitalism. Both fascism and communism have disappeared from everyday politics, so it is difficult nowadays to envisage that for a long time they were the centre of political discourse even after World War II.[54]

A. Quadragesimo Anno

The Encyclical letter ***Quadragesimo Anno,***[55] had an enormous influence in the promotion of a corporatist view of society and government. This encyclical letter is generally associated with the principle of subsidiarity, which was transformed into a Constitutional principle of the European Union. [56] But there are less quoted parts of this letter that were doubtlessly a product of the difficult times when it was written but that still influence the Constitutional culture of corporatism. It condemns 'liberalism' and proposes new ways of organize economic production and society and this has brought some the confusion about its meaning. 'Liberalism' indicates a free market economy but in the XIX and part of the XX centuries in Catholic countries it particularly was understood as

[54] Schumpeter, Capitalism, Socialism and Democracy could be mentioned as an example about how difficult the defence of capitalism was. In many European nations corporatist ideas were quoted as an intellectual alternative to socialism.

[55] *Quadragesimo Anno, Encyclical on Reconstruction of the Social Order, His Holiness Pope Pius XI, May 15, 1931.* Its name came from being published forty years after *Rerum Novarum.*

[56] The principle of subsidiarity is described in paragraph 80. *The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of "subsidiary function," the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.*

the party of secularism.[57] This confusion had and has a vast following indicating that it was impossible to be religious and liberal since the last word implied your agnosticism and secularism. In this way Pius XI praises the previous Encyclical *Rerum Novarum 'For it boldly attacked and overturned the idols of Liberalism,'* and also reminds of '*the unbridled greed of competitors."*

Some paragraphs of the *Quadragessimo Anno* give the basis of corporatist culture.

82. The social policy of the State, therefore, must devote itself to the re-establishment of the Industries and Professions. 'Re establishment means in this case a corporate state similar to the middle ages. *But complete cure will not come until this opposition* (between employers and workers) *has been abolished and well-ordered members of the social body--Industries and Professions--are constituted in which men may have their place, not according to the position each has in the labor market but according to the respective social functions which each performs.*

(83)… *For under nature's guidance it comes to pass that just as those who are joined together by nearness of habitation establish towns, so those who follow the same industry or profession--whether in the economic or other field--form guilds or associations, so that many are wont to consider these self-governing organizations, if not essential, at least natural to civil society.*

84. Because order, as St. Thomas well explains,[58] is unity arising from the harmonious arrangement of many objects, a true, genuine social order demands that the various members of a society be united together by some strong bon…. Just as the unity of human society cannot be founded on an opposition of classes, so also the right ordering of economic life cannot be left to a free competition of forces. For from this source, as from a poisoned spring, have originated and spread all the errors of individualist economic teaching.[59]

There is also an attack to executives of public corporations which a qualified of economic *dictators.[60] Free competition has destroyed itself; economic dictatorship has*

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[57] In the civil wars in Spain during the XIX, generally called 'Carlist' due to the name of the pretender, the two parties were called 'tradicionalistas' which could be translated as 'traditionalists' and 'liberales', liberals.

[58] St. Thomas, Contra Gentiles, lll, 71

[59] There is a description in the Encyclical of the structure of fascist trade unions. *91. Recently, as all know, there has been inaugurated a special system of syndicates and corporations of the various callings which in view of the theme of this Encyclical it would seem necessary to describe here briefly and comment upon appropriately. 94. Strikes and lock-outs are forbidden; if the parties cannot settle their dispute, public authority intervenes.*

[60] *105. In the first place, it is obvious that not only is wealth concentrated in our times but an immense power and despotic economic dictatorship is consolidated in the hands of a few, who often are not owners but only the trustees and managing directors of invested funds which they administer according to their own arbitrary will and pleasure.*

supplanted the free market; unbridled ambition for power has likewise succeeded greed for gain; all economic life has become tragically hard, inexorable, and cruel. (109)

The Corporatist view did not last in the pontifical documents. The Apostolic Letter written by Pope Paul VI *Octogesima Adveniens* promulgated on May 14, 1971 written for the occasion of the eightieth anniversary of Pope Leo XIII's encyclical *Rerum Novarum* discusses themes such as securing democratic foundations in society.

1. Autarchy and the attraction for big institutions.

The economic rule of corporatism is autarchy, a closed economy where an intense protection is established to produce all goods and services at home. This strict mercantilism was applied in Italy and Spain but also had a strong influence in Argentina. An Argentine economist coined the motto '*vivir con lo nuestro*'[61] reminiscent of Keynes article: *'Let goods be homespun'*. [62]

Corporatist mediation by the State is associated with big institutions that represent a large part of the economic, social or labor activity. The Corporatist State needs that every organization and individual be a member of a corporation. No one can be outside a corporation and in a pyramidal structure they form the big organizations. Associated with this hierarchical pyramid there is a desire that all economic activity be done by big companies, that could be simpler to regulate but mainly simpler to mediate with in case of conflict o eventually simpler to negotiate with.

VI. The Constitutional economics of dynamism and inclusion.

[61] Which literally means 'to live with our own'. Aldo Ferrer. Vivir con lo nuestro: Nosotros y la globalización. Fondo de Cultura Económica, 2002 For a general defense of a closed economy see, Aldo Ferrer, La Economía Argentina. Fondo de Cultura Económica. It has many editions.

[62] *'But let goods be homespun whenever it is reasonably and conveniently possible, and, above all, let finance be primarily national.*' John Maynard Keynes, "National Self-Sufficiency," The Yale Review, Vol. 22, no. 4 (June 1933), pp. 755-769.

In general terms, innovation occurs whenever people invent new technological, procedural, and organizational recipes to use arrange and rearrange in increasingly more valuable ways. The focus here is on novelty: given scarce resources, the issue of growth is not about doing more and more of the same stuff but rather about inventing new methods, procedures and techniques that generate more economic value per unit of unprocessed resources.[63] Incentives to innovate flow from the ability to profit from innovative ideas in the form of new products; innovators will primarily appropriate these profits to "keep ahead of the parade"[64] by maintaining their technological capacities. None of these incentives limit competition as the most efficient market structure in the case of ideas, innovations, and new recipes. History witnesses that with respect to investments in the production of ideas, free market systems have historically shown an unrivalled capacity to promote both the growth of technological knowledge and its transformation into new, better, and more valuable products and cheaper production processes. Capitalism has reached this goal mainly by combining decentralization (and therefore multiplicity and diversity of innovative efforts), which needs the avoidance of regulation that prevents the access to the markets, with the certainty that the product of their industry is not expropriated by the state by excessive regulation or by the obligation to be associated with friends of government. [65]

A. The Constitution of inclusion.

Is the quest for inclusion compatible with Constitutionalism? Answers are varied; one possibility is the inclusion in the Constitutional text of social rights as originated in Mexico in 1917 and Germany in 1918, in vast definitions that have been described as 'catalogues of illusions'.[66] But a more useful Constitutional

[63] Giovanni Dosi, Luigi Marengo, Corrado Pasquali Knowledge, Competition and Innovation: is strong IPR protection really needed for more and better innovations? 13 Mich. Telecomm. & Tech. L. Rev. 471.
[64] George J. Stigler, Industrial Organization and Economic Progress, Presentation at the University of Chicago (November 10-12, 1955), in The State of the Social Sciences 273 (L.D. White ed., 1956).quoted by Dosi, Marengo and Pasquali. Knowledge, competition and innovation. Op. cit.
[65] Commentators indicate that in Argentina there is a vast group of businessmen that receive subsidies and other forms of protection from the government, public expenditures are 33% of the GNP. Article by José Luis Espert in La Nación, Buenos Aires,¶November 09, 2008.
[66] None of these Constitutions did have any influence in the development of social inclusion, although for different reasons, but mainly for the high cost of implementing social rights. For a general treatment of the

reading of inclusion was incorporated in the already mentioned note N° 4 in the case *United States v. Carolene Products Company* Justice Stone suggested there were reasons to apply a more exacting standard of judicial review in some cases among them legislation aimed at discrete and insular minorities, who lack the normal protections of the political process, should be an exception to the presumption of Constitutionality, and a heightened standard of judicial review should be applied. This idea has greatly influenced equal protection jurisprudence, and judicial review:

> *…the review of statutes directed at particular religious … or national … or racial minorities …: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.*[67]

Bruce Ackerman thinks that the definition of discrete and insular minorities should be enlarged. That the victims of sexual discrimination or poverty, rather than racial or religious minorities, will increasingly constitute the groups with the greatest claim upon *Carolene*'s concern with the fairness of pluralist process.[68] The problem with discrete minorities is that they cannot forward their problems to the political system or if they do, it would have no effect. Following Albert Hirschmann they cannot apply the 'voice' that is to complain about it or the 'exit', that is to leave, but only the 'loyalty'.[69] Only wait and hope for the best to happen.

Another possible interpretation is that of judicial deference to political authorities if the case is related to the regulation of economic liberties. In this view judges protect political participation and the other rights listed in the Bill of rights and

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subject see: Stephen Holmes, Cass R. Sunstein, The Cost of Rights: Why Liberty Depends on Taxes, W. W. Norton & Company, 2000.

[67] United States v. Carolene Products Company, 304 U.S. 144 (1938),[was an April 25, 1938 decision by the United States Supreme Court. The case dealt with a federal law that prohibited filled milk (skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream) from being shipped in interstate commerce. A wide analysis of this case is made in John Hart Ely, Democracy and Distrust: A Theory of Judicial Review. Harvard University Press, 1980. Pp. 77 ss.

[68] Bruce A. Ackerman, Beyond Carolene Products 98 Harv. L. Rev. 713. Ackerman is critical of the indefinition of 'discrete' and 'insular' as legal terms, basically because he thinks that the question should be resolved through values more than procedures in the interpretation of the Constitution.

[69] A. Hirschman, Exit, Voice and Loyalty (1970).

pretty much leave it to legislatures to regulate economic affairs. The only condition for valid economic regulation is reasonableness. [70] But this division between civil liberties protected and economic liberties less protected, an interpretation called *dualism* by Richard Posner, has no other purpose than to enhance political discretion. This dichotomy only fortifies public officials will in pushing economic regulation outside the public interest and into their own personal interests.

VII. The Argentine road to economic decadence.

The Argentine Constitutional economy has both bad incentives and a bad Constitutional culture which prevent the development of both dynamism and inclusion. Strategic political considerations push rulers into bad economic policies. At the same time, a strong corporate culture favours the resulting mix of authoritarianism, stagnation and social exclusion.

If by a dynamic economy is meant one that is constantly innovating to reduce costs of expanding markets to improve demand and one which is constantly weeding out producers that have not innovated or done it badly,[71] we have to recognize that Argentine Constitutional economy impedes dynamism.

Both norms and constitutional culture obstruct the complying of the three structural parameters of dynamism:

1. The capacity that owners of wealth and of borrowers have to invest in the economy, including free entry rather than charter and licenses, rent seeking and corruption.

[70] Walter Murphy. Constitutional Democracy. Creating and maintaining a just political order. John Hopkins Univ. Press. 2007, p.287.
[71] Edmund S. Phelps, Enterprise and Inclusion in Italy. Kluwer Academic Publishers. 2002. P. 1.

2. The extent to which large stake owners of firms can exert control over self interested managers and can exert autonomy form interventionist state agencies.
3. The degree to which poorly performing enterprises must undergo the discipline of private capital financing and the risks of bankruptcy without financial rescue by the state.[72]

Argentine regulation prevents the application of these three principles, by the existence of widespread rent seeking practices; by the control of enterprises and economic activity by interventionist state agencies; and by the protection of inefficient enterprises by public financing and by the bankruptcy legislation and practice. All these institutions limiting dynamism are not formally written into the Constitution but are derived from a wider legal and cultural practice so strong in its scope and compliance that has the characteristics of a constitutional decision. It's what was defined as a Corporatist Constitution.

The Argentine Republic is a laboratory case of the failure of the corporatist political economy. The origin of this well rooted political and economic corporatism is due in great part of the fear of communism that was very strong before World War II and gave rise to the fascism in the 1930's.[73] After the war, even when the purely fascist influence had diminished, the new political movement the 'Peronismo' had a very strong corporatist political theory.[74] Although the Peronism had at the time a relatively limited political theory there are two documents worth mentioning, the debates of the Constitutional Convention of 1949, which allowed the permanent reelection of the President, and the Conference given by Juan Domingo Peron in 1950 called *'La Comunidad*

[72] Edmund Phelps op. cit. Enterprise and Inclusion in Italy, p. 2.
[73] In 1930 there was a nationalist coup d'etat in Argentina which considered the possibility of changing the Constitution and the creation of a corporatist state. The division of the army prevented this happening. In the same year in Brazil a similar coup happened although not of a purely military character. The new president Getulio Vargas succeeded in establishing a corporatist Constitution in 1936. It was called the 'Estado Novo', the 'new state' and followed the Italian and Portuguese influence.
[74] Peron had participated as a young officer in the 1930 coup, afterwards he was sent to Italy to study with the Alpine mountain forces. In later years he mentioned that had met Mussolini and even had given him some advice, though the story was an invention. Cf. Joseph Page. Peron: A BIOGRAPHY. Random House; 1983.

Organizada'.[75] The 'organized community' required that society respected the natural order and that no one could be outside the organization.[76]

1. The political system: the 'conductor'.

The Argentine presidential system evolved into what is called 'hyper presidentialism' due to bad incentives, an example of this is that the President is at the same time the leader of the governing political party. This unity in the political leadership is traditional in parliamentary systems but less so in the presidential ones. It was corporatist political culture that established the rise of the *'conductor'*. The expression *'conductor'* for political leader and *'conducción'* for leadership was introduced by Perón since the origins of his first presidency in 1946 and was established in the Argentine political vocabulary. In 1952 Perón himself gave a series of conferences for political and trade union leaders which were edited as the *'Manual de Conducción Política'*[77] He introduced terms from military thought as: Strategic and tactical leadership. [78]

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[75] The 'Organized Community' Speech given by the President of the Republic General Juan Domingo Perón in the National Congress of Philosopy, Mendoza 1949. Some passages could be quoted, the language is turgid, similar to the spechees of the corporatists writers of the 30's. *Superación de la lucha de clases por la colaboración social y la dignificación humana…*
…La sociedad tendrá que ser una armonía en la que no se produzca disonancia ninguna, ni predominio de la materia ni estado de fantasía. En esa armonía que preside la norma puede hablarse de un colectivismo logrado por la superación, por la cultura, por el equilibrio. En tal régimen no es la libertad una palabra vacía, porque viene determinada su incondición por la suma de libertades y por el estado ético y la moral.
La justicia no es un término insinuador de violencia, sino una persuasión general; y existe entonces un régimen de alegría, porque donde lo democrático puede robustecerse en la comprensión universal de la libertad y el bien general, es donde, con precisión, puede el individuo realizarse a sí mismo, hallar de un modo pleno su euforia espiritual y la justificación de su existencia.
… En esta fase de la evolución lo colectivo, el "nosotros", está cegando en sus fuentes al individualismo egoísta. Es justo que tratemos de resolver si ha de acentuarse la vida de la comunidad sobre la materia solamente o si será prudente que impere la libertad del individuo solo, ciega para los intereses y las necesidades comunes, provista de una irrefrenable ambición, material también.
[76] The main institutions, the State, the Church, the Armed Forces, the trade unions centralized in the General Confederation of Labor, the enterprises in the General Economic Confederation, the students in the General University Confederation and secondary students in the Union of Secondary Students, there was also el Movimiento as the official party was described. Many of these institutions have disappeared but many of the ideas that originated them and the speech that described them survived.
[77] Cf. Juan Domingo Perón. Manual de Conducción Política. Editorial Freeland, Buenos Aires, 1971. Some of the definitions in the course included: *Las misiones de la conducción estratégica en la dirección del conjunto del Movimiento Peronista están bien determinadas:1. Mantener la unidad del Movimiento, imponiendo por todos los medios la Unión, Solidaridad y Organización. 2. Mantener la orientación ideológica y la unidad doctrinaria. 3. Mantener y desarrollar las relaciones internacionales del Movimiento Peronista. 4. Aprobar y revisar las resoluciones tácticas que, por su importancia, puedan tener aspectos que interesan a la conducción estratégica.*
[78] In Spanish, *'Conducción estratégica y conducción táctica.'*

2. Congress, Federalism and the tax system.

The distribution of the power to tax is the basis of Argentine political power. Local government originated in Argentina in 1820 and the first federal Constitution was sanctioned in 1853 after thirty years of civil wars. Although governors have important political powers the collection and distribution of taxes by the federal government among the provinces has limited federalism and transformed the influence of Congress. This has enhanced the power of the President overall and of the governors of provinces over their representatives in Congress. The mixture of centralized collection of taxes and the proportional electoral system with party lists is at the basis of the political evolution that created a strong president, a weak Congress and authoritarian provincial governors. Fiscal federalism considerations are a factor in almost every policy issue, adding transaction difficulties and rigidities to policy making.

Legislators depend from the governors that are the leaders of the local political parties. It is governors who make the electoral list of their party for the general elections. This legislative dependence enhances the presidential power since he can negotiate needed legislation with governors, and governors have a dependency from the president's power of the purse.[79] Governors receive the product of taxes collected by the federal government and redistributed according to a fix plan independent of how much each province has effectively integrated into the common fund. The federal government policy is generally to impose taxes that are not to be distributed between the provinces. This tax policy makes the governors dependent from the federal government funds that are distributed directly by the president on a political basis. And through the governors' influence, the legislators become dependent from the president. There is a symbiotic interaction between national and provincial policy making that operates through political and federal fiscal channels.[80]

[79] The Argentine slang is even more eloquent, it is called the 'box' (caja).
[80] Pablo T. Spiller, Mariano Tommasi. The Institutional Foundations of Public Policy in Argentina. A Transactions Cost Approach. Cambridge University Press 2008. p. 89

3. The proportional electoral systems and fracture in representation.

Argentine legislators have the wrong incentives. To be a legislator you have to be in the electoral list since there are no individual constituencies. To be on the list they have to obey those who make the list that is the provincial governors and the political bosses in the case of opposition parties. This makes them dependent from the political leaders and at the same time distant from public opinion, the personal popularity of legislators is basically irrelevant for their reelection, on the contrary if they become too popular the political bosses may be reluctant to keep their name on the list. Having only a distant contact with their electors, legislators prefer that the main and less popular decisions are taken by the President and avoid any remnant of political pressure from their constituents.

At the same time, the Argentine party system has evolved from bipartisan to pluripartisan with a dominant party. This change was determined and the incentives created by the electoral system in spite of a strong political culture for bipartisanship that existed for over a century. The electoral system was changed in 1962 from a majoritarian to a proportional party list system. Following the first law of Duverger, majoritarian electoral systems tend to the consolidation of a two party system, but proportional systems tend to fracture representation.[81] This is what happened in Argentina, where the new plural party system created by the electoral legislation helped the consolidation of a dominant party. This party does not obtain a majority of votes but is simply bigger than the fractured opponents.

4. The labor system.

Argentine labor system was originated in the Italian laws of the 1930's and established in the period between 1936 and mainly after 1943.[82] It has had many reforms but basically it still includes:

[81] Maurice Duverger. *La République des citoyens*. Ramsay, 1982

[82] In 1943 a nationalist coup d'etat overturned the conservative but not sufficiently pro Allied government of Argentina. In that period then Colonel Peron started the application of labor laws taken from Italian models. As mentioned before, Peron had military training in Italy before World War II.

1. The labor contracts. Individual labor contracts follow the Italian 'Carta del Lavoro'[83]. The basic regulation is similar to all labor contracts and establishes a compensation paid by the employer when he ceases the labor relation.
2. Centralized trade unions. There is one authorized trade union by activity.[84]
3. Compulsory affiliation to trade unions. If the employee declines to be a member he has to pay compensation to the trade union.
4. Health services organized by trade unions.[85]
5. Binding Collective contracts for all employers and employees in the same branch of activity. There is no collective bargaining by enterprise
6. Collective contracts are binding to all employers and employees in the same branch of activity.
7. A specialized judicial system for labor disputes.

5. A closed economy.

Due mainly to the influence of Raúl Prebisch Argentina adopted in the 40's the doctrine of import substitution industrialization, in which a nation isolates itself from trade and tries to industrialize using only its domestic market to promote growth.[86] This new mercantilism evolved into a tax system that was agreed with industrial manufacturers, this included negotiation of import taxes to avoid foreign competition, subsidies to export of industrial goods and the exemption of income taxes and VAT. When the bilateralism of foreign trade was replaced by multilateralism in the sixties then dumping rules and procedures were established to protect industry from foreign imports. This neo mercantilism evolved into a strong incentive for rent seeking.

[83] The Carta del Lavoro was approved by Gran Consiglio Fascista on April 21st. 1927 and was copied by Argentine legislators in the 30's. See Ludovico Barassi. Tratado del derecho del trabajo, translated by Mario Deveali, Alfa, 1953, which makes a comparison between the two systems.
[84] The Argentine Supreme Court has declared this limitation unconstitutional on November 2008.
[85] This is the main funding for the political activities of trade unions. This concession was given to trade unions by the military government in 1967.
[86] For a general and somewhat sympathetic view of Prebisch' ideas see, Edgar J. Dosman. The Life and Times of Raul Prebisch, 1901-1986 McGill-Queen's University Press 2008.

A. A rent seeking constitution.

Both wide legislative delegation and autonomous legislative executive orders [87] are the cause of the lack of common criteria in economic regulation, and each sector has its own guidelines, therefore there is ample space for rent seeking and the buying of regulation.

The reasons for executive legislation can be found in the influence of parliamentarian institutions that are exogenous to presidential system. In perhaps the ultimate paradox of the Argentine constitution it is the introduction of parliamentarian practices that were intended to limit the hyperpresidentialism that have enforced it.

In parliamentarian systems the government is chosen by and represents the political will of parliament, it is the depositary of its trust and if this ends, it can be forced to resign by a vote of censure. A principal agent relation exists between Parliament and Government, as his agent government legislates following the parliamentary instructions. This system is rightly called of 'confusion of powers' as opposite to 'separation of powers' another name of the presidential government.

But in a government with separation of powers to give the President the powers of a parliamentary government, including the capacity to receive wide delegations from Congress and to sign legislative decrees, is a way not only to court dictatorship but also and mainly to grant privileges to political friends and cronies without much publicity. It is the basis of a 'rent seeking' Constitution.

VIII. The Ineffectual absolutism.

[87] Known as decrees of need and urgency, (*decretos de necesidad y urgencia).*

Hyperpresidentialism is a paradoxical despotism, it has abuse of power and impotence to govern, arbitrariness and indecision, the illusion of infallibility and the accumulation of unresolved problems. It is an all powerful universal competence that has no positive results.[88] The product of the mix of perverse incentives hidden in the Constitution together with the corporatist culture, although personal vices of rulers need not be excluded. This is also enhanced by the political practice of presidents as despotic rulers of small provinces.

With this double problem of bad incentives and authoritarian culture the Argentine hyperpresidentialist state cannot make the necessary reforms needed for stable growth. In this way paradoxes appear, a large state budget for the production of energy produces rationing, extraordinary international prices for agricultural commodities diminish local production, and important economic growth diminishes investment and the flight of capital.

[88] Jean François Revel. L'absolutisme inefficace. Plon. 1992. p. 143.