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## Toward Democratic Consolidation? The Argentine Supreme Court, Judicial Independence, and the Rule of Law

Christopher J. Walker

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*Christopher J. Walker\**

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Democratic consolidation requires serious and continuous effort over a long period; it does not result from a single grand gesture, nor is it the task of a single administration. It is a particularly long process given the difficult conditions under which Latin American democracies operate . . . . General awareness that judges—particularly Supreme Court Justices—do not fulfill their duties of guaranteeing rights or protecting the division of power among the branches is a grave symptom; a loss of confidence in institutions ultimately leads to social dissolution. Preserving the public trust is thus the most important duty of public officials.

— Raúl R. Alfonsín, President of the Republic of Argentina, 1983-89<sup>1</sup>

## I. INTRODUCTION

In June 2001, I learned an important lesson: do not buy airplane tickets from a company that is dangerously nearing bankruptcy. As the taxi approached the corporate headquarters of *Aerolíneas Argentinas* where I was to seek a refund for my airfare, I was taken aback by the open fires and riots in the streets of downtown Buenos Aires. The taxi driver commented that the country was nearing a complete economic collapse,

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1. Raúl R. Alfonsín, *The Function of Judicial Power During the Transition, in* TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY 49, 52 (Irwin Stotzky ed., 1993) [hereinafter *TRANSITION TO DEMOCRACY IN LATIN AMERICA*].

and that losing their prized national airline to bankruptcy would only add insult to injury. Several months later, economic chaos arrived with the devaluation of the peso, the resignation of President De la Rúa, and the ensuing revolving door of interim presidents. With respect to economic stability in Latin America, Argentina went “from poster child to basket case”<sup>2</sup> in a matter of months. Following the scholarship of Samuel Huntington<sup>3</sup> and others,<sup>4</sup> many believed that economic instability invariably would lead to regime instability; democracy in Argentina must have been approaching a “third wave reversal.” However, a more careful analysis revealed quite the contrary. The rest is history.

Although Argentina still faces problems with respect to economic stability and public support for the current administration, democracy remains “the only game in town.”<sup>5</sup> Economic regime performance influences public support for government. Nevertheless, the Argentine public did not rebel against the institution of democracy. Even during this extreme economic crisis, policymakers, for the most part, abided by democratic rules and processes.<sup>6</sup> Consequently, democracy in Argentina is, and will most likely remain, the only game in town. To explain why Argentina did not transition away from democracy and is more consolidated than expected, scholars have reached beyond the minimalist conception of democracy—that of free, fair, and regular elections<sup>7</sup>—to examine political party structures, non-electoral aspects of democracy, and

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2. Steven Levitsky & María Victoria Murillo, *Argentina Weathers the Storm*, 14 J. DEM. 152 (2003).

3. SAMUEL HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 290 (1991).

4. See, e.g., GUILLERMO O'DONNELL, *MODERNIZATION AND BUREAUCRATIC-AUTHORITARIANISM* 53 (1973) (positing that threats to economic development in developing democracies in Latin America would lead to military regime reversal); Alfred Stepan, *The New Professionalism of International Warfare and Military Role Expansion*, in *ARMIES AND POLITICS IN LATIN AMERICA* 134 (Abraham F. Lowenthal & J. Samuel Fitch eds., 1986) (arguing that the military will intervene during economic crisis if democracy is not sufficiently consolidated); Guillermo O'Donnell, *Reflections on the Pattern of Change in the Bureaucratic Authoritarian State*, 13 LAT. AM. RES. REV. 3 (1978); K.L. Remmer & G.W. Merks, *Bureaucratic Authoritarianism Revisited*, 17 LAT. AM. RES. REV. 3 (1982) (agreeing with O'Donnell that the military will respond with some degree of repression to eliminate the threat and with some degree of de-politicization so that economic issues can be treated as technical and not political); Stepan, in *ARMIES AND POLITICS IN LATIN AMERICA*, *supra*, at 144 (arguing for the military's role under “New Professionalism,” in that Latin American military powers are likely to intervene in domestic rule when they feel the values of internal security and national development are threatened).

5. JUAN LINZ & ALFRED STEPAN, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE* 5 (1996).

6. Levitsky & Murillo, *supra* note 2, at 156-60.

7. HUNTINGTON, *supra* note 3, at 4.

the rule of law. These accounts can be woven together to form a more complex picture of democratic consolidation in Latin America.

While these other aspects of democratic consolidation have been explored, little attention has been paid to the role of judiciary in strengthening democracy and the rule of law in Latin America, with even less attention on the Argentine judicial system. In this Article, the role of the courts in consolidation will be examined through the Argentine case study. Part II outlines the current state of the literature on democratization and the rule of law with respect to Latin America, while Part III reviews what has been written about the Latin American judiciary and its influence on the rule of law, emphasizing the importance of judicial autonomy and independence for consolidating democracies. Part IV takes up the task of evaluating the development of the judiciary and the rule of law in Argentina—specifically focusing on the Argentine Supreme Court from its constitutional founding in 1853 through the end of the twentieth century. Part V then evaluates the current-day Argentine predicament with respect to the Supreme Court's role during the turn-of-the-century economic crisis and President Kirchner's present judicial reform efforts.<sup>8</sup>

The lessons learned from the Argentine case study are many and diverse, but several general themes deserve mention in this Introduction. First, as illustrated by President Alfonsín's statement at the Article's onset, democratic consolidation takes time to develop, and as a primary guardian of the rule of law and an important horizontal check on presidential and legislative action, the judiciary plays an important role in such consolidation. Unfortunately, Argentina has not been patient. And this impatience has been an Argentine tradition tracing back to its constitutional founding. For instance, instead of developing its own rule of law and judicial system, the Argentine Framers copied the American system and relied on its track record to establish legitimacy. Subsequent rulers did not respect the American formal institutions, and informally manipulated the courts as they saw fit. Consequently, judicial institutions never became firmly rooted in the Argentine system, and their influence on protecting the rule of law depended almost entirely on who held the executive power. This foundational deficiency played an important

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8. This Article does not pretend to provide an up-to-the-minute report. In the time between writing and publication, the situation in Argentina has further developed, and much of that development has not been captured here. For more information on these current developments, see Christopher Jay Walker, *Judicial Reform in Latin America: Is Judicial Independence Enough to (Re-)Build the Rule of Law in Argentina?*, 14 SW. J. L. & TRADE AM. (forthcoming Sept. 2007), available at <http://ssrn.com/abstract=922393>.

facilitative role in the twenty-first-century economic crisis explored in Part V.

This finding leads to a second general theme: informal institutions and practices are far more important and explanatory than formal counterparts. To understand the role of the judiciary in Argentina, the constitutional text does not tell the entire story. One has to look at how the text was applied and how the courts responded. For instance, the Argentine Supreme Court's independence cannot be clearly ascertained by solely looking to the Argentine Constitution—which grants the same powers as its American counterpart—or even by looking at the text of the Court's decisions. In Latin America, to borrow a line from another context, these “programs never worked as they were meant to work on paper.”<sup>9</sup> Consequently, an interested observer must look beyond court opinions and constitutional text to examine the historical, economic, and political context in which the judiciary functioned. For that reason, this Article traces the Argentine Supreme Court's development back to its constitutional origins in order to better understand why the institution behaves as it does today.

Lastly, public trust in a democratic institution is essential for the institution to be able to carry out its duty—in this case, for the judiciary to serve as the primary guardian of the rule of law. The lack of public confidence in the Argentine Supreme Court—a distrust that is grounded in the fact that the Court has historically been a hollow institution at the mercy of the executive—has plagued the institution's ability to uphold the rule of law. In Argentina, as well as throughout much of Latin America, the executive has historically ignored this hollowness. The Argentine economic crisis of the twenty-first century, however, provided a wake-up call about the importance of the rule of law and of horizontal accountability. Consequently, President Kirchner is now pursuing judicial reforms that aim at restoring public trust in the judiciary with the hope that public legitimacy will strengthen the institution's ability to uphold the rule of law. However, even Kirchner's reform efforts alone will not be sufficient. As Alfonsín explains, the rule of law and judicial independence cannot be rebuilt overnight; reconstruction requires “serious and continuous effort over a long period.”<sup>10</sup> This hard-learned lesson is one of which Argentina's neighbors should take note.

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9. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 232 (2d ed. 1985) (internal citations omitted) (referring to national land law programs in the United States during the nineteenth century).

10. Alfonsín, *The Function of Judicial Power During the Transition*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA*, *supra* note 1, at 49.

## II. DEMOCRATIC TRANSITION AND CONSOLIDATION IN LATIN AMERICA

Before exploring the role of the courts in democracy and the rule of law, existing definitions and frameworks for understanding democratic transition and consolidation should be examined. The ancient Greek *polis* gave birth to the classical concept of democracy, or rule by the people, but its modern version has evolved in complexity and description. These definitions range from basic electoralism litmus tests to more complex frameworks of liberal democracy. In 1942, Joseph Schumpeter summarized the modern-day, minimalist rendering of democracy: "The democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire power to decide by means of a competitive struggle for the people's vote."<sup>11</sup> This Schumpeterian formulation focuses on the democratic procedures of transferring power—through free, fair, and regular (FFR) elections. In this Part, the minimalist definition will first be explored, followed by more complex frameworks for democratic transition and consolidation.

### A. *From the Minimalist, Electoral Definition to Liberal Democracy*

Perhaps considered the most commonly used Schumpeterian formulation of democracy, Samuel Huntington offers a simple procedural definition: a country is a democracy if the collective decision-makers are selected by FFR elections with free contestation and nearly universal suffrage.<sup>12</sup> By treating democracy as a dichotomous variable and analyzing countries accordingly, Huntington empirically identifies five patterns of democracy—cyclical, second-try, interrupted, direct transition, and decolonization—and also outlines three democratic transition paths: transformation, replacement, and transplacement.<sup>13</sup> To determine whether

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11. HUNTINGTON, *supra* note 3, at 6.

12. *Id.* For other examples of this minimalist definition of democracy, see Adam Przeworski et al., *What Makes Democracies Endure?*, 7 J. DEM. 39 (1996).

13. With the examples of Spain, Brazil, and Hungary, transformation occurs when the political elites in power initiate democratization, usually out of fear, overconfidence, sense of right, or expected international benefits. The opposition is usually quite weak. Replacement takes place when the opposition group steadily grows in power and overthrows the government. After the fall, it is difficult to keep the opposition factions together, and the newly formed democracy can become quite unstable. Transplacement, which occurred in Poland, Uruguay, Korea, and Czechoslovakia, happens when the government and opposition have equal footing (though both weak on their own) and decide to compromise. Usually transplacement arises because the government in power fails in liberalization efforts, and a standoff between the government and opposition occurs during which compromises must be made. See HUNTINGTON, *supra* note 3, at 127-62.

a country is democratically consolidated—i.e., that it is unlikely to revert to authoritarian rule—he offers the “two-party turnover test.” If power can be transferred peacefully by FFR elections from one party to its opposition and then back again or to another party, he argues, the chance of reversal to a nondemocratic regime is highly unlikely.

This emphasis on electoralism has led to extensive research on party systems and political parties in Latin America.<sup>14</sup> Jorge Domínguez, for example, argues that political parties have incentives to be reliable and responsible—thus, ensuring FFR elections—in order to remain in power.<sup>15</sup> Some scholars have focused specifically on political parties and the party system in Argentina,<sup>16</sup> while others have done similar analysis on parties in Chile<sup>17</sup> and other neighboring countries.<sup>18</sup> Understanding parties in Latin

14. See, e.g., Mark P. Jones & Scott Mainwaring, *The Nationalization of Parties and Party Systems: An Empirical Measure and an Application to the Americas*, 9 PARTY POL. 139 (2003); Robert R. Kaufman, *Corporatism, Clientelism, and Partisan Conflict: A Study of Seven Latin American Countries*, in AUTHORITARIANISM AND CORPORATISM IN LATIN AMERICA 109 (James M. Malloy ed., 1977); Scott Mainwaring & Matthew Soberg Shugart, *Conclusion: Presidentialism and the Party System*, in PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA 394 (Scott Mainwaring & Matthew Soberg Shugart eds., 1997); Kevin J. Middlebrook, *Introduction: Conservative Parties, Elite Representation, and Democracy in Latin America*, in CONSERVATIVE PARTIES, THE RIGHT, AND DEMOCRACY IN LATIN AMERICA 1 (Kevin J. Middlebrook ed., 2000). In addition to focusing on how parties and party systems affect the election process and democratization in general, others have examined how parties affect economic reform. See, e.g., Javier Corrales, *Presidents, Ruling Parties, and Party Rules: A Theory on the Politics of Economic Reform in Latin America*, 32 COMP. POL. 127 (2000).

15. JORGE I. DOMÍNGUEZ, *DEMOCRATIC POLITICS IN LATIN AMERICA AND THE CARIBBEAN* 66 (1998); Jorge I. Domínguez, *Constructing Democratic Governance in Latin America: Taking Stock of the 1990s*, in CONSTRUCTING DEMOCRATIC GOVERNANCE IN LATIN AMERICA 358 (Jorge I. Domínguez & Michael Shifter eds., 2003) (arguing that parties in Latin America lacked both reliability and responsibility in the 1980s and early 1990s, betraying platforms and campaign promises).

16. See, e.g., Steven Levitsky, *Organization and Labor-Based Party Adaptation: The Transformation of Argentine Peronism in Comparative Perspective*, 54 WORLD POL. 27 (2001); Guillermo O'Donnell, *An Impossible "Game": Party Competition in Argentina, 1955-66*, in MODERNIZATION & BUREAUCRATIC-AUTHORITARIANISM: STUDIES IN SOUTH AMERICAN POLITICS 166-99 (1973).

17. For political party analysis of Chile, see Juan Esteban Montes et al., *Rethinking the Chilean Party System*, 32 J. LAT. AM. STUD. 795 (2000); Peter Siavelis, *Continuity and Change in the Chilean Party System: On the Transformational Effects of Electoral Reform*, 30 COMP. POL. STUD. 651 (1997); Arturo Valenzuela, *The Scope of the Chilean Party System*, 4 COMP. POL. 179 (1972).

18. For more examples of political party analysis on other Latin American countries, see Lawrence Boudon, *Party System Deinstitutionalization: The 1997-98 Colombian Elections in Historical Perspective*, 42 J. INTER-AM. STUD. & WORLD AFF. 33 (2000); Michael Coppedge, *Parties and Society in Mexico and Venezuela*, 25 COMP. POL. 253 (1993); Scott Mainwaring, *Brazil: Weak Parties, Feckless Democracy*, in BUILDING DEMOCRATIC INSTITUTIONS: PARTY



America has shed light on O'Donnell and Schmitter's classic modes-of-transition model<sup>19</sup>—i.e., the way that a country transitions from authoritarianism to democracy affects whether it will remain democratic—as well as on the development of other democratic institutions.<sup>20</sup> Party structure and behavior carry great explanatory power about the development of democracy. But as Juan Linz and Alfred Stepan point out, the political society is *only* one of the five arenas for democratic consolidation.<sup>21</sup>

While such research has been fruitful in explaining electoral dynamics and procedural democracy, Schumpeterian definitions of democracy are subject to what Terry Karl calls the “fallacy of electoralism” or “faith that merely holding elections will channel political action into peaceful contests among elites and accord public legitimacy to its winners.”<sup>22</sup> Other actors, institutions, and conditions substantially contribute to democratic transition and consolidation.<sup>23</sup> For instance, Robert Dahl's “polyarchy” does not only require democratic electoral conditions,<sup>24</sup> but also “a set of institutions that, taken together, distinguish modern representative

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SYSTEMS IN LATIN AMERICA 354 (Scott Mainwaring & T.R. Scully eds., 1995); John D. Martz, *Political Parties and Candidate Selection in Venezuela and Colombia*, 114 POL. SCI. Q. 639 (2000).

19. See GUILLERMO O'DONNELL & P.C. SCHMITTER, TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES (1986); see also Frances Hagopian, “Democracy by Undemocratic Means”? Elites, Political Pacts, and Regime Transition in Brazil, 23 COMP. POL. STUD. 147 (1990) (arguing that an undemocratic mode of transition—i.e., when elite—and military-based political pacts lead the transition—blocks democratic consolidation because authoritarian military and elite practices remain entrenched in the new system). But see W. Hunter, *Continuity or Change? Civil-Military Relations in Democratic Argentina, Chile, and Peru*, 112 POL. SCI. Q. 453 (1997) (arguing against the mode-of-transition model in favor of the electoral dynamic: democracies can overcome undemocratic transitions through electoral competition).

20. See, e.g., Daniel H. Levine, *Paradigm Lost: Dependence to Democracy*, 40 WORLD POL. 377-94 (1988). Levine enhances Hunter's critique of the modes-of-transition model, by arguing that “complete understanding requires that transitions be set in the larger context of democracy's social, economic, cultural, and institutional bases.” *Id.* at 393. Political parties shape and are shaped by these institutional bases.

21. LINZ & STEPAN, *supra* note 5, at 11.

22. Terry Lynn Karl, *Imposing Consent? Electoralism Versus Democratization in El Salvador*, in ELECTIONS AND DEMOCRATIZATION IN LATIN AMERICA, 1980-1985, at 34 (Paul W. Drake & Eduardo Silva eds., 1986); see also LINZ & STEPAN, *supra* note 5, at 3-5.

23. For an example of scholarship that posits that democratic political transitions are not enough to constitute real democratic consolidation, see Arthur MacEwan, *Transitions from Authoritarian Rule*, 15 LAT. AM. PERSP. 115-30 (1988).

24. ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989). Dahl argues that five electoral conditions must necessarily exist for a country to be considered democratic: (1) opportunity for the *demos* to effectively participate in government; (2) equal voting power for all voters; (3) an enlightened and aware public; (4) agenda-setting power under control of people; and (5) relatively universal suffrage.

democracy from all other political systems, whether non-democratic regimes or earlier democratic systems.”<sup>25</sup> These institutions include freedom of expression and association, as well as access to alternative information, and the establishment of the rule of law.

Following Dahl’s criticism, many scholars on democracy in Latin America have argued—and have demonstrated empirically with examples of Latin American regimes—that Huntington’s minimalist definition of democracy is overinclusive. In other words, its broad definition includes what scholars have labeled “delegative democracy,”<sup>26</sup> “illiberal democracy,”<sup>27</sup> or otherwise “thin democracy,”<sup>28</sup> where civil liberties are repressed, rulers are not constrained by the law, or the people have no real influence over public policy. In other words, democracy—or rule by the people—should extend beyond the ballot box to the everyday functions of government and policymaking.

Larry Diamond, for example, distinguishes between two definitions of democracy—electoral and liberal—and in the latter definition he excludes pseudo-democracies, or hollow democracies, that do not truly uphold democratic practices.<sup>29</sup> He claims that Huntington’s electoral definition, though useful to classify countries, is a minimalist definition that does not evaluate all of the essential components of democracy. Consequently, Diamond introduces a more complex formulation, similar to Dahl’s “polyarchy,” that he labels “liberal democracy.”<sup>30</sup> For a country to be considered a liberal democracy, Diamond argues that eleven conditions dealing with civil liberties and the rule of law must be present.<sup>31</sup> Liberal democracy encompasses all of Dahl’s requirements for polyarchy, but it also requires constitutional restrictions on power abuse, checks and balances, judicial review, and the rule of law. Huntington’s minimalist requirement of FFR elections might be the seed of democracy, but these

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25. *Id.* at 218.

26. Guillermo O’Donnell, *Delegative Democracy*, 5 J. DEM. 55-69 (1994) (defining delegative democracy as those governments where ultrapresidentialism stands in the way of the rule of law and other democratic institutions).

27. Fareed Zakaria, *The Rise of Illiberal Democracy*, FOREIGN AFF., Nov./Dec. 1997, at 22-43.

28. Ronaldo Munck, *Introduction: A Thin Democracy*, 24 LAT. AM. PERSP. 5-21 (1997).

29. LARRY DIAMOND, *DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION* (1999).

30. *Id.* at 10.

31. *Id.* at 11-12. The necessary components for liberal democracy include: (1) control of state is in elected officials’ power; (2) executive power is constitutionally constrained; (3) party parity or equality exists; (4) minorities are free to express ideas; (5) citizens have freedom of expression; (6) alternative sources of information are available; (7) universal freedom of speech is guaranteed; (8) all citizens are politically equal; (9) nondiscriminatory judicial system exists; (10) laws protect civil liberties; and (11) the constitution is the supreme authority. *Id.*

other institutions and practices must develop before the government can be considered a liberal democracy.

### B. *Emergence of Linz and Stepan's Democratic Consolidation Framework*

Unlike Huntington or Diamond, Juan Linz and Alfred Stepan divide democratization into two phases: transition and consolidation. Linz and Stepan incorporate aspects of Dahl, Diamond, and Huntington's definitions of democracy. For instance, they utilize Huntington's minimalist definition for democratic transition of basically FFR elections.<sup>32</sup> Furthermore, they claim that democratization entails Diamond's liberalization, but it is a much broader and more political concept. However, they also warn against Huntington's procedural definition of democracy, the "electoralist fallacy," because it constitutes a necessary but not sufficient condition.<sup>33</sup> Democratic practices must be further developed and cultivated in order to ensure that democracy persists and evolves into the only game in town.

After democratic transition takes place, Linz and Stepan argue that "there are still many tasks that need to be accomplished, conditions that must be established, and attitudes and habits that must be cultivated before democracy could be considered consolidated."<sup>34</sup> In other words, democratic transition does not ensure that democracy will remain; it must be further nurtured. Linz and Stepan label this developmental process "democratic consolidation," claiming that consolidation is achieved when democracy has become "the only game in town."<sup>35</sup>

For Linz and Stepan, this process involves three separate but interrelated developments—behavioral, attitudinal, and constitutional

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32. LINZ & STEPAN, *supra* note 5, at 3. Linz and Stepan's definition of democratic transition is as follows:

A democratic transition is complete when sufficient agreement has been reached about political procedures to produce an elected government, when a government comes to power that is the direct result of a free and popular vote, when this government *de facto* has the authority to generate new policies, and when the executive, legislative and judicial power generated by the new democracy does not have to share power with other bodies *de jure*.

33. *Id.* at 4 ("Our definition helps guard against the 'electoralist fallacy,' that is, that a necessary condition of democracy, free elections, is seen as a sufficient condition of democracy.").

34. *Id.* at 5.

35. *Id.*

consolidation.<sup>36</sup> Behavioral consolidation refers to the condition that there are no significant anti-democratic movements. Political actors are willing to play by the rules of the game. Attitudinal consolidation requires public support for, and confidence in, democracy as the most legitimate form of government. Not only must the political actors be invested in democracy, but the public must also trust the system. Constitutional consolidation entails that governmental and nongovernmental forces are subject to and work within a specific set of laws, procedures, and institutions of the democratic process. In other words, the rule *of* law must replace rule *by* law.

In addition to identifying three types of consolidation, Linz and Stepan further categorize the necessary democratic consolidation tasks into five interactive arenas: (1) the *civil society*, which entails freedom of association and communication; (2) the *political society*, which encompasses free and inclusive electoral contestation; (3) the *rule of law* or constitutionalism, which involves judicial review and autonomy and the consistent application of the law; (4) the *state apparatus* or bureaucracy, which requires rational-legal bureaucratic norms and adequate public services; and (5) the *economic society*, which includes the formation of an institutionalized market.<sup>37</sup> These five arenas, along with the guiding principles and evidence of consolidation in each arena, are presented in Table 1.

Linz and Stepan argue that three of these arenas—the civil society, the political society, and the rule of law—are requisite for consolidation, whereas the economic society and state apparatus play an important but not necessary role in democratic consolidation:

The above three conditions—a lively and independent civil society, a political society with sufficient autonomy and a working consensus about procedures of governance, and constitutionalism and the rule of law—are virtually definitional prerequisites of a consolidated democracy. However, these conditions are much more likely to be satisfied if a bureaucracy usable by democratic leaders and an institutionalized economic society exist.<sup>38</sup>

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36. *Id.* at 5-6.

37. LINZ & SHEPAN, *supra* note 5, at 7-15.

38. *Id.* at 10.

**Table 1: Linz & Stepan's Five Arenas of Democratic Consolidation**

<b>Arena</b>	<b>Guiding Principles</b>	<b>Evidence of Consolidation</b>
Civil Society	Freedom of Association and Expression	High Participation in Diverse Associations that Lobby for Interests in Legislature and Promote Non-Governmental Cooperation; Public Opposition to Governmental Practices; Public Confidence in Democratic Institutions
Political Society	Free, Fair and Regular Elections	Existence of Multiple, Developed Parties and Healthy Competition; Free Contestation; Peaceful Transfer of Power; Even Extreme Parties Allowed to Participate in Politics; Generally Universal Suffrage
Rule of Law	Unconditional Adherence to Constitution	Following Constitutional Guidelines Even in Crisis; No Exceptions in the Law Made for Those in Power; Consensus on Rules of Democracy Established in Written Constitution; Judicial Review and Autonomy; Consistent Enforcement of Law
State Apparatus	Usable & Effective Bureaucracy	Low Crime Rates Due to Effective Police Force; Developed Education, Infrastructure Maintenance, and Welfare Systems; High Literacy and Low Unemployment; Developed Infrastructure (Roads, Utilities, Drinking Water)
Economic Society	Institutionalized Market Economy	Functional Market Economy with Sufficient Government Regulation; Stable Inflation and Employment Rates; Laws for Corporations, Stock Market, Weights & Measures, and Protection of Private Property; Stable Currency and Exchange Rate; Established Monetary/Fiscal Policies

This distinction between necessary and supporting arenas parallels their emphasis on attitudinal (civil society), behavioral (political society), and constitutional (the rule of law) consolidation. Their two-level framework will play an important role in explaining the relatively high consolidation level of the Argentine democracy at the turn of the twenty-first century, in spite of an economic crisis and a relatively unusable state apparatus. Now that the literature on consolidation has been presented, Part III examines Linz and Stepan's third arena—the rule of law—and what role courts play in constructing the rule of law.

### III. DEMOCRACY, THE RULE OF LAW, AND THE COURTS

While the rule of law is not a necessary feature of the minimalist, electoral concept of democracy—except as to ensuring FFR elections—it is a critical component of the democratic consolidation<sup>39</sup> and liberal democracy<sup>40</sup> frameworks. For instance, Juan Linz proclaims, “No Rechtsstaat, No democracy!”<sup>41</sup> Similarly, Diamond considers the rule of law to be a cornerstone of liberal democracy. To develop liberal democracy, the constitutional order must protect civil liberties and prevent “unjustified detention, exile, terror, torture, and undue interference in the personal lives not only by the state but also by organized nonstate and antistate actors.”<sup>42</sup> Rights and liberties must extend beyond electoral integrity, and constrain actors within a constitutional and legal framework, not only to allow citizens to freely choose their leaders, associate with others of similar political beliefs, and be heard in the political society, but also to ensure a consistent, uniform enforcement of the law to government actors and all sectors of society.

In that sense, maintaining the rule of law is critical to both constitutional and attitudinal consolidation. The rule of law not only ensures that conflict resolution and governance are carried out in accordance with existing constitutional and statutory provisions, but it also increases public trust or faith in democratic principles, practices, and institutions. Conversely, rule *by* law, government corruption, human rights violations, and unconstitutional suppression of civil and political liberties

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39. *Id.* (“[A]ll significant actors—especially the democratic government and the state—must respect and uphold the rule of law.”).

40. DAHL, *supra* note 24, at 218; DIAMOND, *supra* note 29, at 10; O'Donnell, *supra* note 26, at 56; Munck, *supra* note 28, at 13; Zakaria, *supra* note 27, at 27.

41. Juan Linz, *Democracy Today: An Agenda for Students of Democracy*, 20 SCANDINAVIAN POL. STUD. 118-20 (1997).

42. DIAMOND, *supra* note 29, at 12.

all undermine citizen trust in democracy as the most effective form of governance and mechanism for conflict resolution.<sup>43</sup> Indeed, the rule of law also touches Linz and Stepan's third consolidation type—behavioral consolidation—in that upholding the rule of law constrains anti-democratic actors and encourages all actors to play by the rules of the game. Perhaps the fact that the rule of law affects all three types of consolidation explains why Linz and Stepan—as well as Dahl, Diamond, Karl, O'Donnell, Zakaria, and many others—argue that it is a necessary condition, indeed a cornerstone of democratic consolidation.

Whereas there is a general consensus that the rule of law is a necessary condition for liberal democracies, defining it in any detail or determining effective indicators of the rule of law is more contested.<sup>44</sup> In fact, political scientists seldom define, examine, or empirically research this critical element of democracy, perhaps because it is difficult to define and reaches into all five arenas of consolidation. Rebecca Bill Chavez remarks:

A complete story about how emerging democracies construct the rule of law must address patterns of power in the political, economic, and societal realms. The balanced dispersal of political power is a necessary condition for the rule of law. The distribution of economic resources among members of a divided elite is one part to the requisite political fragmentation. Countries that are characterized by a concentration of both political and economic power are not, however, necessarily trapped without the rule of law. A reform coalition of nonstate actors can activate societal power, which fractures monopolies in the political realm.<sup>45</sup>

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43. REBECCA BILL CHAVEZ, *THE RULE OF LAW IN NASCENT DEMOCRACIES: JUDICIAL POLITICS IN ARGENTINA* 7-27 (2004); see also *Maria Lagos, How People View Democracy: Between Stability and Crisis in Latin America*, 12 J. DEM. 137 (2001) (finding that citizen trust in democracy in Latin America declines as government corruption increases). See generally ANDREAS SCHEDLER ET AL., *THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES* (1999).

44. See generally Erik G. Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses*, in *BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW* 338-42 (Erik G. Jensen & Thomas C. Heller eds., 2003). Senator Hutchinson provides a clear, albeit simplistic, definition of the rule of law: "the rule of law involves four basic requirements: Equality under the law. A respect for individual rights. An independent and honest judiciary. And transparent court proceedings. Without a strong commitment to every aspect, even a democratic society will not mature." Kay Bailey Hutchinson, *Democracy and the Rule of Law*, 39 INT'L LAW. 663 (2005).

45. CHAVEZ, *supra* note 43, at 9.

In other words, a complete analysis concerning the state of the rule of law within a particular country involves incorporating analysis from Linz and Stepan's other four arenas for democratic consolidation. This analysis can also turn to other qualitative and quantitative indicators, ranging from evidence of human rights violations<sup>46</sup> and the status of civil and political liberties,<sup>47</sup> to the level of government corruption<sup>48</sup> and the degree of adherence to constitutional and statutory provisions. Access to justice and protection of property rights are other useful indicators. While various indicators exist to gauge the strength of the rule of law within a particular country, this Article focuses on one obvious, yet often neglected,<sup>49</sup> measure: the courts.

#### *A. Horizontal Accountability: Judicial Check on the Rule of Law*

With respect to the role of courts in upholding the rule of law, O'Donnell asserts that the horizontal accountability an independent judiciary can provide is paramount to upholding the rule of law:

In institutionalized democracies, accountability runs not only vertically, making elected officials answerable to the ballot box, but also horizontally, across a network of relatively autonomous powers (i.e., other institutions) that can call into question, and eventually

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46. See, e.g., Web Site of Human Rights Watch, <http://www.hrw.org/> (last visited Feb. 22, 2005) (providing country reports, world and regional rankings, and current news on human rights violations).

47. See, e.g., Web Site of Freedom House, <http://www.freedomhouse.org/> (last visited Feb. 22, 2005) (rating each country worldwide on a seven-point scale for both political rights and civil liberties).

48. See, e.g., Web Site of Transparency International, <http://www.transparency.org/> (last visited Feb. 22, 2005) (evaluating the level of corruption within a particular country using the Corruption Perception Index).

49. CHAVEZ, *supra* note 43, at 10. Besides various articles published in scattered journals, there exist only three mainstream, English-language books on the role of the judiciary in democracy and the rule of law in Latin America. See WILLIAM C. PRILLAMAN, *THE JUDICIARY AND DEMOCRATIC DECAY IN LATIN AMERICA: DECLINING CONFIDENCE IN THE RULE OF LAW* (2000); *THE RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM* (Pilar Domingo & Rachel Sieder eds., 2001) [hereinafter *RULE OF LAW IN LATIN AMERICA*]; *TRANSITION TO DEMOCRACY IN LATIN AMERICA*, *supra* note 1. Stotzky, a law professor at the University of Miami, united a diverse group of scholars, policymakers, public officials, and practitioners from the United States and Latin America to contribute to this book—culminating in a collection of 25 separate chapters. Since Stotzky had spent part of 1991 and 1992 in Argentina as a Fulbright Fellow, many of the book's contributors have connections to Argentina—including an article by former President Raúl Alfonsín, which is cited in this Article's Introduction.



punish, improper ways of discharging the responsibility of a given official.<sup>50</sup>

Horizontal checks and balances within a democratic system ensure that the more powerful actors are constrained by the rule of law. Without these checks, countries get trapped in an “asymmetric equilibrium,” where the dominant government actors—in Latin America, the executive branch—have incentives to act beyond or outside their formal limits.<sup>51</sup>

An independent, horizontal check on the dominant government actor is of particular importance in Latin America, where ultrapresidentialism is a common feature of governance. Throughout the whole region, the executive branch has historically dominated the legislative and judicial branches, leaving O'Donnell and others to label Latin American regimes as “delegative democracies,”<sup>52</sup> where democratically elected presidents rule by law and presidential decree, instead of conforming to the rule of law. Rationales for the emergence of ultrapresidentialism in Latin America range from its colonial-era roots of patterns of power and the subsequent emergence of *caudillismo*<sup>53</sup> to the region's strong historical precedent of military authoritarian rule.<sup>54</sup> The region's long tradition of civil law also contributes to this power asymmetry.<sup>55</sup>

Regardless of its origin, Latin American countries—and Argentina in particular—have historically provided less than adequate horizontal checks on ultrapresidentialism, which has left the region vulnerable to delegative democracy and authoritarian reversals.<sup>56</sup> Consequently, understanding how

50. O'Donnell, *supra* note 26, at 61-62.

51. Barry Weingast, *The Political Foundation of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 249-51 (1997).

52. O'Donnell, *supra* note 26.

53. CHAVEZ, *supra* note 43, at 12-14. Chavez explains that ultrapresidentialism is a result, in part, of the colonial era tradition when the culture and political climate were heavily authoritarian and instilled a sense of *caudillismo* or executive supremacy. *Id.*; see also Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 INTER-AM. L. REV. 1 (1987) (examining the historical and cultural explanations of ultrapresidentialism and the dependent judiciary).

54. See *supra* note 4 for sources that discuss the role of a military tradition in creating ultrapresidentialism.

55. See, e.g., CHAVEZ, *supra* note 43, at 13-14. See generally ARTHUR TAYLOR VON MEHREN, *THE CIVIL LAW SYSTEM: CASES AND MATERIALS FOR THE COMPARATIVE STUDY OF LAW* (1957); see generally CARLOS FAYT, *LA SUPREMACÍA CONSTITUCIONAL Y LA INDEPENDENCIA DE LOS JUECES* (1994).

56. For a more detailed explanation of the role of high courts in the horizontal accountability of the executive, see DRUSCILLA SCRIBNER, *LIMITING PRESIDENTIAL POWER: THE HIGH COURT AND EXECUTIVE ACCOUNTABILITY* (forthcoming 2005) (focusing specifically on the Argentine case study).

the courts can serve as a horizontal check on executive power is particularly important for democratic consolidation in Latin America. One potential solution, which this Article explores with respect to democracy in Argentina, is to provide for and protect independent and autonomous judiciaries.

Because courts are arguably “the primary guardians of the rule of law” and a key ingredient “to the protection of individual rights and to the consolidation of the region’s new democracies,”<sup>57</sup> judicial reform has emerged as a hot topic in recent scholarship on law and policy in Latin America. The breadth of policy reforms proposed in the literature is impressive—ranging from calls for wider access to courts, decreased delays and backlogs, and judicial education to demands for less corruption, more efficient administration, increased use of alternative dispute resolution initiatives, and updated procedural codes.<sup>58</sup> Studies also span from focusing on local and regional courts, to the high or supreme court in a particular country, and from evaluating public attitudes and perceptions of court functioning to analyzing substantive and procedural laws within a particular country or comparatively across various countries in the region.

To some degree, all these reform proposals would undoubtedly influence democratic consolidation and the development of the rule of law in Latin America. This Article, however, limits its scope to the role of the high or supreme court in strengthening the rule of law—specifically focusing on judicial independence and autonomy and public perception of the Argentine Supreme Court. The judiciary’s perceived and actual independence appears to be a major, if not the predominant, factor in whether courts serve as an effective horizontal check on the executive and legislative branches, as well as on other governmental and

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57. Jodi Finkel, *Judicial Reform in Argentina in the 1990s: How Electoral Incentives Shape Institutional Change*, 39 LAT. AM. RES. REV. 56, 57 (2004). Courts have often been called the primary guardian of the rule of law, but they are perhaps more accurately described as institutions that, when functioning effectively, reflect and reinforce the rule of law.

58. See, e.g., EDWARD BUSCAGLIA JR., MARIA DAKOLIAS & WILLIAM RATLIFF, JUDICIAL REFORM IN LATIN AMERICA: A FRAMEWORK FOR NATIONAL DEVELOPMENT 21-35 (1995) (suggesting a broad judicial reform agenda based on the findings in the literature); see also Thomas Carothers, *The Many Agendas of Rule-of-Law Reform in Latin America*, in RULE OF LAW IN LATIN AMERICA, *supra* note 49, at 4-16 (providing additional, diverse policy proposals for strengthening the courts in Latin America); Maria Dakolis, *Legal and Judicial Reform: The Role of Civil Society in the Reform Process*, in RULE OF LAW IN LATIN AMERICA, *supra* note 49, at 80-98 (outlining civil society-based reforms to the judicial systems in Latin America); Luis Salas, *From the Law and Development to Rule of Law: New and Old Issues in Justice Reform in Latin America*, in RULE OF LAW IN LATIN AMERICA, *supra* note 49, at 17-46 (exploring various new issues in judicial reform efforts).

nongovernmental actors, thus ensuring the rule of law. Before turning to the Argentine case study, relevant definitions of judicial independence must first be explored.

### B. *Judicial Independence and Autonomy in Latin America*

The term “judicial independence”<sup>59</sup> has been described in the literature as “elusive”<sup>60</sup> and “far more complex than first appears.”<sup>61</sup> Indeed, “[t]here are nearly as many definitions and taxonomies of judicial independence as authors writing about the subject.”<sup>62</sup> For example, Paul Kahn provides one of the broadest definitions by dividing judicial independence into three main categories: “independent from the parties to a conflict, independent from the political institutions of a government, and independent from contested ideologies.”<sup>63</sup> Owen Fiss agrees with Kahn that judicial independence involves both independence from the parties of a conflict, and independence from other governmental institutions, but “take[s] exception to Professor Kahn’s broadening of the notion of judicial independence to include ‘independence from ideology.’”<sup>64</sup> However, they both also concur that countries need to establish the “right degree of independence” because “in a democracy it must be acknowledged that too much independence may be bad thing.”<sup>65</sup> This conception of independence

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59. See generally JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY (Peter Russell & David O’Brien eds., 2001) (providing various essays on judicial independence that present diverse definitions and frameworks). I presuppose that some degree of judicial independence is helpful for strengthening democracy and the rule of law, which others have questioned. See, e.g., John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962 (2002); see also JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen B. Burbank & Barry Friedman eds., 2002) [hereinafter JUDICIAL INDEPENDENCE AT THE CROSSROADS] (presenting several chapters on this topic). While important, this normative question lies outside the scope of this Article.

60. Matías Iaryczower et al., *Judicial Independence in Unstable Environments, Argentina 1935-1998*, 46 AM. J. POL. SCI. 699 (2002).

61. Owen M. Fiss, *The Right Degree of Independence*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA, *supra* note 1, at 55; SCHEDLER ET AL., *supra* note 43.

62. Daniel Brinks, *Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium*, 40 TEX. INT’L L.J. 595, 596 (2005).

63. Paul W. Kahn, *Independence and Responsibility in the Judicial Role*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA, *supra* note 1, at 73.

64. Fiss, *The Right Degree of Independence*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA, *supra* note 1, at 67 n.2.

65. *Id.* at 58; Kahn, *Independence and Responsibility in the Judicial Role*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA, *supra* note 1, at 73 (“Most democratic states, however, would reject such a proposal [of a wholly independent judiciary] because it ignores judicial responsibility. Responsibility, I will argue, is as important a judicial norm as is independence and it cuts against too much independence.”).

appears in line with O'Donnell's claim that the horizontal checks "must be *relatively* autonomous powers (i.e., other institutions) that can call into question, and eventually punish, improper ways of discharging the responsibility of a given official."<sup>66</sup> Under this view, independence focuses even more narrowly on autonomy from other governmental institutions, not neutrality from the parties to a suit or independence from political ideologies.

Christopher Larkin also focuses on independence from the parties to the suit (neutrality) and from other governmental institutions (political insularity), while underscoring the courts' scope of authority or the extent of their judicial review.<sup>67</sup> Conversely, Daniel Brinks argues that judicial independence encompasses both neutrality and political insularity but that the scope of authority—which he equates with the courts' power—is distinct from independence. Brinks further emphasizes that "formal independence is not useful"—especially in Latin America where the formal structures on paper are routinely not applied in practice.<sup>68</sup> With respect to judicial independence in Latin America, Chavez notes that "[t]he gap between rules and practices highlights the need to focus on informal patterns of power."<sup>69</sup> Chavez further explains: "Many scholars mistakenly limit their analysis to formal guarantees of judicial autonomy. Actual practices may illustrate that the formal institutions are mere façades that hide subordination of the courts."<sup>70</sup> So while an analysis of formal institutions—such as the text of national constitutions and statutes—might suggest independence, how political actors apply (and work around) the formal institutions appears to be a much more important indicator of judicial independence in Latin America.

Similarly, empirical research suggests that analyzing actual court decisions to look for signs of pressure from, or dependence on, other political institutions might also be misleading—as Latin American courts often engage in strategic defection<sup>71</sup> and other prudential measures to

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66. O'Donnell, *supra* note 26, at 61-62 (emphasis added).

67. Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605 (1996). For a general overview of judicial review in Latin America, see Richard J. Wilson, *Reflections on Judicial Review in Latin America*, 7 SW. J. L. & TRADE AM. 435 (2000).

68. Brinks, *supra* note 62, at 597; see also Charles M. Cameron, *Judicial Independence: How Can You Tell It When You See It? And, Who Cares?*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 59.

69. CHAVEZ, *supra* note 43, at 23.

70. *Id.* at 23-24 (internal citations omitted).

71. Gretchen Helmke, *Checks and Balances by Other Means: Strategic Defection and Argentina's Supreme Court in the 1990s*, 35 COMP. POL. 176 (2003). Helmke argues that judges appear to engage in "strategic defection" by ruling against the sitting government more often as the

maintain institutional capacity. This strategic behavior constitutes a way that the courts balance safeguarding judicial independence with preserving institutional capital. Thus, individual decisions must be viewed in the broader political and social context in which they are decided to better understand the courts' level of independence from other governmental institutions.<sup>72</sup> Or has Avner Grief puts it, "To study the impact of a legal system, we must therefore also examine the rules, belief, and norms that generate behavior and others."<sup>73</sup> Likewise, judicial independence cannot be measured by judicial reversal alone; once again, Latin American judges—discussed in an empirical study by Matias Iaryczower, Pablo Spiller, and Mariano Tommasi—often engage in strategic decision-making to preserve institutional independence.<sup>74</sup> In fact, some scholars argue that the state of the government (whether politically divided among parties)<sup>75</sup> and electoral incentives<sup>76</sup> must be taken into account when evaluating judicial independence or autonomy.

The above discussion is not meant to serve as a comprehensive literature review of judicial independence but, instead, to illustrate the various components of evaluating independence and the need to look beyond formal institutions and place the court's action within the larger societal and political context. Context matters. In particular, Chavez notes that "informal institutions and practices that allow Latin American presidents to control the courts are often stronger than the formal

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ruling administration grows weaker near the end of its tenure in order to garner favor with the incoming administration. See Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 291 (2002) [hereinafter Helmke, *The Logic of Strategic Defection*].

72. Diana Kapiszewski, *Institutions and Influence: Examining the Political Role of the Argentine Supreme Court*, Paper Presented at the Annual Meeting of the Law & Society Association (May 27, 2004) (on file with author). Looking at the context of six landmark economic decisions by the Argentine Supreme Court over the last two decades, Kapiszewski concludes: "[T]he Court has played no role consistently, and its influence is varied. Further, the Court's influence has varied not linearly across time, but by case—high court influence appears to be a dynamic variable that is continuously affected by the current state of politics." *Id.* at 34. In other words, to understand judicial decisions and the role of "independence" in judicial decision-making, the decisions must be evaluated within the broader social, economic, and political contexts in which they are made.

73. AVNER GREIF, *INSTITUTIONS AND THE PART TO ECONOMIC MODERNITY: LESSONS FROM MEDIEVAL TRADE 3* (forthcoming 2007).

74. Iaryczower et al., *supra* note 60, at 713.

75. CHAVEZ, *supra* note 43 (arguing that divided government between two or more parties is essential for the development of judicial autonomy).

76. Finkel, *supra* note 57 (demonstrating how electoral incentives shape judicial reforms and influence judicial autonomy).

constitutional guarantees of judicial independence.”<sup>77</sup> She outlines five historical indicators of executive subordination of the judiciary in Latin America:

1. The executive uses an opaque process to appoint pliant judges.
2. The executive violates judges’ tenure protection.
3. The executive violates judges’ salary protection.
4. The executive packs the Supreme Court.
5. Judges are unwilling to endure the costs of ruling against executive interests.<sup>78</sup>

Although not an exhaustive list, Chavez illustrates several of the methods by which the Latin American executive has intruded on the independence of the judiciary both through formal and informal means. In Part IV, the role of the Supreme Court in the Argentine predicament will be examined to better understand the judiciary’s function in the country’s democratic consolidation efforts, especially in light of Argentina’s economic woes at the turn of the twenty-first century. While scholars have examined how economic and political actors affected consolidation during the economic crisis, little attention has been paid to the role of the rule of law and the Argentine courts. The Argentine Supreme Court’s story can then be placed within the overall consolidation framework to help illustrate where the judiciary fits into the democratic transition and consolidation scholarship and how it affects the rule of law in Latin America.

#### IV. THE ARGENTINE SUPREME COURT: AN AMERICAN CARBON COPY AND HOLLOW INSTITUTION UNDER AUTHORITARIANISM AND ULTRAPRESIDENTIALISM

In this Part, a brief historical sketch of Argentina’s constitutionalism and the role of the judiciary will be presented, followed by a more detailed analysis of the development of the Argentine Supreme Court during the past two decades. This review will illustrate that, while Argentina has formally maintained a version of American constitutionalism since 1853, what is on paper has seldom been implemented as intended in practice. Argentina’s 1853 Constitution has endured undemocratic regime changes, human rights abuses, and ultrapresidentialism, which dramatically departed from the written text. This trend is particularly important to the

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77. CHAVEZ, *supra* note 43, at 23.

78. *Id.* at 26, tbl.1.1.

role of the judiciary in the development and maintenance of the rule of law. Because the Argentine Supreme Court emerged as a carbon copy of the U.S. Supreme Court—not based on any preexisting Argentine institution—and because its role was, at best, that of a “rubber stamp”<sup>79</sup> for much of the twentieth century, Argentina’s democratic re-transition in the 1980s arguably did not fully reestablish the Court’s position as the primary guardian of the rule of law.

With this historical perspective, the Court’s behavior during the economic crisis at the turn of the twenty-first century—its submission to Menem’s agenda and thus contribution to the economic crisis—as well as President Kirchner’s current judicial reform efforts, can be better understood. The lessons learned from the Argentine case study can then be applied to other Latin American countries that face similar challenges to the rule of law. This Part is divided chronologically into four subparts: (1) Argentina’s constitutional foundation, 1853-1930; (2) the era of authoritarian regimes, ultrapresidentialism, and judicial dependence, 1930-1983; (3) Alfonsín’s redemocratization and empowerment of the judiciary, 1983-1989; and (4) Menem’s delegative democracy, 1989-1998.

#### A. *Constitutional Foundation, 1853-1930: Copying the American Model*

Argentina gained independence from Spanish colonial rule in 1810. After several subsequent decades of pseudo-colonial rule and civil war, Brigadier General Juan Manuel de Rosas assumed the governorship of Buenos Aires in 1829. He demanded from the outset that the legislature grant him “the entire sum of public power”<sup>80</sup>—establishing a tradition of *caudillismo* or ultrapresidentialism that would remain a common theme even under democratic rule. Rosas continued as ruler over the Argentine Confederation with complete dictatorial power until the emergence of the Argentine Constitution in 1853. Professor Jonathan Miller notes: “Rosas’s power exceeded that of the most absolutist Spanish monarchs of the colonial period, and he used it to the fullest. Rosas legislated by decree and decided many judicial cases himself.”<sup>81</sup> His *caudillismo* rule included terror tactics aimed at the middle and upper classes and populist recruitment of the rural poor.

79. This term is borrowed from Iaryczower et al., *supra* note 60, at 703.

80. JOHN LYNCH, ARGENTINE DICTATOR, JUAN MANUEL DE ROSAS, 1829-1852, at 48 (1981).

81. Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite’s Leap of Faith*, 46 AM. U. L. REV. 1483, 1498 (1997). Taken from parts of his J.S.D. dissertation, Miller’s article details the development of constitutionalism in nineteenth-century Argentina.

Rosas remained in power until 1852, when he was defeated by General Justo Jose de Urquiza, the *caudillo* from the northern province of Entre Ríos. Urquiza then called for a constitutional drafting, even though Argentina had no history of the rule of law or any governmental institutions in place to support formal rules and structures.<sup>82</sup> Of particular importance for the development of the judiciary, Miller notes its absence in pre-1853 Argentina:

The situation of the judiciary was particularly bleak. During the period of predominantly unitarian control of Buenos Aires immediately following independence, a court of appeals took over the judicial functions of the *audiencia* [closest institution to a judiciary in Spanish colonial rule], including, in some periods, the critical areas of customs disputes and other tax matters. In most provinces between 1810 and 1852, as in Buenos Aires under Rosas, what justice existed was exercised personally by the local *caudillo*.<sup>83</sup>

Without formal institutions already in place, the Argentine Framers—consisting of a small group of intellectuals led by Juan Bautista Alberdi and Domingo Faustino Sarmiento<sup>84</sup>—started from scratch and decided to adopt a document strikingly similar to that of the U.S. Constitution.<sup>85</sup> With the U.S. Constitution as its model, the Argentine Constitution was established in 1853 and has only been partially amended five times since its adoption.<sup>86</sup> Formally, the Argentine Framers created a

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82. *Id.* at 1500.

83. *Id.* at 1500-01; see also RICARDO ZORRAQUIM BECU, *LA ORGANIZACIÓN JUDICIAL ARGENTINA EN EL PERIODO HISPÁNICO* 215-16 (1981) (describing in greater detail the role of the judiciary in Argentina before 1853).

84. For more information on the “Alberdian Vision” for the Argentine Constitution, which basically sought to model the Argentine Constitution after the U.S. Constitution, see Miller, *supra* note 81, at 1501-22. See generally PABLO LUCAS VERDU, *ALBERDI, SU VIGENCIA Y MODERNIDAD CONSTITUCIONAL* 81 (1998) (providing a general history of the development of the Argentine Constitution and also noting that Alberdi was called the “Founder of the Republic of Argentina”).

85. *Id.* at 1522; Manuel Jose Garcia-Mansilla, *Separation of Powers: The Case of Argentina*, 32 GA. J. INT’L & COMP. L. 307, 309 (2004) (detailing the development of the Argentine Constitution and the country’s subsequent failure to uphold the separation-of-powers mechanisms in place in the U.S. system). Both Miller and Garcia-Mansilla provide detailed accounts of the constitutional drafting.

86. Garcia-Mansilla, *supra* note 85, at 310 n.3 (noting that the Argentine Constitution was amended five times: 1860, 1866, 1898, 1957, and 1994).



federal constitutional democracy<sup>87</sup> with a strong separation of powers between the three branches of government—an executive branch headed by a democratically elected president, a U.S.-style bicameral legislature, and an independent judiciary.<sup>88</sup>

In fact, the U.S. system continued to be the driving influence—the “talisman” by some accounts—behind the development of democracy and the rule of law through the end of the nineteenth century, declining somewhat in the early 1900s.<sup>89</sup> For instance, in 1891 the U.S. Ambassador to Argentina noted: “[N]o leading lawyer here [in Argentina] is without his complete set of our U.S. Supreme Court reports.”<sup>90</sup> Miller further notes that “[e]ven as late as 1900, Argentina published more translations and adaptations of works by U.S. authors writing on the U.S. Constitution than Argentine treatises on the Argentine Constitution.”<sup>91</sup> Perhaps the most compelling evidence of Argentina’s reliance on the U.S. Constitution can be found in the Argentine Supreme Court’s decisions in the late nineteenth century. For instance, in an 1877 decision, the Court remarked:

The system of government which governs us is not of our own creation. We found it in action, tested by long years of experience, and we have appropriated it. And it has been correctly stated that one of the great advantages of this adoption has been to find a vast body of doctrine, practice and case law which illustrate and complete its fundamental principles, and which we can and should use in everything which we have not decided to change with specific constitutional provisions.<sup>92</sup>

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87. ARG. CONST. art. 2 (“The Argentine Nation adopts for its government the federal, republican, representative form as established by the present Constitution.”).

88. See ARG. CONST. pt. II, arts. 44-120 (describing the form of the federal government).

89. Miller, *supra* note 81, at 1562; Garcia-Mansilla, *supra* note 85, at 310-11. Garcia-Mansilla explains that while Argentina adopted the form of the U.S. Constitution, it also later adopted incompatible European practices and doctrines—such as the French version of Continental European public law. Garcia-Mansilla, *supra* note 85, at 348.

90. Miller, *supra* note 81, at 1544 (quoting Letter from John Pitkin, U.S. Ambassador to Argentina, to U.S. Secretary of State (May 16, 1881)).

91. Miller, *supra* note 81, at 1544 n.463.

92. Corte Suprema de Justicia [CSJN], 1877, “De la Torre,” Fallos (1877-19-231, 236) (Arg.) (holding that the House of Deputies could imprison or fine an editor of a small Buenos Aires newspaper on the basis of its contempt powers). In *De la Torre*, a habeas corpus action, the Court noted that it reached its decision based on the U.S. Supreme Court’s ruling in *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821). For a more detailed analysis of the Argentine Supreme Court’s early reliance on the U.S. Supreme Court jurisprudence, see Miller, *supra* note 81, at 1544-60.

As the above statement indicates, not only did the Argentine Supreme Court rely on the U.S. Constitution formally, but U.S. Supreme Court precedent also heavily influenced it.

Of particular importance, the Argentine Supreme Court did not derive its judicial review power explicitly from the Argentine Constitution of 1853, but instead, the Court utilized the *Marbury v. Madison*<sup>93</sup> approach of reading judicial review into the Argentine Constitution.<sup>94</sup> In the *Sojo* decision of 1887,<sup>95</sup> the Argentine Supreme Court established judicial review by interpreting that two clauses in the Constitution—one that established the supremacy of the Constitution<sup>96</sup> and another that created jurisdiction of all courts over any action regulated by the Constitution<sup>97</sup>—guaranteed a *Marbury*-type judicial review power. The nineteenth-century Argentine legislature reinforced the Court's interpretation of judicial review by codifying the judiciary's responsibility as a check on unconstitutional action by the other branches of government.<sup>98</sup> Similar to the American theory of justiciability, Argentina's judicial review requires a real case or controversy where the parties have standing (i.e., injury in fact, causation, and redressability), and the case or controversy is ripe (i.e., no advisory opinion, but instead, an after-the-fact ruling on the actual enforcement of an enacted law) and not moot (i.e., not already fully resolved through extra-judicial means).<sup>99</sup> Additionally, the Argentine Constitution mirrors the U.S. Constitution with respect to

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93. 5 U.S. (1 Cranch) 137 (1803).

94. See generally CARLOS S. NINO, FUNDAMENTOS DE DERECHO CONSTITUCIONAL (1992) (detailing the fundamental principles of constitutional law and judicial review in Argentina); Carlos S. Nino, *On the Exercise of Judicial Review in Argentina: Declining Confidence in the Rule of Law*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA, *supra* note 1, at 310-20 (detailing the emergence and subsequent decline of judicial review in Argentina).

95. Corte Suprema de Justicia de la Nación [CSJN], 1887, "Sojo," Fallos (1887-32-120) (Arg.) (declaring that the courts have a constitutionally vested power and duty to strike down federal legislation as unconstitutional). Scholars often refer to *Sojo* as the *Marbury v. Madison* of Argentine constitutional law. See, e.g., Iaryczower et al., *supra* note 60, at 701 n.14. One year later, the Court exercised this power to strike down a law passed by Congress. See Corte Suprema de Justicia de la Nación [CSJN], 1888, "Municipalidad de la Capital v. Elortondo," Fallos (1888-33-162) (Arg.). Fifteen years before *Elortondo*, the Court had also declared the unconstitutionality of a presidential decree. See Ríos, 1 Fallos 36 (1863).

96. ARG. CONST. art. 31 (1853) (remaining the same in the 1994 amended version).

97. ARG. CONST. art. 100 (1853) (remaining the same but moved to Article 116 in the 1994 version).

98. 1862 Arg. Law 27, ch. 1, art. 1 (establishing the duty of the judiciary as a check to ensure that the other branches of the central government abided by the Constitution); see also Nino, *On the Exercise of Judicial Review in Argentina: Declining Confidence in the Rule of Law*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA, *supra* note 1, at 333.

99. See Kapiszewski, *supra* note 72, at 17.

jurisdiction—granting both original and appellate jurisdiction to the Supreme Court over the same types of cases.<sup>100</sup>

Notwithstanding its similarities, Argentine judicial review differs from the American model in one significant way: every court in the federal judiciary has the power to strike down an unconstitutional law or executive action, but the ruling is only binding on the case at hand.<sup>101</sup> This case-by-case approach touches on a larger difference between the American and Argentine judiciaries in that the Argentine system is a civil law scheme that lacks the formal institution of binding precedent.<sup>102</sup> In recent years, the Court has attempted to create “informal precedent” by establishing that lower courts have a “duty” to conform their decisions to Supreme Court holdings. If departure from precedent is necessary, the lower courts must distinguish the current case from previous Supreme Court rulings.<sup>103</sup> So while precedent was never formally established, it has evolved informally in practice.

This Part is not meant to provide an exhaustive account of the development of constitutionalism and the judiciary in the nineteenth century, but instead, to illustrate how the Argentine Framers and the early Supreme Court copied the American model in form and function—especially with respect to the role of the judiciary in upholding the rule of law. Understanding its American roots can help explain the current state of the Argentine judiciary and why it has not been particularly successful in upholding the rule of law in the post-1983 democracy. Namely, the institution lacks a solid historical foundation and has never fully developed into an independent guardian of the rule of law—due in part to its initial reliance on the U.S. model. While Miller argues that “copying a foreign constitution can work,” and did work, in Argentina because “the recognized success of the U.S. Constitution gave that Constitution a talismanic authority,”<sup>104</sup> many scholars tracing back to Hegel have argued that an effective constitution cannot be copied specifically because the principles will not be founded in existing institutions.<sup>105</sup> In other words, a constitution must be the product of

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100. ARG. CONST. art. 100-01 (1853) (remaining the same but moved to Articles 116 and 117 in 1994). However, appellate review evolved differently in Argentina, as it is granted for both ordinary jurisdiction (review over all federal matters) and extraordinary jurisdiction (review over any case in which the interpretation of a federal norm is at stake). See GUILLERMO N. MOLINELLI ET AL., CONGRESO, PRESIDENCIA, Y JUSTICIA EN ARGENTINA 639-50 (1999).

101. MOLINELLI ET AL., *supra* note 100, at 640; Kapiszewski, *supra* note 72, at 17.

102. *Id.* at 15.

103. *Id.* at 16.

104. Miller, *supra* note 81, at 1487-88.

105. See GEORG WILHELM FRIEDRICH HEGEL, HEGEL'S PHILOSOPHY OF RIGHT 178-79 (T.M. Knox trans., Oxford Univ. Press 1967) (1821) (“The constitution of any given nation depends in

societal values, political institutions, and national culture in order to be embraced by society and succeed in the long run in its role as the supreme source of the rule of law.

This anti-copying argument echoes Linz and Stepan's claim for the necessity of both constitutional and attitudinal consolidation.<sup>106</sup> Not only must the constitution be formally constructed to uphold the rule of law and sustain democracy; the people must have confidence in it. In the case of Argentina, as Hegel would argue, the people could not trust the Argentine Constitution because it came from a foreign source and was not imbued in the country's foundation. While Miller might be correct in asserting that the Argentine Constitution initially received extra attitudinal legitimacy due to its foundation in the proven American model, this foundation was far from rock-solid.<sup>107</sup> Consequently, political and economic forces challenged the Court's legitimacy in a way that would not have occurred if the Argentine Framers had built the Constitution on the country's existing culture and institutions. At that point, the Court failed to serve as the guardian of the rule of law because it was never deeply rooted in a solid pre-constitutional foundation.

However, as this Part has detailed, perhaps there was no solid foundation upon which to construct the Argentine Constitution and establish the Court as its primary guardian. The Court's subsequent failure arguably was not due to copying, but to the lack of any other foundation on which to build. Whatever the cause, Alfonsín's remedy nevertheless applies: "Democratic consolidation [as well as judicial independence and the rule of law] requires serious and continuous effort over a long

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general on the character and development of its self-consciousness. In its self-consciousness its subjective freedom is rooted and so, therefore, is the actuality of its constitution."); see also Atilio A. Boron, *Latin America: Constitutionalism and the Political Traditions of Liberalism and Socialism*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* 339-40 (Douglas Greenberg et al. eds., 1993). For other examples of the anti-copying argument, see sources cited in Miller, *supra* note 81, at 1487 n.14.

106. See *supra* Part II.B and Table 1 for further details of Linz and Stepan's democratic consolidation model.

107. Indeed, Miller might have intended to limit his argument to the nineteenth century, as the title of his article indicates. See Miller, *supra* note 81. The initial success of the Argentine Constitution in the nineteenth century could be attributed to its American roots. However, the twentieth century seems to disprove his thesis—at least with respect to the long-term legitimacy of Argentina's democracy. It should be noted that Garcia-Mansilla asserts that perhaps Miller's thesis was not disproved in the twentieth century, since the Argentine judiciary's demise occurred because the Court gradually relied less on the U.S. model and more on incompatible European judicial doctrines. See Garcia-Mansilla, *supra* note 85, at 348.

period.”<sup>108</sup> Unfortunately, as the rest of this Part outlines, any effort at consolidation was at best discontinuous and short lived.

*B. The Authoritarian Regimes, 1930-1983: Widening Gap Between Formal and Informal Institutions*

The Argentine judiciary might have emerged as a mirror image to the American model, but its legitimacy and role as guardian of the rule of law gradually eroded in the twentieth century with the cyclical rise of authoritarianism and ultrapresidentialism. This erosion was due in large part to the emergence of a widening gap between formal and informal institutions. Gretchen Helmke explains:

A defining feature of contemporary Latin American politics is the gap between formal and informal institutions. Yet, it is worth pointing out that in the case of the Argentine Supreme Court, a gap did not always exist. In the late nineteenth and early twentieth centuries, the Argentine Supreme Court enjoyed fairly broad authority and legitimacy. As early as 1887, the Court established for itself the power of judicial review in the case of *Sojo*, which based its reasoning on *Marbury*. From 1903 to 1929, the Court . . . extended its power of judicial review to cover a number of important areas, such as property rights, equal protection, and labor.<sup>109</sup>

As the previous Part illustrates and Helmke underscores, this formal-informal gap in democratic institutions was not the norm at the onset of the Republic. Under Chavez’s five indicators of judicial independence,<sup>110</sup> the Court was relatively independent from 1853 to 1930. For instance, no Justice was impeached or forced to resign during this time.<sup>111</sup> So for its first seven decades, the Court remained relatively independent from other political institutions, and played an important role in upholding the rule of law.

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108. Alfonsín, *The Function of Judicial Power During the Transition*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA*, *supra* note 1, at 49.

109. GRETCHEN HELMKE, *COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA* 63 (2005) (internal citations omitted). Helmke is one of the leading American political scientists studying the Argentine judiciary. This book is based in part on her doctoral dissertation. See Gretchen Helmke, *Ruling Against the Ruler: Court-Executive Relations in Argentina Under Dictatorship and Democracy* (2000) (unpublished Ph.D dissertation, University of Chicago).

110. See *supra* text accompanying note 78 (outlining Chavez’s five indicators).

111. HELMKE, *supra* note 109, at 63.

That trend began to change, however, on September 30, 1930—four days after General Jose Felix Uriburu's military coup—when the Court issued a resolution (*acordada*)<sup>112</sup> that declared the military government to be constitutional.<sup>113</sup> In this resolution, the Court instituted the controversial De Facto Doctrine: a *de facto*, and in this case authoritarian, government can provisionally exercise all national power due to its successful revolution against an existing *de jure* regime.<sup>114</sup> The Court argued that this holding was rooted in a longstanding principle that the people have a right to revolution or insurrection.<sup>115</sup> Additionally, the Court justified its decision by the fact that the *de facto* government promised to uphold the Constitution and would provide for national security.<sup>116</sup> J. Irizarry y Puente explains the underlying rationale for the doctrine: “[T]he obvious purpose [of the De Facto Doctrine was] to give the new government a semblance of regularity and legality . . . to invest, in other words, the government with a colorable title to office, a plausible investiture and an appearance of general acceptance by and support of the people.”<sup>117</sup>

Faced with an institutional independence and legitimacy crisis, the Court decided to grant constitutional authority to the military regime. This strategy worked in the short run to preserve the Court's institutional capacity, as under the first military government, the Justices were not removed from office and continued to rule on the constitutionality of government action.<sup>118</sup> In the years following the first military coup, the Court claimed to be the final check on *de facto* government power with the scope being limited by the Constitution.<sup>119</sup> In 1935, the Court limited the power of the *de facto* government—in that the military would have

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112. Corte Suprema de Justicia [CSJN], 1930, “Acordada sobre reconocimiento del Gobierno Provisional de la Nación,” Fallos (1930-158-290) (Arg.).

113. William C. Banks & Alejandro D. Carrio, *Presidential Systems in Stress: Emergency Powers in Argentina and the United States*, 15 MICH. J. INT'L L. 27 (1993).

114. Garcia-Mansilla, *supra* note 85, at 350.

115. See, e.g., Corte Suprema de Justicia [CSJN], 1865, “*In Re Baldomero Martinez y Manuel Otero*,” Fallos (1865-2-127) (Arg.) (holding that General Mitre could provisionally exercise “all national powers . . . with the right of triumphant revolution, assented to by the people, by virtue of the grave duties that victory imposed on him”).

116. Tim Dockery, *The Rule of Law over the Law of Rulers: The Treatment of De Facto Laws in Argentina*, 19 FORDHAM INT'L L.J. 1578, 1596 (1996).

117. J. Irizarry y Puente, *The Nature and Powers of a “De Facto” Government in Latin America*, 30 TUL. L. REV. 15, 33 (1955). In some ways this doctrine resonates with the American Declaration of Independence—in that the people can dissolve the government if it becomes destructive of unalienable rights. In other words, the Argentine Supreme Court was loosely recognizing the right of revolution. See *id.* at 17-18.

118. HELMKE, *supra* note 109, at 63.

119. Garcia-Mansilla, *supra* note 85, at 351.

executive, but not legislative or judicial powers.<sup>120</sup> But even this holding was later weakened in 1943 when the Court recognized that the executive may usurp legislative power through emergency decrees.<sup>121</sup> Thus, the gap between the Court's formal and actual independence widened; the Court was forced to ignore the rule of law, in favor of "the law of rulers,"<sup>122</sup> in order to preserve the institution.

This pattern recurred several times until re-democratization in 1983, and the Court gradually became a hollow institution—lacking both public confidence and independence from the executive. For instance, Generals Ramirez and Perón's coup of June 3, 1943 produced a similar outcome. The new military regime, although suspending the Constitution, left the Court in tact in exchange for the Court's recognition of the *de facto* government's authority.<sup>123</sup> The Court's recognition came in a resolution that was an exact reproduction of the one issued in 1930.<sup>124</sup> The Court's independence and power withered even further under Perón's military regime. While one might assume that the Court would regain power when Perón transitioned the country to democratic rule in 1947, the formal-informal gap widened even further with Perón's first democratically elected government.

One of Perón's first tasks in 1947 was to "fix" the Supreme Court so that it would support the Peronist focus on labor, and not interfere with his efforts to govern the country as he saw fit. Perón's remedy was to impeach four of the five Justices, so he brought forward two charges or issues for impeachment:

The specific charges leveled against the Court involved two major issues for the Peronist government: the Court's political role and its hostility to labor. The Court was accused of having exceeded its authority in two separate but identical resolutions passed by the Court in 1930 and 1943 that granted legal recognition to the *de facto* governments. The specific allegations were that the Court had

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120. Corte Suprema de Justicia de la Nación [CSJN], 1935, "Administracion de Impuestos Internos v. Malmonge Nebredacase," Fallos (1935-172-365) (Arg.).

121. Corte Suprema de Justicia de la Nación [CSJN], 1943, "Acordada sobre reconocimiento del Gobierno Provisional de la Nacion," Fallos (1943-196-5) (Arg.).

122. This phrase is borrowed from the title of Tim Dockery's article. See Dockery, *supra* note 116.

123. *Id.* at 1598.

124. Compare *Acordada sobre reconocimiento del Gobierno Provisional de la Nación*, 196 Fallos 5 (1943) with Corte Suprema de Justicia de la Nación [CSJN], 1930, "Acordada sobre reconocimiento del Gobierno Provisional de la Nación," Fallos (1930-158-290) (Arg.).

meddled in political questions and that the Court had decided abstract questions rather than resolve concrete cases.<sup>125</sup>

The second issue was the Court's anti-labor stance, as reflected by its 1946 *Dock Sud* decision.<sup>126</sup> In this pre-election case, the Court struck down a labor initiative to create a national labor relations board. Outraged by the decision, the Minister of Labor called for noncompliance and protest, and Perón harshly criticized the opinion during the campaign.<sup>127</sup> Within nine months, Congress removed three of the five Justices with a fourth resigning before his impeachment.<sup>128</sup> The Perón Court was exactly that; it did little to challenge Perón's use of power even when used to harass political opponents or to rule by presidential decree.

This en masse "court swapping" approach became common practice in Argentina—occurring five more times in the twentieth century.<sup>129</sup> Before Perón's election in 1947, judicial tenure was an established norm. Between 1862 and 1946, for instance, thirty-five Justices served on the Court for an average tenure of eleven years; between 1947 and 1999, however, fifty-seven Justices served for an average tenure of less than five years.<sup>130</sup> In addition to court swapping, Argentina experienced drastic regime changes from 1955 to 1976 with six coups—five by the military and one by civilian revolutionaries. The first occurred in 1955 when Perón was removed, and each subsequent coup replaced a democratically elected administration with a *de facto* president or dictatorial ruler. Juan Perón and his Peronist Party returned to power in 1974, and the party remained in power until another military coup in 1976. During this entire period, the Court was, at best, a dependent, weak institution that did little to challenge the ruler or to uphold the rule of law; at worst, it was a servant of an authoritarian regime that reinforced unconstitutional practices and policies.

The lowest point occurred from 1976 to 1983, when the *junta* (military regime) ruled Argentina and waged a "dirty war" of covert terror against

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125. HELMKE, *supra* note 109, at 64.

126. Corte Suprema de Justicia de la Nación [CSJN], 1946, "Dock Sud de Buenos Aires Ltda.," Fallos (1946-204-23) (Arg.).

127. JONATHAN MILLER ET AL., CONSTITUCIÓN Y PODER POLÍTICO JURISPRUDENCIA DE LA CORTE SUPREMA Y TÉCNICAS PARA SU INTERPRETACIÓN 875-96 (1995).

128. HELMKE, *supra* note 109, at 64.

129. See Garcia-Mansilla, *supra* note 85, at 352. This court-swapping phenomenon occurred in 1947, 1955, 1966, 1976, and 1983. *Id.* Furthermore, every new administration between 1947 and 1983, inclusively, replaced the majority of the Justices with the exception of military-appointee Arturo Illia in 1963. See HELMKE, *supra* note 109, at 65 n.4.

130. See HELMKE, *supra* note 109, at 66-68 & tbls.4.1 & 4.2 (reporting data initially presented in MILLER ET AL., *supra* note 127).



the civilian population.<sup>131</sup> The military regime severely restricted civil and political liberties and persecuted those who resisted. In total, the Argentine government later reported that at least nine thousand civilians were *los desaparecidos* (“disappeared ones”)—were detained, tortured, and likely murdered. Human rights organizations estimated the number to be around thirty thousand.<sup>132</sup> Daniel Schwartz vividly illustrates the level of unconstitutional human rights abuses that took place during the *junta*’s seven-year reign of terror:

Those who survived their torture sessions were transferred to large detention centers, the existence of which the military routinely denied. . . . After spending unknown amounts of time in these centers without adequate medical care or nutrition, the majority of detainees were executed. . . . Many times, cadavers simply appeared in the street. Bodies were also disposed of by means such as incineration or burial in unmarked graves. Even more notorious methods included mass drownings. Depositions of detainees who survived recount the “transfer” of prisoners as a process by which they were injected with pentothal, loaded aboard a plane, and dumped out over the ocean.<sup>133</sup>

In addition, the *junta* replaced the entire government institution by decree—centralizing all power to be shared equally among the three branches of the military.

Like the earlier military regimes, this *junta* replaced the entire Supreme Court with appointees who were “politically conservative jurists with strong professional qualifications who cared about retaining their posts, and perhaps even more strongly, about their professional reputations.”<sup>134</sup>

131. See Daniel W. Schwartz, *Rectifying Twenty-Five Years of Material Breach: Argentina and the Legacy of the “Dirty War” in International Law*, 18 EMORY INT’L L. REV. 317 (2004) (providing an excellent summary of the “dirty war” and subsequent legal actions taken, or not taken, to remedy the human rights violations). For more general histories on *los desaparecidos* and the *junta*, see generally IAIN GUEST, *BEHIND THE DISAPPEARANCES* (1990); DONALD C. HODGES, *ARGENTINA, 1943-1987: THE NATIONAL REVOLUTION AND RESISTANCE* (1988); DEBORAH L. NORDEN, *MILITARY REBELLION IN ARGENTINA* (1996); NUNCA MÁS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED (1986).

132. JUAN E. MENDEZ, *TRUTH AND PARTIAL JUSTICE IN ARGENTINA: AN UPDATE* 18-19 (1991) (stating the number of *los desaparecidos* was more likely 30,000); see also HUMAN RIGHTS WATCH, *ARGENTINA: SUPPORT HUMAN RIGHTS TRIALS* (2001), <http://www.hrw.org/press/2001/12/argtrials1212.htm> (last visited Apr. 15, 2005) (finding that the government kidnapped, imprisoned, tortured, and executed at least 14,000 alleged leftist rebels).

133. Schwartz, *supra* note 131, at 324 (internal citations omitted).

134. HELMKE, *supra* note 109, at 75.

In other words, they were willing to serve the *junta* so long as their professional reputations remained in tact. If their reputations were challenged, they would either declare that the issue was a political question and avoid it, or they would resign from the Court and be replaced by another professional who was more willing. This type of judiciary conformed with the norm for authoritarian and semi-authoritarian regimes, in that the regime went “to great lengths to ensure the impartiality of their judges in order to attach a bit of legitimacy to their rule.”<sup>135</sup> So, the regime appointed prestigious, politically conservative judges who were unwilling to challenge the government and thus “turn[ed] a blind eye to the regime’s horrendous human rights record.”<sup>136</sup>

The Court was thus more the guardian of the rule *by* law than that of the rule *of* law—as it catered to those in power and failed to protect civil and political liberties. Rumors of the dirty war and *los desaparecidos* led to thousands of habeas petitions that were left unanswered; even demands for information about the disappeared ones by foreign governments, international organizations, and the national media fell on deaf ears.<sup>137</sup> The public’s dissatisfaction with the *junta*’s inability to stabilize the economy and its outrage with the *junta*’s coercive behavior culminated with its failed attempts to retake the Falkland Islands (*Las Malvinas*) from the United Kingdom—leading to a relinquishment of power and preparation for democracy in 1982.<sup>138</sup>

None of these preparations, however, involved the reconstruction of the Supreme Court or the restoration of the rule of law through the judicial process. The Supreme Court was left as a hollow, illegitimate institution that garnered little attention from the public or policymakers. Certainly, the prior fifty years did little to establish a firm foundation on which to build the rule of law or judicial independence.

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135. See Christopher Larkin, *The Judiciary and Delegative Democracy in Argentina*, 30 COMP. POL. 436 (1998) (explaining the typical role of the judiciary under authoritarian regimes in Latin America).

136. *Id.* at 437; see also Martin Feinrider, *Judicial Review and the Protection of Human Rights Under Military Governments in Brazil and Argentina*, 5 SUFFOLK TRANSNAT’LL. REV. 176 (1981); Alejandro M. Garro, *The Role of the Argentine Judiciary in Controlling Government Action Under a State of Siege*, 4 HUM. RTS L.J. 311 (1983).

137. *Id.* at 71.

138. Schwartz, *supra* note 131, at 325.

*C. Alfonsín's Liberal Democracy, 1983-1989: Empowering the Judiciary to Protect the Rule of Law*

With democracy being interrupted by the *junta* during the 1970s and early 1980s, Argentina experienced rule *by law* for seven consecutive years. In other words, when it was not convenient for the government to follow the rule of law, the rulers oftentimes assumed unconstitutional and undemocratic powers, which led to massive human rights violations and the restriction of civil and political liberties. On October 30, 1983, however, the tides turned: President Raúl Alfonsín was democratically elected, and the re-democratization process began. Alfonsín remarked on the obstacles facing this new democracy:

During this long period [of military rule] the absence of the rule of law, violence, and systematic violation of human rights plagued the country. The national constitution was suspended, constitutional rights and guarantees were disregarded, separation of powers of the branches of government and federalism were suppressed, and the power of the judiciary was threatened. Political and labor union activity was forbidden, the universities were occupied, and the press was censored. Thousands of citizens were detained without due process of law; many of them were tortured and later assassinated in numerous detention centers. More than 10,000 people disappeared.<sup>139</sup>

Not only did Alfonsín's election mark the first time for democracy in almost a decade; this Radical Party candidate was the first president ever to be elected in an open election that was *not* from the Peronist Party.<sup>140</sup> With respect to restoring the Supreme Court and the rule of law, Alfonsín faced two main challenges: appointing a Supreme Court that would genuinely protect the rule of law, and restoring the political and civil liberties lost during the dirty war. His response to both of these challenges will be briefly explored in this Part.

*Alfonsín's Court Swap:* The Alfonsín Administration rejected the legitimacy of the *de facto* government, thus striking down the laws created by the *junta*.<sup>141</sup> It also planned to remove by presidential decree all of the

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139. Alfonsín, *The Function of Judicial Power During the Transition*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA*, *supra* note 1, at 42-43.

140. HELMKE, *supra* note 109, at 76. Alfonsín defeated the Peronist candidate, Italo Luder, by garnering 52% of the vote. See EDGARDO R. CATTERBERG, *ARGENTINA CONFRONTS POLITICS* 84-85 (1991).

141. CHAVEZ, *supra* note 43, at 49.

Supreme Court Justices since they were appointed by the *junta*.<sup>142</sup> All five Justices resigned once Alfonsín's intentions were made public, so he was free to select the entire Court without having to invoke a presidential decree or work through the impeachment process.<sup>143</sup> A somewhat ironic twist, he continued the detrimental tradition of disrupting judicial tenure and thus affecting judicial independence. But, his justification was arguably based on constitutional grounds, in that the Court was not appointed by a *de jure* government.

Alfonsín also defied the traditional strategy of appointing a Court that was unanimously of the same ideology as the party in office. Instead, as Helmke notes, Alfonsín appointed a variety of Justices from diverse backgrounds:

[T]he Alfonsín court was best characterized as composed of individual "stars" rather than as a team of players with a common set of objectives. The post of the chief justice was initially offered to Italo Luder, the Peronist candidate whom Alfonsín had defeated. After Luder refused the post, it was subsequently offered to Genero Carrió, a well-known law professor and human rights attorney . . . . The four other justices selected were Augusto Belluscio, José Severo Caballero, Carlos S. Fayt, and Enrique Petracchi. Belluscio and Caballero were both lower court judges with ties to the Radical Party, Petracchi was a high-profile labor lawyer from Buenos Aires, and Carlos Fayt was a socialist lawyer. . . . All of the nominees were unanimously approved without discussion either before or during the Senate confirmation process.<sup>144</sup>

These politically diverse and highly competent selections appear to have sent a strong message to the country that Alfonsín meant to establish the Court as the primary guardian of the rule of law.

However, an alternative interpretation—one not explicitly forwarded in the existing literature—is that the Court did not matter; it was a hollow institution without much importance or legitimacy. Perhaps for that reason the Senate unanimously approved the nominees,<sup>145</sup> and the announcement of the new Court only garnered five short paragraphs in *La Nación*, Argentina's major newspaper.<sup>146</sup> As Finkel notes, "the naming of the new

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142. HELMKE, *supra* note 109, at 77.

143. CHAVEZ, *supra* note 43, at 39.

144. HELMKE, *supra* note 109, at 77-78 (internal citations omitted).

145. *Id.* at 78.

146. *El Senado confirma a la nueva corte*, LA NACIÓN, Dec. 3, 1983, at 1.

Court sparked little political debate or public interest.”<sup>147</sup> Moreover, Italo Luder vehemently turned down the offer to be Chief Justice—a position that one would assume to be prestigious and important—because he considered the offer to be “a way of emphasizing Alfonsín’s electoral victory and placing Luder in a position of minor relevance.”<sup>148</sup> So, perhaps one should not read into his selections an intent to provide the Court with independence and legitimacy. Alfonsín would disagree, claiming that “a viable democracy . . . presupposes an impartial, respected judiciary and the judiciary’s working interrelationship with the other government branches.”<sup>149</sup> Whether these statements reflect political rhetoric or personal conviction remains an open question. His post-term writings<sup>150</sup> and subsequent actions during the *Pactos Olivos*<sup>151</sup> seem to indicate that these convictions were genuine.

*Restoration of Political and Civil Liberties:* Many scholars note that the Alfonsín Court progressively expanded political and civil liberties to an unprecedented level.<sup>152</sup> For instance, the Court struck down a law that prohibited divorced individuals from remarrying,<sup>153</sup> and a criminal law that made the mere possession of illegal drugs a crime.<sup>154</sup> The Court also instituted constitutional protections with respect to search and seizures,<sup>155</sup> confessions to law enforcement,<sup>156</sup> the exclusionary rule,<sup>157</sup> and freedom

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147. Finkel, *supra* note 57, at 62.

148. EDUARDO OTEIZA, LA CORTE SUPREMA: ENTRE LA JUSTICIA SIN POLÍTICA Y LA POLÍTICA SIN JUSTICIA 111 (1994).

149. Alfonsín, *The Function of Judicial Power During the Transition*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA, *supra* note 1, at 44.

150. See, e.g., *id.* (consisting of an article he wrote to be included in an academic book).

151. See *infra* notes 210-20 and accompanying text (describing Alfonsín’s role in the *Pactos Olivos*, an attempt at judicial reform near the end of Menem’s first term).

152. ALEJANDO CARRÍO, LA CORTE SUPREMA Y SU INDEPENDENCIA 149-50 (1996); Jorge Bacque, *Corte Suprema de justicia de la nación: Cambio de jurisprudencia en materia de derechos individuales*, 6 NO HAY DERECHO 9 (1995); Finkel, *supra* note 57, at 62; Nino, *On the Exercise of Judicial Review in Argentina: Declining Confidence in the Rule of Law*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA, *supra* note 1, at 323-24.

153. See Corte Suprema de Justicia de la Nación [CSJN], 1986, “Sejean v. Zaks de Sejean,” Fallos (1986-308-2286) (Arg.).

154. See Corte Suprema de Justicia de la Nación [CSJN], 1986, “Bazterrica,” Fallos (1986-308-1392) (Arg.).

155. See, e.g., Corte Suprema de Justicia de la Nación [CSJN], 1984, “Fiorentino,” Fallos (1984-306-1752) (holding a search unconstitutional if without either court approval or accused’s consent).

156. See, e.g., Corte Suprema de Justicia de la Nación [CSJN], 1987, “Ruíz,” Fallos (1987-310-1847) (Arg.) (excluding evidence obtained from coerced confession); Corte Suprema de Justicia de la Nación [CSJN], 1987, “Francomano,” Fallos (1987-310-2384) (Arg.) (adopting a standard similar to *Miranda v. Arizona*, 384 U.S. 436 (1966)).

157. See, e.g., Corte Suprema de Justicia de la Nación [CSJN], 1986, “Rayford,” Fallos (1986-

of the press.<sup>158</sup> Perhaps for this reason, public confidence in the Supreme Court was relatively high during the first part of Alfonsín's term with between forty-five and fifty-seven percent of the public trusting the Court.<sup>159</sup>

From these decisions, it would appear that the Court was independently progressive. But Miller disagrees: "[N]one of these decisions were contrary to the general direction of the government policy, and sometimes actively supported it."<sup>160</sup> Perhaps it was Alfonsín that was advancing the rule of law and progressive politics, and the Court was just dependently following his lead.<sup>161</sup> With a more progressive party in office, a captive Court would be more progressive as well. Even Alfonsín noted that his "first objective was to implement effective judicial protection of human rights."<sup>162</sup> This dependency argument might be true to some extent, but it does not square well with the fact that the Supreme Court, on balance, ruled against Alfonsín's policies thirty-seven percent of the time between 1983 and 1987, which increased to forty-seven percent during the last two years of his term.<sup>163</sup> Regardless of the Court's motives, its rulings expanded civil and political liberties to an unprecedented level.

While the Court was clearly not all-powerful, entirely independent, or fully committed to the rule of law during this period of re-democratization, Alfonsín and his Court made great strides toward judicial independence, liberal democracy, and the rule of law—especially considering the

308-733) (Arg.) (instituting the exclusionary rule to bar evidence gathered against third parties through an illegal detainment and search).

158. See, e.g., Corte Suprema de Justicia de la Nación [CSJN], 1987, "Costa v. Municipalidad de la Ciudad de Buenos Aires," Fallos (1987-310-508) (Arg.) (mentioning in dicta the Court's approval of *New York Times v. Sullivan*, 376 U.S. 254 (1964), and its free speech protections).

159. Jonathan M. Miller, *Evaluating the Argentine Supreme Court Under Presidents Alfonsín and Menem (1983-1999)*, 7 SW. J. L. & TRADE AM. 369, 372 (2000).

160. *Id.* at 391.

161. For instance, Alfonsín initially pressed hard to prosecute the military officials responsible for the dirty war and the human rights violations that occurred during the military regime. He established the National Commission on the Disappeared Persons and encouraged, participated in, and accepted various regional and global organizations' efforts to uncover the truth and hold the guilty accountable—including efforts by the U.N. Convention Against Torture, the Inter-American Court on Human Rights, and the American Convention on Human Rights. See Schwartz, *supra* note 131, at 327. It should be noted, though, that in 1986 Alfonsín—in order to appease military forces—granted amnesty to the military officers who committed human rights violations during military dictatorial rule. See HUMAN RIGHTS WATCH, *supra* note 132.

162. Alfonsín, *The Function of Judicial Power During the Transition*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA, *supra* note 1, at 43.

163. Helmke, *The Logic of Strategic Defection*, *supra* note 71, at 296. This increase was due in part to Alfonsín's failed attempt to add two Justices to the Court in 1987. *Id.*; see also OTEIZA, *supra* note 148, at 189-91.

previous regime's violation of all three. The Court was relatively independent, in that the Justices were willing to rule against the administration and only one Justice was replaced during Alfonsín's rule—resigning due to health reasons in 1985.<sup>164</sup> Alfonsín understood the importance of an independent and legitimate judiciary:

The judiciary, and particularly the Supreme Court, must ensure that the Constitution and the laws are upheld. If they succeed, they will win the respect and following of the citizenry. If they fail, they will lose their prestige and power; moreover, this failure will open the doors to anarchy or oppression.<sup>165</sup>

The Court's expansion of political and civil liberties, and its willingness to strike down unconstitutional government action, reinforced its efforts to develop a liberal democracy and the rule of law. In sum, the Alfonsín era was one in which the Supreme Court began to develop into the primary guardian of the rule of law. Unfortunately for the Court, Alfonsín constitutionally could only be president for one six-year term and his successor, Carlos Menem, returned to traditional practices of ultrapresidentialism and delegative democracy. These undemocratic practices would virtually strip the Supreme Court of virtually all power and independence and set up the country for an even more debilitating economic crisis.

During the second half of the 1980s, the financial crisis deepened, and Alfonsín tried to remedy the economic situation and salvage any chances for his party's reelection. In 1986, the President restructured the pension system using his decree powers in hope of freeing up more capital. Pensioners filed suit, and the case reached the Supreme Court. In *Rolón Zappa*,<sup>166</sup> the Court agreed with the appellate court's ruling and struck down the executive action, addressing both the decision-making process and the merits of the decision. Without binding precedent, however, this decision only applied to Zappa's claim, and the Alfonsín Administration responded by declaring a state of "economic emergency"—reforming the pension program and declaring a freeze on all litigation.<sup>167</sup> This economic emergency power was not grounded in Argentine constitutional law, and

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164. HELMKE, *supra* note 109, at 77-78.

165. Alfonsín, *The Function of Judicial Power During the Transition*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA*, *supra* note 1, at 45.

166. Corte Suprema de Justicia de la Nación [CSJN], 1986, "Rolón Zappa," *Fallos* (1986-308-1848) (Arg.). For in-depth analysis of *Rolón Zappa* and its political and economic context, see Kapiszewski, *supra* note 72, at 20-22.

167. See Miller, *supra* note 159, at 383-84.

the decree challenged constitutional limits by usurping legislative authority and ignoring judicial decisions.

Nevertheless, the Court delayed deciding pension cases for two years and then declared the constitutional issue moot, since it had already been resolved by subsequent legislative and presidential action.<sup>168</sup> The same tactic of “judicial deference through delay”<sup>169</sup> was used to implement Alfonsín’s Austral Plan to address hyperinflation in 1986,<sup>170</sup> as well as in other controversial exercises of executive or legislative powers.<sup>171</sup> This judicial deference strategy opened the door for even further manipulation of the Court by President Carlos Menem, who reached far beyond Alfonsín’s subtle attempts to influence the Court. Menem subdued it to his political will.

#### *D. Menem’s Delegative Democracy, 1989-1998: Removing Horizontal Checks to Executive Power*

When Menem assumed the presidency in 1989—in a Peronist sweep of the executive and Congress—Menem had a mandate to turn the economy around<sup>172</sup> and enjoyed no horizontal checks on his authority with the exception of the judiciary.<sup>173</sup> A newspaper article in *La Nación* aptly summarized the opportunity Menem had to consolidate the Supreme Court’s role as the primary guardian of the rule of law:

The Argentine system is designed so that each president receives a Supreme Court he did not designate and only may do so through natural modifications that occur with the passage of time. For the first time in more than half a century, a constitutional government is in the position of being able to accept it and instead is running the risk of reducing the stability and independence of the judiciary.<sup>174</sup>

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168. *Id.* at 384.

169. *Id.* at 385.

170. The presidential decree was delivered in June 1985, and the legislature ratified the decree in October 1986. By the time the Supreme Court heard the case in April 1989, the constitutional issue was already moot. See Corte Suprema de Justicia de la Nación [CSJN], 1989, “Porcelli v. Banco de la Nación Argentina,” Fallos (1989-312-555) (Arg.). For further discussion on *Porcelli*, see Kapiszewski, *supra* note 72, at 22-24.

171. See, e.g., Corte Suprema de Justicia de la Nación [CSJN], 1986, “Klein,” Fallos (1986-308-1489) (Arg.) (taking almost two years to resolve a law firm’s action against a congressional committee for seizing client files).

172. Munck, *supra* note 28, at 8 (“If Alfonsín had neglected the economy to his cost, with Menem it moved center-stage and became the linchpin of his political project.”).

173. For a comprehensive account of the judiciary under Menem, see generally Larkin, *supra* note 135, at 423-42.

174. HORACIO VERBITSKY, HACER LA CORTE: LA CREACIÓN DE UN PODER SIN CONTROL NI



When questioned why he was not seizing this historic opportunity to build the judiciary's capacity to protect the rule of law, Menem responded: "Why should I be the only president in fifty years who hasn't had his own court?"<sup>175</sup> His administration believed and publicly stated that a judiciary that was willing and able to resist Menem's aggressive economic reforms would ruin any chance for economic recovery.<sup>176</sup> So, he turned his attention to taming the Court.

Menem's first attempt to replace the Court took place shortly before taking office. This approach consisted of informal bribes and threats for the current Justices to step down and be replaced by those who would be more sympathetic to his agenda. Larkin explains:

Shortly before [Menem] took office, members of Menem's inner circle reportedly offered ambassadorships and other prestigious posts to various justices in order to induce their resignations, thereby giving the new president a few vacancies to fill. Jorge Luis Manzano, leader of the president's Peronist Party in the Chamber of Deputies, also supposedly threatened particular justices with impeachment should they refuse to resign. While these pressures succeeded in securing the resignation of Chief Justice Caballero, none of the other justices budged.<sup>177</sup>

When informal means of court swapping did not work, Menem took a page from Franklin D. Roosevelt and decided to pack the Court. Unlike Roosevelt, Menem was successful, increasing the Court from five to nine Justices. With Caballero's resignation, the four new positions, and the

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JUSTICIA 35 (1993) (quoting the article from *La Nación*).

175. Mariano Grandona, *La justicia y los políticos*, in *LA JUSTICIA EN CRISIS* 136 (Francisco Diez ed., 1994) (quoting President Menem on the Argentine political show *Hora Clave*).

176. See Larkin, *supra* note 135, at 428. Menem's economic reforms were varied and aggressive: "[Menem's] reform plan included deregulation, privatization, changes in tax structure and collection, tariff reduction and elimination of foreign trade limitations, deregulation of the exchange market, a reduction in bureaucracy, and suppression of government in the private sector." See Manuel A. Solanet, *Privatization: The Long Road to Success in Argentina*, *BUS. F.: J. BUS. & ECON.*, Winter/Spring 1994, at 28. Menem's reforms were embraced for their initial success, but his "reform first" approach led to economic collapse and undemocratic practices. During his first month in office, he convinced Congress to pass the Law of Economic Emergency and the State Reform Law, which unleashed his plan for radical privatization. See Charles H. Blake, *Economic Reform and Democratization in Argentina and Uruguay: The Tortoise and the Hare Revisited*, 40 *J. INTER-AM. STUD. & WORLD AFF.* 7 (1998). Consequently, Menem was able to privatize with little oversight. For instance, Congress's *Comisión Bicameral de la Reforma del Estado* (CBRE) could monitor the privatization efforts, but it could not regulate or prohibit sale. *Id.*

177. Larkin, *supra* note 135, at 427-28.

resignation of another in protest, Menem was able to add six Justices to the Supreme Court.<sup>178</sup>

Not only did Menem expand the Court to fulfill his political agenda; his choice of Justices was highly controversial. One appointee was a former partner at Menem's law firm, and several others were family friends. Once nominated, one member of Menem's inner-circle proclaimed: "I am and always will be a Peronist," while another nominee from Menem's cabinet remarked: "My only two bosses are Perón and Menem."<sup>179</sup> Another nominee described himself as a "friend of the President" and defined his judicial philosophy as "the functions are three, but the power is one."<sup>180</sup> Another appointee was reportedly Menem's favorite tennis doubles partner.<sup>181</sup> Anecdotal stories of their close ties with and allegiance to Menem flooded the newspaper headlines and the tabloids.

In addition to their close personal ties with Menem, the six appointees all had a track record of conservative jurisprudence that was compatible with Menem's neoliberal reforms.<sup>182</sup> Having appointed six of the nine Justices, Menem could ensure that the Court did not strike down his reforms, and the Court complied with his wishes. Legal scholar German Bidart-Campos remarked: "[I]n cases that do not interest the government, the Court has handed down rather acceptable decisions. In the other cases, however, the Court does not leave one with an impression of impartiality and independence."<sup>183</sup> Another legal scholar remarked that the Court acted as if as it were "addicted" to Menenism.<sup>184</sup>

The Court's lack of independence reached its low-point with the "stolen decision" in 1993. In what Miller calls the "single most damning incident for the Supreme Court as an institution,"<sup>185</sup> the Court ordered the Central Bank to pay \$100,000 in attorneys' fees to a firm who had helped liquidate a bank.<sup>186</sup> The Economic Minister feared that the fee was excessive and would set a bad precedent for future liquidations, so he requested that the Chief Justice fix the problem. The Chief Justice's law

178. HORACIO VERBITSKY, *HACER LA CORTE* 67 (1993). In addition to packing the Court, Menem removed four of the five members of the Fiscal Tribunal, which oversaw government spending, and he unconstitutionally removed the state attorney that prosecutes for irregularities in public administration. Blake, *supra* note 176, at 7.

179. Larkin, *supra* note 135, at 428.

180. Miller, *supra* note 159, at 395.

181. Larkin, *supra* note 135, at 428 (quoting an interview with German Bidart-Campos).

182. *Id.*; Miller, *supra* note 159, at 395-96.

183. Larkin, *supra* note 135, at 429.

184. *Id.* (quoting Rosendo Fraga as stating that the Menemist Court was "addicted").

185. Miller, *supra* note 159, at 396-97 (describing the case in greater detail).

186. *Conmune al Poder Judicial el caso del expediente sustraído*, LANACIÓN, Sept. 30, 1993, at 22.

clerk removed the old decision and replaced it with one that was more favorable to Menem's government; the old decision simply disappeared, or as the press claimed, it was stolen.<sup>187</sup> The Court's minority publicly objected, and the decision was later replaced. Nevertheless, the Chief Justice remained on the Court and was only demoted to Associate Justice.<sup>188</sup> This "stolen case" scandal was just one of many incidences that destroyed the Court's credibility as the chief guardian of the rule of law; allegations of bribery, nepotism, and personal favors for friends of the administration also made the headlines.<sup>189</sup> Any public trust in the institution that Alfonsín had worked so hard to establish was destroyed by the end of the first couple years of the Menem Administration. In one 1992 survey, for instance, ninety-three percent of Buenos Aires attorneys described the judiciary as "not independent" or "marginally independent."<sup>190</sup>

And, Menem took advantage of this illegitimacy. Without any real horizontal checks on his power, he initiated the further hollowing out of democratic institutions and practices. O'Donnell asserts that Menem abused executive powers and assumed "delegative democratic authority" that extended well beyond the written constitution.<sup>191</sup> Miller notes that Menem expanded presidential power in three main ways: (1) the emergence of emergency executive decrees of necessity and urgency (DNU's); (2) the delegation of legislature authority to the executive; and (3) the dismissal of officials with executive oversight.<sup>192</sup> With an understanding of these three delegative democracy moves, one can see how Menem was able to implement radical economic reforms, and why such reforms would ultimately fail: there was no check on his power. Moreover, the Supreme Court played a critical role in expanding Menem's

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187. *Reconocieron en la Corte el robo de la sentencia*, LA NACIÓN, Nov. 10, 1993, at 22.

188. *Una tarjeta amarilla*, PÁGINA DOCE, Dec. 1, 1993, at 2.

189. Miller describes the state of the Court's credibility after the "stolen case" debacle:

These events [of the "stolen case"] were accompanied by well-founded allegations that the Court had agreed to inflated prices in contracts to purchase buildings for the lower courts, of nepotism in the appointment of law clerks and administrative personnel, and of detailed allegations of bribery and favors for friends. These allegations were accepted as true by most of the public. The Court packing, multiple scandals, and a media willing to give the scandals free play, could not help but leave the Court reeling.

Miller, *supra* note 159, at 397-98 (internal citations omitted).

190. CHAVEZ, *supra* note 43, at 52.

191. O'Donnell, *supra* note 26, at 58-62.

192. Miller, *supra* note 159, at 399-400.

power by neither standing in the way, nor slowing down his reform project when it violated constitutional protections.

*Executive Decrees of Necessity and Urgency (DNUs):* Facing hyperinflation in 1990, the Menem Administration instituted DNU 36/90, known as the Bonex Plan, which froze private savings accounts and turned most bank accounts with over one million australes (about six hundred U.S. dollars) into long-term government bonds.<sup>193</sup> Some bank account holders challenged the action—both the constitutionality of the DNU process and the property deprivation of the presidential action. In *Peralta v. Nación Argentina*,<sup>194</sup> what was probably the most debated and criticized decision of the Menem Court, no member of the Court challenged the DNU, and the bank account holders were left without any remedy. More importantly, *Peralta* opened the floodgates for Menem's constitutionally questionable use of the DNU—a power that should have been strictly limited because it encroached on legislature authority. Miller explains that only twenty DNUs were issued during democratic governments from 1853 to 1983, and Alfonsín only issued ten more during his presidency from 1983 to 1998. However, Menem issued 401 DNUs from 1989 to 1993 alone.<sup>195</sup> Miller comments that “[w]ith the exception of some decisions during the lame duck months of the Menem Presidency, the Court gave the President virtual carte blanche for emergency decree powers by upholding the decrees with minimal analysis.”<sup>196</sup> Most of these DNUs were utilized to implement his economic reform plan, which meant that neither Congress nor the courts—or any other policymaking body or democratic institution—played a deliberative role in the radical reforms that Menem instituted. These unchecked reforms would contribute to the economic crisis at the beginning of the twenty-first century.

*Delegation of Legislative Authority:* While DNUs allowed the President to usurp legislative powers when “necessary and urgent” and Menem expanded the scope well beyond its intended purpose, Menem went a step further in 1993. This time he claimed legislative powers outside of DNUs, basing this delegation of authority under a law passed by Congress that authorized the executive to reform the public administration and engage in expansive privatization. Under the color of this law, Menem abrogated collective bargaining agreements in various maritime and port activities,

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193. *Id.* at 400.

194. Corte Suprema de Justicia de la Nación [CSJN], 1990, “*Peralta v. Nación Argentina*,” Fallos (1990-313-1513) (Arg.). For in-depth analysis of *Peralta*, see Kapiszewski, *supra* note 72, at 24-26; Miller, *supra* note 159, at 400-03.

195. Miller, *supra* note 159, at 401; see also Zakaria, *supra* note 27, at 30-31 (noting that Menem passed over 300 presidential decrees in the first years of his presidency).

196. Miller, *supra* note 159, at 403.

even though the law provided no grounds for the executive to abrogate.<sup>197</sup> In *Cocchia v. Nación Argentina*,<sup>198</sup> the Supreme Court upheld the President's action, even though the dissent vehemently rejected the notion that the President could unilaterally abrogate collective bargaining agreements between two private parties.<sup>199</sup> By upholding the President's power in *Cocchia*, the Court further conceded traditionally legislative authority to the executive. Now Menem was able to seize power liberally at any time that Congress did not explicitly restrict executive action when creating national policy within a particular realm. Because the Court interpreted these powers so broadly, Menem was granted a virtual blank check to implement his economic reforms.

*Removal of Executive Oversight:* One final executive action deserves mention to illustrate how Menem turned Argentina into a delegative democracy: his removal of executive oversight. Miller explains three instances in which Menem removed this oversight:

(1) the forced resignation of the *Procurador General*, an official who acted as head of all government prosecutors and as the representative of the government before the Supreme Court, and who by tradition, had enjoyed life tenure with the same appointment process and removal protections as a judge of the Supreme Court; (2) the packing of the *Tribunal de Cuentas*, the government body in charge with reviewing all government expenditures, after the *Tribunal* questioned several irregular contracts; and (3) the firing of the *Fiscal General de Investigaciones Administrativas*, a permanent prosecutor charged with investigating and prosecuting illegal conduct by Executive Branch officials.<sup>200</sup>

The Supreme Court only had the chance to review the third measure, and as expected, the Court upheld Menem's action. In *Molinas*,<sup>201</sup> the majority seemed to defy constitutional provisions that granted the Fiscal General lifetime tenure by claiming that the executive was vested with all powers

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197. *Id.* at 403-04.

198. Corte Suprema de Justicia de la Nación [CSJN], 1993, "*Cocchia v. Nación Argentina*," Fallos (1993-316-2624) (Arg.). For a more detailed account of *Cocchia*, see Miller, *supra* note 159, at 403-07.

199. *Cocchia*, 316 Fallos at 2687-89 (Petracchi, J., dissenting).

200. Miller, *supra* note 159, at 407-08 (emphasis added; internal citations removed).

201. Corte Suprema de Justicia de la Nación [CSJN], "*Melinas*," Fallos (1991-314-1091) (Arg.).

over the “general administration of the country.”<sup>202</sup> By removing these officials charged with oversight of the executive, Menem not only expanded his power to legislate; he removed any post-execution checks on his power. And the Court let him.

It is because of this usurpation of horizontal powers and checks, that scholars have labeled democracy under Menem as a “thin,”<sup>203</sup> “delegative,”<sup>204</sup> and “persistently unconsolidated” democracy,<sup>205</sup> a “democracy in turmoil,”<sup>206</sup> and a case of “neopopulism.”<sup>207</sup> Table 2 further outlines the informal means by which Menem decreased judicial independence and authority. When *Peralta*, *Cocchia*, and *Molinas* are taken together, it is easy to see how Menem received his blank check to revolutionize the Argentine economy.<sup>208</sup>

If Menem were a benevolent dictator or philosopher king—if there is such a ruler—perhaps such power centralization would not have been so problematic. Instead, corruption, mismanagement, and unilateral

202. *Id.* at 1105 (citing ARG. CONST. art. 86, § 1 (1860)).

203. Munck, *supra* note 28, at 13.

204. O'Donnell, *supra* note 26, at 55.

205. Philippe Schmitter, *Transitology: The Science or the Art of Democratization?*, in CONSOLIDATION OF DEMOCRACY IN LATIN AMERICA 17 (Joseph Tulchin ed., 1995).

206. Liliana De Riz, *Argentina: Democracy in Turmoil*, in CONSTRUCTING DEMOCRATIC GOVERNANCE: SOUTH AMERICA IN THE 1990s, at 120 (Jorge Domínguez & Abraham Lowenthal eds., 1996).

207. Kurt Weyland, *Neopopulism and Neoliberalism in Latin America: Unexpected Affinities*, 31 STUD. IN COMP. INT'L DEV. 1, 3 (1996).

208. For more information on Menem's economic reforms, see *supra* text and sources accompanying note 176. Two of his economic reforms merit particular attention: privatization coupled with the Convertibility Plan of 1991. Blake explains that this plan “basically placed the Argentine economy on a rigid dollar standard [. . . and] also called for the creation in 1992 of a new Argentine currency, the peso, which would remain at a one-to-one exchange rate with the dollar.” Blake, *supra* note 176, at 8. To peg the peso to the dollar, the government had to back the peso with dollars from the national reserve and compensate for any market shifts. With a stable currency came lower inflation and more effective privatization efforts. Menem's plan produced immediate, but only temporary success: “The economy grew at 8.8 percent a year in 1991-1992 and by 6.0 percent a year in 1993-1994. Meanwhile, annual inflation fell from 1,344 percent in 1990 to 84 percent in 1991. It fell below 20 percent in 1992 and below 10 percent in 1993-94.” *Id.* at 7. Menem also executed expansive privatization efforts, often selling utilities to friends or others who paid a personal commission or made a campaign contribution. *Id.*

Some economists initially concluded that privatization positively affected the economy. See, e.g., Leo Paul Dana, *A Contrast of Argentina and Uruguay: The Effects of Government Policy on Entrepreneurship*, 35 J. SMALL BUS. MGMT. 102 (1997). Conversely, Linz and Stepan argued that such reforms were no more successful than Alfonsín's attempts and that the country would once again face the threat of hyperinflation coupled with a financial collapse due to pegging the peso to the dollar. See LINZ & STEPAN, *supra* note 5, at 196. History reveals that Linz and Stepan provided the more accurate prediction.

**Table 2: History of Informal Practices in Argentina  
1822-1999**

<b>Informal Practice</b>	<b>1862-1946</b>	<b>1946-1983</b>	<b>Alfonsin (1983-1989)</b>	<b>Menem (1989- 1999)</b>
The executive uses an opaque process to appoint pliant justices	No	Yes— <i>except the 1976-1983 military government</i>	No	Yes
The executive violates judges' tenure protection	No— <i>except the 1930 de facto government's dismissal of lower court judges</i>	Yes	Yes	Yes
The executive packs the Supreme Court	No— <i>except the 1869 Court expansion</i>	Yes	No	Yes
Judges are unwilling to endure the costs of ruling against executive interests	No— <i>although the Court began to show some restraint after the 1930 coup</i>	Yes	No	Yes
Judges uphold the de facto doctrine	Yes	Yes	No	Yes
Number of practices that indicate executive subordination of the judiciary	1 out of 5: High degree of judicial autonomy (although decline began in 1930)	5 out of 5: Executive subordination of the courts	1 out of 5: High degree of judicial autonomy	5 out of 5: Executive subordination of the courts

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decision-making dominated his administration. For instance, when Menem assumed power in 1989, business owners began to trust government less. Transparency International's Corruption Index reveals that the perception of corruption worsened from 5.91 to a staggering 3.00 by the end of the Menem Administration.<sup>209</sup> Additionally, Argentina's Freedom House scores, which measure democracy levels with respect to political and civil liberties and the rule of law, worsened under Menem's rule from 1.5 in 1989 to 3.0 in 1998.<sup>210</sup> Some scholars even speculated that Menem would not leave office peacefully.<sup>211</sup> Nevertheless, Menem was peacefully and democratically removed from office in 1999, and democracy persisted even in the face of economic collapse and political chaos. After leaving office, Menem was even imprisoned for his involvement in illegal arms sales to Croatia and Ecuador.<sup>212</sup>

It should be noted that Menem's second term brought false hope that he might finally move toward democratic consolidation and the reestablishment of the judiciary as the primary guardian of the rule of law.<sup>213</sup> But, this hope was short lived. Before 1994, the Constitution prohibited a second term in office. Menem, however, was determined to remain in office beyond his first term. As Finkel explains, Menem had enough votes in the Senate to pass a Declaratory Law that would amend the Constitution, but it was unclear whether he had enough votes in the Chamber of Deputies; he likely needed the support of the Radical Party.<sup>214</sup> Menem approached the Radicals, led by Alfonsín, and they entered into an agreement, the *Pactos Olivos*, which would allow Menem to seek a second

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209. JOHANN GRAF LAMBSDROFF, TRANSPARENCY INTERNATIONAL, CORRUPTION INDEX (2001), available at [www.transparency.org](http://www.transparency.org) (last visited Mar. 20, 2005) ("The . . . score relates to perceptions of the degree to which corruption is seen by business people—a perfect 10.00 would be a totally corruption-free country."). Since the 1999 presidential election, business owners had more confidence in government, and the score rose from 3.0 to 3.5 in 2001, which ranked Argentina fifty-seventh in the world. *Id.* That score has undoubtedly fallen since 2001.

210. FREEDOM HOUSE, REPORT: FREEDOM IN THE WORLD 2001-2002 (2002) [hereinafter FREEDOMHOUSE REPORT], available at <http://www.freedomhouse.org> (last visited Feb. 20, 2005).

211. See, e.g., De Riz, *supra* note 206, at 165; Marcos Novaro, *Shifting Alliances: Party Politics in Argentina*, 31 NACLA REPORT ON THE AMERICAS 10, 15 (1998).

212. BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, ARGENTINA: COUNTRY REPORT ON HUMAN RIGHTS PRACTICES (2002), available at <http://www.state.gov/g/drl/rls/hrrpt/2001/wha/8278pf.htm> (last visited Feb. 13, 2005). See *infra* Part V.B for more information on Menem's illegal arms sales.

213. While the history of Menem's *Pactos Olivos* and second term will only be briefly treated in this Article, see Finkel, *supra* note 57, at 56-80, for a comprehensive review of the agreement and the empty promises that colored Menem's second term in office.

214. *Id.* at 64.



term in return for a set of thirteen institutional reforms. These reforms included:

a reduction in presidential tenure from six to four years; increases in judicial independence; creation of a cabinet chief of staff responsible to both the president and Congress; direct election of the mayor of Buenos Aires; an increase in the number of senate seats awarded to the opposition; and creation of an Auditor General's Office under the leadership of the major opposition party. Along with these constitutional changes, the Radicals also demanded an "extraconstitutional" judicial change—transfer of ownership of the Supreme Court.<sup>215</sup>

With respect to the judiciary's role as guardian of the rule of law, three of these changes were of particular importance: the swapping of the Supreme Court, the modified court selection process, and the National Judicial Council. Each merits a brief discussion.

*Swapping of the Court:* Perhaps the most important judicial reform was the informal agreement to shift the Court's balance to 5-4 in favor of the Radicals. Menem waited until the last minute to approve this court swap, and he did so only informally through a "gentleman's agreement."<sup>216</sup> Two of the Justices were immediately replaced according to plan, but the third Menemist Justice did not retire as planned in February 1994. Instead, he remained in office until November 1995, and then Menem violated the agreement and replaced the Justice with another friend, preserving the Peronist (or better said, Menemist) majority on the Court.<sup>217</sup> The Radicals demanded that Menem undo his appointment and keep his end of the *Pactos Olivos*, but Menem never changed his position. As Finkel notes, this move served two purposes: first, the Court would not strike down Menem's policies while in office, and second, the Court would resist any changes after Menem had left office—thus solidifying his legacy and preserving his economic reforms.<sup>218</sup>

*National Judicial Council:* The 1994 Constitution also required Menem to establish the National Judicial Council (NJC), which would be responsible for judicial selection and administration—including

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215. *Id.* at 64-65 (internal citations omitted). The Radical Party's reform measures were based on a report issued by the Inter-American Development Bank. See INTER-AMERICAN DEVELOPMENT BANK, REPORT ON THE REFORM OF THE ADMINISTRATION OF JUSTICE IN ARGENTINA (1993).

216. *Id.* at 69.

217. *Id.*

218. See Finkel, *supra* note 57, at 70.

administering written exams to nominees, investigating judicial misconduct, and managing the judicial budget, training, and internal regulations.<sup>219</sup> The NJC was to be operational by August 1995, but Menem dragged his feet. Even with pressure from the International Monetary Fund and other international organizations and foreign countries, Menem did not budge until it was clear that his party would lose the next election.<sup>220</sup> At that point, he began the process of implementation, but the NJC representatives were not sworn in until November 18, 1998. The NJC began operation in 1999, months after Menem was no longer in office, and five years later than the 1994 constitutional amendment had mandated.<sup>221</sup>

*Court Selection Process:* Unlike the NJC and the court swap, the selection process requirements were instituted. Under the amended 1994 Constitution, the President retained his nomination powers, but the confirmation process would now require two-thirds majority in the Senate, instead of a simple majority.<sup>222</sup> Nevertheless, this reform alone was not sufficient to provide any significant increase in judicial independence; it would only protect future minorities from being dominated by a majority party with respect to judicial nominations. In other words, Menem's party would benefit most from this protection after the elections.

As Part IV documents, the Argentine Supreme Court has experienced a cycling of judicial independence with autonomy being interrupted by authoritarianism, ultrapresidentialism, and delegative democracy. As illustrated in Table 2, the Court has never had a prolonged period of judicial independence—clearly not long enough to meet Alfonsín's standard of a "serious and continuous effort over a long period . . . [more than] a single grand gesture, []or . . . a single administration."<sup>223</sup> As Part V demonstrates, Menem's delegative democratic rule might have initially produced economic prosperity, but it was short lived and produced long-term damage. More importantly, his power usurpation set the Court back decades and substantially frustrated the development of the rule of law. Only after several years of a revolving presidential door did the dust settle enough for the current president to begin rebuilding the Supreme Court and restoring its role as the primary guardian of the rule of law.

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219. *Id.* at 68.

220. *Id.* at 70-71.

221. *Id.* at 72.

222. *Id.* at 67.

223. See Alfonsín, *The Function of Judicial Power During the Transition*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA*, *supra* note 1, at 49.

## V. THE EFFECT OF HOLLOW INSTITUTIONS: THE COURT'S ROLE IN ARGENTINA'S ECONOMIC COLLAPSE AND KIRCHNER'S SUBSEQUENT JUDICIAL REFORMS

In February 1999, Fernando De la Rúa of the Alliance for Jobs, Justice, and Education was elected president by defeating Peronist candidate Eduardo Duhalde with 48.5% of the vote to 38.1%. Domingo Cavallo, Menem's former Economics Minister, finished third with 10.1%.<sup>224</sup> This election marked several milestones for democratic consolidation of Argentina's political society. First, the Alliance's win signified that Argentina finally passed Huntington's "two-party turnover test."<sup>225</sup> The Radical Party president (Alfonsín) had been replaced by a Peronist (Menem), who was now democratically replaced by an Alliance candidate (De la Rúa). In other words, under Huntington's framework, Argentina was officially consolidated for the first time in its history.<sup>226</sup>

Additionally, the Alliance's victory, the first multi-party coalition to win office in Argentine history, signified a major democratic evolution, as Linz claims that multi-party alliances reveal consolidation development.<sup>227</sup> The substantial success of the third party further demonstrated that the system was pluralistic, and political competition was significantly developed. Steven Levitsky notes that this political pluralism was extremely important because hypermajoritarianism threatened party politics during the Menem Administration.<sup>228</sup> In other words, the opposition parties were so fragmented that the public had no viable alternative to Menem and his Peronist Party. Such one-party domination of the political society weakened consolidation efforts by monopolizing governing power. With a new party in the presidency and multiple parties vying for public support, however, Levitsky claims that the 1999 elections brought about a "normalization of Argentine politics."<sup>229</sup> The Alliance victory in the 1999 elections also marked the end of the "impossible game," which Guillermo O'Donnell claimed Argentina might never

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224. See *C.N.N. Election Watch: 1999 Presidential Elections in Argentina* (1999), available at [www.CNN.com/WORLD/election.watch/americas/argentina.html](http://www.CNN.com/WORLD/election.watch/americas/argentina.html) (last visited Mar. 20, 2005).

225. Steven Levitsky, *The "Normalization" of Argentine Politics*, 11 J. DEM. 57 (2000).

226. See *supra* Part II.A for more information on Huntington's minimalist definition. Though Huntington's framework does not evaluate all facets of consolidation, it is useful in the Linz and Stepan model to measure political society development.

227. See generally Juan Linz, *Legitimacy of Democracy and the Socioeconomic System*, in *COMPARING PLURALIST DEMOCRACIES: STRAINS ON LEGITIMACY* 25 (Mattei Dogan ed., 1988).

228. Levitsky, *supra* note 225, at 60.

229. *Id.* at 68.

conquer.<sup>230</sup> With party competition in the legislature and party turnover in the presidency, Argentina could begin to rebuild the separation of powers among the three branches.

However, Menem had so hollowed out the democratic institutions—both with respect to the actual power of the other branches and the public trust in them—and unilaterally implemented drastic economic reforms, that economic crisis was virtually inevitable. By 2001, economic chaos arrived with the devaluation of the peso, the resignation of President De la Rúa, and a revolving door of interim presidents. With respect to economic stability in Latin America, Argentina went “from poster child to basket case” in a matter of months.<sup>231</sup> A casual observer would assume that with the economy in shambles, democracy would be the next to go. However, Levitsky counters:

Given the relative strength of Argentina’s core democratic institutions, however, these [economic] problems are unlikely to be regime-threatening. . . . Indeed, it is one of the greatest paradoxes of Menem’s presidency that at its close, in spite of Menem’s evident lack of interest in strengthening democratic institutions, the prospects for stable democracy have perhaps never been better.<sup>232</sup>

While democracy has had its challenges since 2001, it has remained the only game in town. In this Part, Argentina’s twenty-first-century economic crisis will be outlined—including some discussion of the Court’s role, or lack thereof—followed by a brief analysis of President Kirchner’s current judicial reform efforts.

### *A. Argentina’s Collapse, 1999-2003: Facing an Economic Crisis and Presidential Revolving Door*

As a result of Menem’s economic reforms, Argentina appeared to have escaped from the economic uncertainty and stagnancy of the 1980s, but Vicente Palermo and John Collins note that this was merely a façade: “Nevertheless, at the end of six years of reforms that were specifically designed to resolve significant imbalances presented by the Argentine economy and state, it became clear that a painless exit from the convulsive paralysis of the 1980s was little more than an illusion.”<sup>233</sup> The government

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230. See O’Donnell, *supra* note 16, at 170.

231. Levitsky & Murillo, *supra* note 2, at 153.

232. Levitsky, *supra* note 225, at 68.

233. Vicente Palermo & John Collins, *Moderate Populism: A Political Approach to Argentina’s 1991 Convertibility Plan*, 25 LAT. AM. PERSP. 56 (1998).

had stepped in to establish a market economy, yet it failed to establish effective federal fiscal policy reforms, and the monetary and capitalistic reforms only led to short-lived economic prosperity.<sup>234</sup> The Menem mirage abruptly ended with his departure from office.

Similarly, Fernando De la Rúa's electoral victory was short-lived both politically and economically. Although De la Rúa easily won the 1999 election, he faced a polarized legislature and a growing recession. His administration was feeble and indecisive, and it was further weakened by the lack of a congressional majority and the resignation of his vice-president. In March 2001, De la Rúa replaced his Economic Minister with Ricardo Lopez, who sought to balance the budget. When De la Rúa and Lopez disagreed about reducing government spending, he replaced Lopez with Domingo Cavallo, Menem's former Economics Minister. Cavallo reversed his own Convertibility Plan of 1991 and devalued the peso, triggering an economic crisis. He further manipulated the banking system in various ways, leading to a "bank run" between July and November of 2001. Argentines withdrew more than \$15 million.<sup>235</sup> On December 1, 2001, Cavallo restricted savings withdrawals to \$1,000 per month, which dramatically increased the quantity of protests, thefts, and violence. With their attempts to stabilize the economy having failed,<sup>236</sup> both De la Rúa and

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234. Mariano Tommasi, Sebastián Saiegh & Pablo Sanguinetti, *Fiscal Federalism in Argentina: Policies, Politics, and Institutional Reform*, ECONOMÍA, Spring 2001, at 196.

235. *A Decline without Parallel—Argentina's Collapse*, ECONOMIST, Mar. 2, 2002, at 8 [hereinafter *Argentina's Collapse*].

236. It should be noted that De la Rúa and Cavallo's attempts to save the economy were also frustrated by the international response to their efforts. The International Monetary Fund (IMF) and the United States offered a \$40 billion aid package to Argentina in 2000, which only delayed an eventual economic collapse. See PADMA DESAI, FINANCIAL CRISIS, CONTAGION, AND CONTAINMENT: FROM ASIA TO ARGENTINA 231 (2003). However, the following year Paul O'Neil took over the U.S. Treasury, while Horst Kohler assumed the directorship at the IMF. With these appointments came a dramatic shift in the IMF's role from firefighting to "imprudence-fighting." See Javier Corrales, *The Politics of Argentina's Meltdown*, WORLD POL'Y J., Fall 2002, at 36. They concluded that Argentina had already received too much aid, that Argentine economic ills would not spread, and that its fixed exchange rates would have to be removed for any chance of recovery. Consequently, unlike in Mexico and Brazil, the IMF implemented a "toughen-as-you-sink policy" in Argentina—a "test of commitment to reform that [Argentina] could never pass"—with strict preconditions such as a zero-deficits law and exchange-rate reform. *Id.* Needless to say, this imprudence-fighting approach failed to revive the Argentine economy.

Furthermore, the IMF's actions weakened the national and international community's confidence in Argentina's ability to recover. The IMF did not show political support for the Argentine reforms, but instead, its preconditions for lending cast doubt on the IMF's faith in Argentina's chances for recovery. This further frustrated an already fragmented political landscape, making it nearly impossible to garner the political capital necessary to quench the crisis. The United States did not take the lead, as it had with Mexico and Brazil, which cast further doubt on Argentina's promise. Instead, O'Neil publicly outlined the new U.S. role: "We've been supportive

Cavallo resigned within three weeks of the bank freeze.<sup>237</sup>

Protests and public pressure removed three interim presidents from office in less than a month—Federico Ramón Puerta, Adolfo Rodríguez Saá, and Eduardo Oscar Camaño. In January 2002, Congress followed constitutional procedures and chose Eduardo Duhalde, the runner-up in the 1999 presidential election from the Peronist Party, as the interim president. Duhalde took an incremental approach to the economic dilemma, stating: “There are problems all around us, and the solutions are coming in droplets.”<sup>238</sup> Needless to say, it was unsuccessful. In March 2002, the Argentine government defaulted on its \$155 billion public debt, the largest such default in history. At the current exchange rate, income per person was estimated to have decreased from \$7,000 to just \$3,500, with unemployment over twenty-five percent.<sup>239</sup> Between October 2001 and June 2002, over five million people fell into poverty making more than half the country below the poverty line, as compared with twenty-two percent in 1994.<sup>240</sup> Many enterprises that Menem had privatized—including *Aerolíneas Argentinas*—had already gone bankrupt or were converging on it. By April 2002, the peso, once interchangeable with the dollar, had fallen to almost one third (2.75:1) the value of the American dollar.<sup>241</sup>

By June 2002, public protests over the country’s economic woes and the current administration’s futile attempts at recovery reached a breaking point—one which even stirred talk about military intervention for the first time in over a decade<sup>242</sup>—and Duhalde was forced to step down

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through the instrument of choice which is the IMF.” *Id.* at 37. O’Neil remarked in another setting that it was “ridiculous for America’s plumbers and carpenters to pay for someone else’s [Argentina’s] bad decisions.” Hector E. Schamis, *Argentina: Crisis and Democratic Consolidation*, 13 J. DEM. 85 (2002).

237. *Central Bank Poised to Intervene in Market—Argentina’s Duhalde*, BBC MONITORING, Feb. 21, 2002.

238. *Id.* (quoting Interim President Eduardo Duhalde at a press conference on February 20, 2002).

239. *Argentina’s Collapse*, *supra* note 235.

240. Levitsky & Murillo, *supra* note 2, at 155.

241. Marcelo Romano, *El dólar se cotizó a 2,75 pesos para la venta*, LA NACIÓN, Apr. 5, 2002, at 1.

242. See Levitsky & Murillo, *supra* note 2, at 155. Military intervention has been a major roadblock to democratic stability in Latin American politics—ruining legitimacy for elected governments and allowing citizens to compare democratic regime performance with prior military regime performance. See GEORGE PHILIP, *THE MILITARY IN SOUTH AMERICAN POLITICS* 12-13 (1985). While Levitsky and Murillo note that talk in the media and political circles brought up the military, military leaders remained “spectators more than participants.” See Larry Rohter, *In Argentine Crisis, Military Stays in Step*, N.Y. TIMES, Feb. 24, 2002, § 1, at 6. Rohter summarizes the military’s historic role and its current absence in the Argentine political society:

prematurely. Rather than waiting out the term until December 2003, he announced that he would step down in May 2003, and presidential elections were set for April.<sup>243</sup> Even though the party system was fragmented and on the brink of collapse due to the political and economic pressures, the 2003 presidential election was carried out without any major controversy. Two Peronist candidates qualified for the run-off—one of which, surprisingly, was Carlos Menem, who the Supreme Court had let off of criminal racketeering charges in November 2001.<sup>244</sup> Néstor Kirchner was elected president when Menem dropped out of the run-off.<sup>245</sup>

So, what was the Supreme Court's role in the economic crisis? What did the Court do in the months preceding the collapse and in the years following it? Part of the answer is nothing, in that the political crisis of the revolving presidential door was solved within constitutional bounds, so the Court had nothing to review or correct. Hector Schmais remarks:

In sum, Argentina has resolved a serious political crisis without violating the laws, procedures, and institutions of the democratic process. When tested, the game of democracy managed to subordinate the other games and prevented a rupture. That should count as evidence of consolidation. Institutions may hold the key to this process, but only in so far as they lead crucial players to choose certain types of behaviors over others.<sup>246</sup>

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Throughout Argentina's modern history, the military has usually been the ultimate arbiter of political disputes, intervening six times in less than fifty years to topple unpopular or discredited civilian governments. But with the country facing what all here agree is its worst crisis, the armed forces . . . have been spectators more than participants.

*Id.* Furthermore, Lieutenant General Ricardo Brinzoni explains that the military alternative to democracy was no longer an option: "The armed forces support the system, not a particular party or individual [. . . and as a result, the current crisis] has unfolded in relative calm." *Id.* (quoting Lieutenant Brinzoni).

243. Levitsky & Murillo, *supra* note 2, at 155-56.

244. See Alejandro Carrió, *The Argentine Supreme Court Ruled "There Are No Crimes" and Former President Menem Walked Away: That's What Friends Are For*, 8 SW. L.J. & TRADE AM. 271 (2001). This case is described in more detail *infra* Part V.A.

245. Levitsky & Murillo, *supra* note 2, at 158-59. Levitsky and Murillo report that a large anti-Menem contingency emerged after the first election, and Menem realized that he would not win the run-off. His face-saving withdrawal, though, also denied Kirchner of a large public mandate. Menem made it look as if he had given Kirchner the presidency. See *id.* at 159-61.

246. Schmais, *supra* note 236, at 90.

With respect to the economic crisis, the damage was already done when the Court allowed Menem to usurp legislative power, pass hundreds of constitutionally questionable executive decrees, and remove virtually all horizontal checks from the political process.<sup>247</sup> In one sense, the Court might be considered a “but-for” cause of the crisis, or at least a major contributing factor. Furthermore, Menem’s weakening of the Court—coupled with the Court’s inaction and submission to the President’s agenda—destroyed public trust in the institution, as most believed it was merely one of Menem’s many puppets.<sup>248</sup> For that reason, protesters congregated on the steps of the Supreme Court each Thursday after the economic collapse—demanding that Menem’s Court be removed and judicial independence and the rule of law be restored.<sup>249</sup> Even Duhalde tried to impeach the entire Court, but failed.<sup>250</sup> The whole country seemed to recognize the illegitimacy of the Court and its role in condoning Menem’s unconstitutional reforms.

Perhaps the most controversial post-Menem ruling, which confirmed for many the Court’s illegitimacy, came in November 2001 and involved criminal racketeering charges against Menem and other top government officials.<sup>251</sup> During the early 1990s, Menem and his administration allegedly sold military weapons to Bolivia, Panama, and Venezuela, but further investigation revealed that arms deals were actually being made with Croatia and Ecuador. Such deals violated international law because the United Nations had an embargo on Croatia, and Argentina was mediating the ongoing war between Ecuador and Peru.<sup>252</sup> Menem’s brother-in-law, Emir Yoma, played an integral role in the scandal, and presidential decrees, which constituted intentional false statements, were used to cover up the bribes and illegal arms sales. The trial court ordered pre-trial detainment of Yoma, and the appellate court affirmed. On appeal, the Supreme Court reversed, holding that Yoma could not be detained

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247. See text and accompanying notes in *supra* Part IV.B.

248. See, e.g., *Para el Duhaldisimo, el fallo de la Corte Suprema fue impulsado por Menem*, LA NACIÓN, Mar. 6, 2003 (arguing that the Court’s problem under Duhalde was that the Court was chosen, owned, and manipulated by Menem).

249. *La Corte siente que tiene los días contados*, LA NACIÓN, Feb. 5, 2002, at 1 (explaining that the Court had its days counted); *Cómo hacer que la Corta tenga un peso propio*, PÁGINA DOCE, Oct. 17, 2004, at 7 (discussing how the Court could obtain regain its power and legitimacy—the only way being with new Justices).

250. See *La Corte siente que tiene los días contados*, *supra* note 249, at 1.

251. See generally Carrió, *supra* note 244, at 271-81 (describing in great detail the charges against Menem, the events leading up to the Supreme Court’s ruling, and the content of the Court’s decision).

252. *Id.* at 272-73.



before the trial.<sup>253</sup> The Court even chastised the appellate court for having “created crimes where there were plainly none” and held that “there were no crimes committed.”<sup>254</sup> The racketeering charges were dismissed.

A smuggling charge still remained against Menem, the investigating magistrate decided that it was not a sufficient reason to keep Menem imprisoned, so he was let out at the end of 2001.<sup>255</sup> Within two years, he was not only free and clean of all charges; he was in the run-off for president. One legal scholar, reflecting on the Court’s decision in *Yoma*, concluded: “To the Argentine people, the Court’s legitimacy had been severely undermined and the prevailing sentiment was that the members of the Argentine Supreme Court, molded by Menem’s taste at the beginning of his two-term administration, had not disappointed him in his darkest hour.”<sup>256</sup> Any headway Alfonsín had made in establishing judicial independence was hollowed out by Menem’s delegative democracy; three additional years of economic and political crisis only solidified public opinion concerning the illegitimacy of the Supreme Court.

While the Court did let Menem out of prison under questionable jurisprudential grounds, two landmark decisions that struck down government action should also be briefly mentioned. Under the backdrop of pot-banging protestors on the Supreme Court steps each Thursday—chanting “*que se vayan todos*” (“may they all leave”)<sup>257</sup>—the Court was asked to evaluate the constitutionality of De la Rúa’s freeze on bank accounts in 2002. When faced with a nationwide “bank run,” De la Rúa and Cavallo placed a one thousand dollar per month restriction on withdrawals from bank accounts and converted all investments from dollars to pesos.<sup>258</sup> By seizing the citizens’ savings, the government clearly violated the rule of law—violating constitutionally protected property rights—and the IMF and other international organizations criticized such violations.<sup>259</sup>

253. *Yoma*, Fed. No. 17,755, pt. 7 (Nov. 21, 2001).

254. *Id.* pt. 10.

255. See Carrió, *supra* note 244, at 280.

256. *Id.* at 280-81 (internal citations omitted).

257. Kapiszewski notes that this saying—“*que se vayan todos*”—is the same phrase that reformers had chanted for the revolution of an entire political class. See Kapiszewski, *supra* note 72, at 29.

258. *Argentina’s Collapse*, *supra* note 235.

259. *Id.* Not only were international actors upset with the government’s action, but the Argentine public was also outraged. For instance, in a poll of 4282 Argentine citizens, 88.7% believed that the government should have forced the banks to allow unconditional withdrawals. See *Encuesta: Cree que la devolución de depósitos debería ser obligatoria y no voluntaria?*, LA NACIÓN, Apr. 5, 2002, at 9.

A citizen by the name of Carlos Smith requested access to his frozen savings account, and his case reached the Argentine Supreme Court.<sup>260</sup> On February 1, 2002, the Court declared such banking curbs unconstitutional—in violation of Articles 14, 17, 18 of the Argentine Constitution, as well as the property rights protections of the Inter-American Convention on Human Rights.<sup>261</sup> The government was forced to respond, and on April 5, 2002, the Central Bank announced that banks would be forced to allow unconditional withdrawals by January 2, 2003, reestablishing property rights under the rule of law.<sup>262</sup> Within two days of the ruling, however, legislators also vowed to accelerate the impeachment process against the Court.<sup>263</sup>

One year later, the Supreme Court heard another case arising out of the same presidential decree. This case was even more political in nature, as Adolfo Rodríguez Saá, the governor of San Luis and a 2003 presidential candidate, brought an action on behalf of the Province of San Luis to gain access to the province's \$250,000 US bank deposit and to "re-dollarize" the money from its conversion to pesos.<sup>264</sup> In March 2003, the Court, in a 5-3 decision, narrowly struck down the law as unconstitutional, and ordered the federal government to re-dollarize the deposit and return it to the province.<sup>265</sup> With Duhalde leaving office in a matter of months, Argentine Economics Minister Roberto Lavagna released a statement that the administration accepted the Court's decision but that it would not alter its economic policy in light of the ruling.<sup>266</sup> The country still had not recovered from its economic woes, and re-dollarizing all of the accounts would have been fiscally impossible; additionally, in a matter of months, this would no longer be Duhalde's problem. So he left the issue for the Kirchner Administration to handle.

In addition to the Supreme Court's attempt to protect property rights, the judiciary attempted to address civil and political liberties—including the prosecution of the *junta*'s human rights violations. For instance, the

260. *Argentina-Menem: If Crisis Is Not Resolved, Elections Must Be Held*, EFE NEWS SERV., Feb. 20, 2002.

261. *Declaran inconstitucional el corralito*, LA NACIÓN, Feb. 20, 2002, at 6. See generally Kapiszewski, *supra* note 72, at 28-32 (providing in-depth commentary on the Court's ruling in Smith).

262. *Desde el 2 de enero los bancos podrán devolver los depósitos*, LA NACIÓN, Apr. 5, 2002, at 6.

263. *Prometen acelerar el juicio a la Corte*, LA NACIÓN, Feb. 3, 2002, at 1.

264. *Fallará hoy la Corte contra la pesificación de los depósitos*, LA NACIÓN, Mar. 4, 2003, at 1.

265. *Id.* See generally Kapiszewski, *supra* note 72, at 28-32 (providing in-depth commentary on the ruling).

266. *Calma en el Gobierno, que aceptó el fallo*, LA NACIÓN, Mar. 6, 2003, at 1.

Federal Court of Buenos Aires in 2001 declared that amnesty was not available to human rights violators.<sup>267</sup> Notwithstanding these attempts to reestablish the rule of law, the period after Menem and before Kirchner was fraught with public distrust of the Supreme Court and a complete lack of judicial reform efforts from the government—except for, of course, the administration's call for impeachment of the entire Court. Kirchner was left to deal with this perceived and actual lack of independence in what was still considered Menem's Court.

*B. Kirchner's Normalization of Politics,<sup>268</sup> 2003-2005:  
Reestablishing Checks to Executive Power*

Because Kirchner's mandate was weakened by Menem's "gift" concession in the run-off election and he was still ruling in Duhalde's shadow, many observers expected Kirchner to be a weak president.<sup>269</sup> However, he has at least initially proven the skeptics wrong. Kirchner has attempted to make broad-sweeping reforms to reestablish economic and political stability, as well as strengthen the rule of law and deepen democratic institutions and practices. With respect to judicial reform, Daniel Brinks notes that Kirchner initially had dual concerns to balance:

Kirchner thus faced a dilemma—on the one hand, a politicized and openly partisan Supreme Court, discredited and the subject of popular and elite demands for resignation or impeachment; on the other, the appearance that by removing all the sitting justices he would himself be simply perpetuating a long tradition of appointing subservient justices that would compound and extend the problem [of the perceived lack of independence].<sup>270</sup>

To address these dual and conflicting concerns, Kirchner has tried to implement two separate strategies—one to address the judicial

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267. On November 9, 2001, the Federal Court of Buenos Aires ruled that the amnesty granted was unconstitutional and violated international norms, affirming that "to do justice is not an option, but an obligation." HUMAN RIGHTS WATCH, ARGENTINA: AMNESTY FOR HUMAN RIGHTS VIOLATORS SCRAPPED (2001), available at [http://www.hrw.org/press/2001/11/argentina\\_1109.htm](http://www.hrw.org/press/2001/11/argentina_1109.htm) (Mar. 5, 2005). José Miguel Vivanco of Human Rights Watch summarizes the ruling's significance: "It is a historic breakthrough that crowns the progress made in recent years by the Argentine courts to bring the guilty to account, and opens the way for further prosecutions." *Id.*

268. This term is borrowed from the title of Levitsky's article on the 1999 Argentine elections. Levitsky, *supra* note 225.

269. Levitsky & Murillo, *supra* note 2, at 164.

270. Brinks, *supra* note 62, at 599 n.25. Professor Brinks's article provides a detailed examination of President Kirchner's current judicial reform efforts.

appointment process and another to replace some, but not all, of the Menemist Justices on the Court.

With respect to the judicial appointment process, Kirchner has attempted to make the nomination process more transparent, public, and deliberative. To achieve these ends, he signed a voluntary presidential decree<sup>271</sup> that limits his discretion in the judicial nomination process. As outlined in Table 3, Kirchner must publicly announce his candidates and post their names online and in various government publications. The nominees then have to submit a statement for public scrutiny detailing their affiliations, activities, assets, and so forth for the past eight years. The public has fifteen days to file comments and objections, and then Kirchner has another fifteen days to either submit or withdraw the names. Under the 1994 *Pactos Olivos* amendment to the Constitution, the Senate needs a two-thirds majority to confirm the President's choices.<sup>272</sup> This self-imposed presidential decree will make the process more public and transparent, but it is still too early to measure its effectiveness in restoring some legitimacy to the selection process and to the Supreme Court more generally. Additionally, this voluntary presidential decree might provide more lasting independence and legitimacy to the Court if it were incorporated as a constitutional requirement that would bind subsequent administrations.

The second prong of Kirchner's judicial reform strategy involves the balancing act of replacing the Menemist Justices without continuing the democratically corrosive tradition of entirely replacing the Court with Justices who would blindly uphold the new administration's policies. To achieve this balance, Kirchner decided to replace four of the Menemist Justices, while leaving one Menemist on the Court in order to avoid having a Kirchner majority.<sup>273</sup> Kirchner vehemently opposed Congress's call for impeachment of the last Menemist Justice, Antonio Boggiano,<sup>274</sup> but commentators indicated that it was only a matter of time before Congress succeeds in driving Boggiano off the bench.<sup>275</sup> Indeed, he was removed from office in September 2005.<sup>276</sup> Like Kirchner's first strategy, it is too early to tell whether this approach helped restore the perception of judicial

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271. Arg. Exec. Decree 220/03, June 22, 2003.

272. Brinks, *supra* note 62, at 599 nn.25-26.

273. *Id.* at 600 n.27; see also *Una Corte Suprema demasiado cercana a las ideas de Kirchner*, LA NACIÓN, Nov. 1, 2004, at 6 (describing that the Supreme Court is still not the "Kirchner Court" unless and until the last Menemist Justice, Antonio Boggiano, is removed from the Court).

274. See, e.g., *Kirchner quiere que Boggiano continúe en la Corte Suprema*, LA NACIÓN, Oct. 12, 2004, at 6.

275. *Supremo 8½*, BUENOS AIRES HERALD, Mar. 2, 2005, at 4.

276. *Argentina: Senate Completes Court Shakeup*, MIAMI HERALD, Sept. 30, 2005, at A12.

independence. What is certain is that Kirchner appears to be following more in the footsteps of Alfonsín than in those of Menem or Perón, which is a step in the right direction for democracy.

<b>Table 3: New Rule of Judicial Appointments (self-imposed presidential decree)</b>	
<b>Rule</b>	<b>Description</b>
Notice	President's nominees published for 30 days in Official Bulletin and 3 days in two national newspapers, as well as on the Ministry of Justice website
Credentials	Nominees must file sworn statement on background for past eight years
Public Review	NGOs, associations, and general public have 15 days to file responses, then president has 15 days to confirm or remove names
Senate Consent	Senate requires two-thirds vote in open and public hearing (under 1994 Constitution)

## VI. CONCLUSION

While the literature on democratic consolidation in Latin America has explored various practices and institutions that contribute to deepening democracy, little attention has been paid to the role of judiciary in strengthening democracy and the rule of law. This is due, perhaps, to the fact that the courts have not played a major, positive role in democratic consolidation in most Latin American countries, Argentina included. Similarly, it is by no happenstance that Latin American countries have been plagued by delegative democracy and an absence of the rule of law. As this Article has demonstrated through the Argentine case study, an independent judiciary can play an important, if not necessary, role in guarding the rule of law and providing a horizontal check on ultrapresidentialism and delegative democracy.

What this Article has *not* presented is a clear roadmap for Latin American policymakers, which details how to establish an independent judiciary that has the authority and legitimacy necessary to ensure that all actors play by the democratic rules of the game. The Argentine story does not provide it. The Argentine Supreme Court, while at times showing signs

of independence and legitimacy, has never fully developed into an institution that has the capacity to be an effective horizontal check on the executive power and an adequate protector of the civil and political liberties of its citizens. The Argentine case study, however, does offer several lessons about what does *not* work—or at least what is not sufficient to establish the judiciary as the primary guardian of the rule of law.

*Informal v. Formal Institutions:* First, putting it in writing is not enough to ensure that it happens in practice; informal institutions and practices are far more important than formal institutions. For instance, the Argentine Constitution is a carbon copy of the U.S. model with the same powers vested in the judiciary and with the Argentine Supreme Court's textual adoption of *Marbury*-like judicial review. One might expect these two texts to produce similar results. But, the Argentine Supreme Court's independence was not informally established by putting it into the Constitution, or even by the Court's attempts to create such judicial review in its opinions. What is written has not been applied as intended in practice. To overcome this gap between formal and informal institutions, Latin American policymakers must take the historical, economic, and political context into account. The Argentine story vividly demonstrates what happens when rulers do not uphold formal institutions. This finding leads to a related lesson: beware of carbon copies. Importing another country's institution—while perhaps initially providing legitimacy to the newly established institution—is a dangerous endeavor; policymakers must find ways to informally anchor the borrowed institutions in their new context. This lesson might be particularly pertinent to current democratization efforts in Iraq.

*Constitutional v. Attitudinal Consolidation:* Second, similar to the formal-informal gap, there is also an important distinction between actual and perceived independence. This distinction echoes Linz and Stepan's emphasis on the distinction between constitutional and attitudinal consolidation.<sup>277</sup> As Argentina has learned the hard way, public trust in a democratic institution is essential for it to carry out its governing function. The lack of public confidence in the Argentine Supreme Court—a distrust grounded in the fact that the Court has historically been a hollow institution at the mercy of the executive—has plagued the institution's ability to uphold the rule of law. While President Kirchner is now pursuing judicial reforms to restore the Supreme Court's independence, he realizes that such reforms must also aim at regaining the public's trust in the institution. Both real and perceived independence matter. As Alfonsín aptly notes, “[p]reserving the public trust is thus the most important duty

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277. See *supra* text accompanying note 36.

of public officials.”<sup>278</sup> Because once public trust is lost, it is difficult, if not impossible, to regain.

*Serious and Continuous Effort:* Lastly, as illustrated by President Alfonsín’s re-democratization efforts in the 1990s, neither “a single grand gesture . . . nor [the work] of a single administration”<sup>279</sup> is sufficient to establish the long-term viability of the rule of law or an independent judiciary. Even though Alfonsín made great strides to restore democracy, reestablish an independent judiciary, and reinstate the rule of law, democratic consolidation takes considerable time and patience to develop. Unfortunately, it requires much less time to destroy, as Menem proved by setting democracy back fifty years during one presidential term. Alfonsín’s hard-learned lesson is one of which Argentina’s neighbors should take note: “Democratic consolidation requires serious and continuous effort over a long period.”<sup>280</sup>

When Kirchner’s reforms are placed within Argentina’s unique historical context, one can safely conclude that his efforts to reestablish judicial independence are not a quick fix. But, they arguably are a necessary step in the right direction. Perhaps the most important lesson gleaned from the Argentine case study is that the rule of law and judicial independence cannot be (re-)built overnight.

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278. Alfonsín, *The Function of Judicial Power During the Transition*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA*, *supra* note 1, at 52.

279. *Id.* at 49.

280. *Id.*