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2003

# Pesification and Economic Crisis in Argentina: The Moral Hazard Posed by a Politicized Supreme Court

Becky Jacobs, Professor, *University of Tennessee College of Law*

## ARTICLES

# PESIFICATION AND ECONOMIC CRISIS IN ARGENTINA: THE MORAL HAZARD POSED BY A POLITICIZED SUPREME COURT

BECKY L. JACOBS\*

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## I. INTRODUCTION

If you believe what you read in the papers, La Corte Suprema de Justicia de la Nación (the “Argentine Supreme Court”) holds the economic fate of Argentina in its beleaguered hands.<sup>1</sup> In what has been hailed as a landmark ruling,<sup>2</sup> the Court declared uncon-

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\* Associate Professor of Law, University of Tennessee College of Law. Prior to joining the faculty of UT, Professor Jacobs was an Associate General Counsel for Duke Energy International in its São Paulo, Brazil office. Email: Jacobs@libra.law.utk.edu. The author would like to express her gratitude to Valeria Macchia, Argentine lawyer extraordinaire, and to the following patient reviewers: Professors Keith Rosenn, Tom Plank, Carol Parker, Amy Hess, and Dwight Aarons. Any meritorious content herein can be attributed directly to these individuals; all else must be claimed by the author.

1. Gilbert Le Gras, *Courts Threaten Argentina's Banks*, (Sept. 15, 2002), at [http://www.news24.com/News24/Finance/Economy/0,4186,2-8-25\\_1257777,00.html](http://www.news24.com/News24/Finance/Economy/0,4186,2-8-25_1257777,00.html).

2. *San Luis, Provincia de c. Estado Nacional*, \_\_ FALLOS \_\_ (Arg. CSJN Mar. 5, 2003), available at [http://www.csjn.gov.ar-imagess-pdf-San\\_Luis.wpd.pdf](http://www.csjn.gov.ar-imagess-pdf-San_Luis.wpd.pdf) (full Spanish

stitutional the controversial Presidential "Pesification" Decree that forcibly converted billions in U.S. dollar-denominated bank deposits into pesos.<sup>3</sup> Argentina's President<sup>4</sup> direly predicted that such a ruling could plunge the nation into chaos.<sup>5</sup>

It is not only Argentina's President who has a stake in the Court's pesification decision. His government fears that the opinion striking down the decree will imperil the economic recovery that Argentina appears to be experiencing.<sup>6</sup> The Argentine banks also have much riding on the pesification outcome. These institutions warn that the nation's financial system could collapse under

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text). While the ruling announces a constitutional principle, discussed in more detail in Section IV *infra*, it resolved only one U.S.\$247 million claim brought by the province of San Luis against a state-owned bank, Banco de la Nación, regarding dollar deposits. The ruling did not address the constitutionality of the pesification of dollar-denominated debt. *Argentina Says Next Govt to Tackle 'Pesification' Ruling*, (Mar. 7, 2003), <http://news.morningstar.com/news/DJ/M03/D07/1047093660830.html>. The Argentine legal system does not accommodate class action lawsuits. See generally Symposium, *Challenges to Fragile Democracies in the Americas: Legitimacy and Accountability*, 36 TEX. INT'L L.J. 319, 344 (2001). Further, the ruling did not resolve the constitutionality of the pesification of dollar-denominated debt. *San Luis, Provincia de*, \_\_ FALLOS \_\_ (Arg. CSJN Mar. 5, 2003), *supra*. See also Bradley Brooks, *Banks Seek Solution in Argentina*, (Mar. 7, 2003), at <http://www.upi.com/view.cfm?StoryID=20030307-034734-2729r>.

3. DECREE No. 214/02, B.O. (Arg.), 3 Feb. 2002. This decree converted all dollar-denominated debts and deposits into pesos as part of a package of emergency measures designed to pull Argentina out of its worst ever financial crisis. See *Argentina Unveils Crisis Package*, BBC News, (Feb. 4, 2002), at <http://news.bbc.co.uk/2/hi/americas/1799402.stm>. A detailed examination of the Argentine Executive's emergency powers is beyond the scope of this Article. For a more extended analysis, see William C. Banks & Alejandro D. Carrio, *Presidential Systems in Stress: Emergency Powers in Argentina and the United States*, 15 MICH. J. INT'L L. 1 (1993).

4. This reference is to Eduardo Duhalde, the President of Argentina when these events transpired. Following President Fernando de la Rúa's resignation on December 20, 2001 amidst violent street protests, the Argentine Congress appointed Duhalde to be the country's fifth president in two weeks. *New Man Takes Helm in Argentina*, BBC News, (Jan. 2, 2002), at <http://news.bbc.co.uk/2/hi/americas/1737562.stm>.

5. Gilbert Le Gras, *Argentine Leader Says Court Ruling May Bring Chaos*, (Sept. 14, 2002), at <http://www.forbes.com/newswire/2002/2002/09/14/rtr721431.html>.

6. *Argentine High Court Postpones Peso Ruling Until Feb*, Dow Jones Int'l News, (Dec. 27, 2002), WL DJINS database. See also Simon Gardner, *Argentina Court Defies State with Dollar Ruling*, (Mar. 5, 2003), available at <http://www.reuters.com> ("[Then Argentine President] Duhalde tried to fight the ruling for fear that it would endanger stability ahead of the . . . vote."). More recently, however, the government has attempted to downplay its significance. See Larry Rohter, *Policy on Peso is Overturned in Argentina*, N.Y. TIMES, (Mar. 6, 2003), available at <http://www.nytimes.com/2003/03/06/business/worldbusiness/06PESO.html> ("Government officials have been warning for months that any verdict in favor of redollarization would lead to financial chaos. But as it became increasingly clear that the court intended to rule in favor of depositors, the government began backing away from those dire predictions.").

the weight of the Court's ruling against the decree as they do not have sufficient reserves to return deposits in the original dollar currency.<sup>7</sup> Conversely, Argentine depositors, many of whom have watched helplessly while the value of their life savings has declined steadily,<sup>8</sup> fervently hoped that the Court would invalidate the pesification decree and wildly cheered the ruling.

The pesification issue also has serious implications for the international community. The International Monetary Fund ("IMF") and other multilateral development institutions and their member countries, private banks and lenders, and foreign investors have a direct economic interest in the Court's ruling. Yet, they also are deeply concerned about Argentina's financial condition and a possible contagion that might infect Latin America should Argentina's economic woes worsen and spread.<sup>9</sup> The possibility of further institutional instability and of a widespread humanitarian crisis also occupies the minds of Argentina's leaders and the world community.<sup>10</sup>

The Argentine Supreme Court is not wholly unfamiliar with this intense scrutiny. In fact, many contend that the Court is "totally discredited."<sup>11</sup> Several of the Court's rulings have attracted strong criticism. Its seemingly unwavering loyalty to former President Carlos Menem<sup>12</sup> has resulted in a number of legally questionable and publicly-reviled decisions,<sup>13</sup> including a ruling dismissing arms trafficking charges against Menem and

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7. See *Argentine High Court Postpones Peso Ruling Until Feb*, *supra* note 6.

8. Marcela Valente, *A Banking System in Coma*, (May 21, 2002), at <http://www.proutworld.org/news/en/2002/may/20020522arg.htm>.

9. *Argentina: More Chaos*, Lat. Bus. Chron., (Feb. 4, 2002), at <http://www.latinbusinesschronicle.com/reports/reports/duhalde.htm>.

10. *Argentina's Financial Crisis: What is the Solution*, BBC News, (Nov. 15, 2002), at [http://news.bbc.co.uk/2/hi/talking\\_point/2480639.stm](http://news.bbc.co.uk/2/hi/talking_point/2480639.stm).

11. See *Argentine Judges Face Corruption Probe*, BBC News, (Feb. 7, 2002), at <http://news.bbc.co.uk/2/hi/americas/1807705.stm>.

12. During his 1989-99 Presidency, Menem audaciously expanded the Supreme Court's membership from five justices to nine. Ley 23.774, [1990-A] A.L.J.A. 64, B.O. (Arg.), 16 Apr. 1990. This increase, in addition to the resignation of two justices, enabled Menem to appoint a total of six of the nine judges. See Geronimo Perez, Comment, *Argentina's Supreme Court Enters the Political Fray in a Move Aimed at Surviving the Public Calls for Impeachment*, VIII Sw. J. L. & TRADE AM. 357, 357 (2001-02). This Court-packing plan has eroded the public's confidence in the Court's independence. See Jonathan Miller, *Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and its Collapse in Argentina*, 21 HASTINGS INT'L & COMP. L. REV. 77, 80 (1997). Menem's influence appears to continue today, as four of the nine current justices are Menem-appointees. See *Argentine Judges Face Corruption Probe*, *supra* note 11.

13. See *Argentine Judges Face Corruption Probe*, *supra* note 11.

several rulings on privatization and telephone-tapping widely regarded as favorable to the former President.<sup>14</sup> In the midst of public pot-banging demonstrations known as *cacerolazos* where protesters denounced the Court as being corrupt and politicized and for protecting its own political agenda,<sup>15</sup> the Argentine Congress even began impeachment hearings into the Court's alleged abuses of authority.<sup>16</sup>

The pesification appeal presented a true Morton's Fork,<sup>17</sup> or Catch-22,<sup>18</sup> for the Argentine Supreme Court. If the Court had bowed to political pressure and upheld the pesification decree, the Argentine government certainly would have been pleased. Such a ruling also may have averted the further erosion of Argentina's economic landscape.

Yet, a ruling in favor of pesification would have dealt a crushing blow to the hopes of Argentine depositors seeking to recover the value of their converted deposits, further enraging these weary citizens and confirming the widely-held belief that the Court lacks any independence from the country's political apparatus.<sup>19</sup> Foreign investors as well as Argentineans would lose all confidence in the Court for what certainly would have been viewed as a political decision. A lack of confidence in a country's judicial system or a lack of alternative mechanisms for dispute resolution often will make an investment too risky to undertake.<sup>20</sup> Further, the government's continuing successful efforts to influence the

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14. *Id.*

15. Alfred Hopkins, *Running out of Patience*, (Feb. 27, 2002), at <http://www.worldpress.org/Americas/380.cfm>.

16. See *Argentine Judges Face Corruption Probe*, *supra* note 11. Lawmakers later voted to abandon the impeachment proceedings, ostensibly to resolve the institutional instability that appeared to be an obstacle to a foreign aid package. See *Argentina Ditches Bid to Impeach Judges*, Tiscali News, (Oct. 11, 2002), at <http://www.tiscali.co.uk>.

17. The phrase "Morton's Fork" is derived from English cleric John Morton, the Bishop of Ely, then Archbishop of Canterbury during the reign of Henry VII. When collecting taxes from his tenants, Morton argued that the rich clearly could afford to pay the taxes. If the tenants were poor, however, they were holding onto their money, so they too could pay the tax. As forks at that time had two prongs, his two-pronged logic construction was nominated a Morton's Fork. See Morton's Fork, at [http://www.math.iastate.edu/burkardt/wordplay/weird\\_words.html](http://www.math.iastate.edu/burkardt/wordplay/weird_words.html).

18. Derived, of course, from the classic Joseph Heller novel of the same name, originally published in 1961.

19. See *Argentine Judges Face Corruption Probe*, *supra* note 11.

20. See Frank C. Shaw, *Reconciling Two Legal Cultures in Privatizations and Large-Scale Capital Projects in Latin America*, 30 LAW & POL'Y INT'L BUS. 147, 155-56 (1999) (part of a Symposium entitled, *The Role of Legal Institutions in the Economic Development of the Americas*, 30 LAW & POL'Y INT'L BUS. 1 (1999)). When making investment decisions, investors analyze the degree of legal risk associated with a

nation's courts would pose an increasingly serious moral hazard<sup>21</sup> for lawmakers, who appear to be unconstrained by Argentine law when fashioning remedies and defining policies in times of crises. The very concept of a constitutional democracy is undermined if Argentina's highest judicial authority accommodately approves any action taken by the executive and legislative branches of the government, regardless of the explicit text of the Constitution.<sup>22</sup>

The Court, however, firmly grasped the other prong of its Morton's Fork,<sup>23</sup> and its ruling against pesification may have polished the tribunal's tarnished public image, at least temporarily.<sup>24</sup> The Court upheld the nation's Constitution<sup>25</sup> and exercised its independence by resisting intense pressure to toe the line on the government's economic reform package.<sup>26</sup> This exercise of judicial independence appears to have bolstered the public's confidence in the Court as an institution. The ruling drew hundreds of Argen-

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potential investment. *Id.* at 148-49. Legal risks include not only the content of a nation's laws, but also their enforcement. *Id.*

21. In financial parlance, the term "moral hazard" refers to excessive risk-taking in the presence of insurance or other financial guarantees. See Frank Partnoy, *Why Markets Crash and What Law Can Do About It*, 61 U. PITT. L. REV. 741, 757 n.88 (2000).

22. See generally Alberto F. Garay, *Federalism, the Judiciary, and Constitutional Adjudication in Argentina: A Comparison with the U.S. Constitutional Model*, 22 U. MIAMI INTER-AM. L. REV. 161, 201-02 (1991).

23. The Court also might have elected to delay its ruling until the issue became moot. This option is discussed further *infra* Part IV.

24. Questions concerning the Court's motivation for striking down the pesification decree appeared almost immediately in the press. See, e.g., Daniel Helft & Eliana Raszewski, *Argentina Supreme Court's Politics Play Into Ruling on Peso*, (Mar. 10, 2003), available at <http://quote.bloomberg.com> ("The judges on the court just operate politically, . . . . They were appointed because they are friends and accomplices of [former President] Menem and their rulings have been contradictory and self-serving.") (quoting Eduardo Barcesat, head of the Human Rights Department at the University of Buenos Aires). See also Paul Waldie, *Argentina's Top Court Rules Forced 'Pesofication' Illegal*, GLOBE AND MAIL, (Mar. 6, 2003), at <http://www.globeandmail.com/servlet/ArticleNews/TPStory/LAC/20030306/RARGE/Business/Idx> ("[A]n economist with Raymond James Argentina . . . said the ruling may have more political than economic consequences. The country is holding elections . . . . [Then current President] Mr. Duhalde tried to fight the ruling for fear that it would endanger stability ahead of the . . . vote. But . . . others say the Supreme Court is believed to be loyal to Mr. Duhalde's nemesis, former President Carlos Menem, a leading candidate in the election.").

25. *San Luis, Provincia de*, \_\_ FALLOS \_\_ (Arg. CSJN Mar. 5, 2003), *supra* note 2. The opinion refers specifically to ARG. CONST. art. 17, which provides that "[p]roperty may not be violated, and no inhabitant of the Nation can be deprived thereof except by virtue of a sentence based on law. Expropriations in the public interest must be authorized by law and previously compensated." See also ARG. CONST. art. 14 ("All inhabitants of the Nation are entitled to . . . make use and dispose of their property.").

26. See, e.g., Perez, *supra* note 12, at 366.

tineans to the courthouse steps to cheer the Court and to denounce the nation's banks.<sup>27</sup> Gleeful depositors announced that "[n]ever again in Argentina will the rights of citizens be trampled on and that's what the Supreme Court has ruled."<sup>28</sup> The Court's new-found popularity might come at a price, however, if the government's dire predictions were to come to pass. Invalidating the decree not only has the potential to reverse Argentina's recent economic gains, it also could trigger a severe economic decline.<sup>29</sup>

This article offers one view on the causes and consequences of the prongs of the Argentine Supreme Court's Morton's Fork. It first will explore the roots of Argentina's latest economic crisis and will review recent news and events. It next will provide a brief history of the legal framework in which these events transpired, including a discussion of Argentina's Constitution, its Supreme Court, and the role of constitutional interpretation in a civil law setting. The article finally will consider the Supreme Court's ruling on the pesification decree and possible alternate scenarios available to the Court and will ponder the risks and rewards associated therewith.

## II. THE ROOTS OF ARGENTINA'S CONTINUING CRISES

### A. *Argentina's Dramatic Beginnings*

The roots of the Argentine Supreme Court's latest conundrum lie deep within the nation's earliest history. Inherited Spanish values influenced colonial Argentina and lingered long after Argentina declared its independence from Spain in 1816.<sup>30</sup> Castilian society was characterized by an authoritarian monarch, an ineffectual parliament, and a dominant church.<sup>31</sup> In the highly stratified society of colonial Argentina, the elite class supported these inherited Castilian institutions. Because of these features

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27. *Argentina-Banks (Scheduled) Argentine depositors celebrate Supreme Court ruling*, (Mar. 5, 2003), at <http://hoovnews.hoovers.com>; *Argentine High Court Nixes Dollar Decree*, (Mar. 5, 2003), at <http://hoovnews.hoovers.com>.

28. *Argentina-Banks (Scheduled) Argentine depositors celebrate Supreme Court ruling*, *supra* note 27. As will be discussed in more detail *infra*, this declaration is somewhat of an exaggeration regarding the holding in the case. The opinion did, however, contain strong language on property rights. See *San Luis, Provincia de*, — FALLOS — (Arg. CSJN Mar. 5, 2003), *supra* note 2.

29. See *Le Gras, Argentine Leader Says Court Ruling May Bring Chaos*, *supra* note 5.

30. See *Banks & Carrio*, *supra* note 3, at 8.

31. *Id.* at 7. See also Anne Proffitt Dupre, *Transforming Education: The Lesson From Argentina*, 34 VAND. J. TRANSNAT'L L. 1, 8 (2001).

and because Spanish-born officials governed colonial Argentina exclusively, Argentina had no experience with, or real concept of, self-governance or of a governmental system based upon separation of powers and checks and balances between various branches of the government.<sup>32</sup> Within this hierarchy there existed a widespread indifference to the rule of law and a longing for strong leaders.<sup>33</sup>

Following its declaration of independence in 1816,<sup>34</sup> Argentina experienced political turmoil, but that inherited Castilian institution, the authoritarian central Executive, survived, and thrived.<sup>35</sup> Even the drafters of the 1853 Constitution recognized the nation's attachment to its *caudillos*,<sup>36</sup> strong, charismatic rulers, by granting to the Executive very broad authority.<sup>37</sup>

Despite the adoption of a Constitution, Argentina continued to suffer internal strife.<sup>38</sup> In 1930, for the first time in the country's history, the elected government fell to a military coup.<sup>39</sup> This event "began a downward spiral from which Argentina has yet to recover."<sup>40</sup> Since 1930, the nation has experienced five military coups, and, until Carlos Menem was elected in 1989, no civilian President served a full term in office,<sup>41</sup> not even the popular and charismatic Juan Peron.<sup>42</sup> During this period, the Argentine peo-

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32. Keith S. Rosenn, *The Success of Constitutionalism in the United States and Its Failure in Latin America: An Explanation*, 22 U. MIAMI INTER-AM. L. REV. 1, 20-27 (1990) [hereinafter Rosenn, *Latin American Constitutionalism*].

33. See Banks & Carrio, *supra* note 3, at 64-65.

34. Paradoxically, the Argentine enthusiasm for an absolute and paternalistic monarch led to the country's independence in 1816. See Banks & Carrio, *supra* note 3, at 8. "Creoles," Argentinean-born individuals of Spanish descent who were loyal to the deposed King of Spain, Ferdinand VII, agitated for the wars of independence. See Rosenn, *Latin American Constitutionalism*, *supra* note 32, at 21. These elite Creoles refused to accept the rule of Napoleon's brother, Joseph, a mere commoner. *Id.* This group was further incensed when Ferdinand, having returned to the throne, accepted a liberal Constitution in 1812 and abolished the Inquisition. *Id.* Ferdinand's seeming rejection of their traditional, conservative values inspired the Creoles to fight for their independence. *Id.*

35. Banks & Carrio, *supra* note 3, at 9 ("Among all of the divisions which became apparent in the first half of the nineteenth century, just about the only point upon which the competing dominant groups agreed was that strong leaders were good and necessary.").

36. See *id.* at 8.

37. See ARG. CONST. arts. 1-35.

38. Banks & Carrio, *supra* note 3, at 16-19.

39. *Id.* at 25.

40. *Id.*

41. *Id.*

42. Even those wholly unfamiliar with Argentina's history recognize Juan Peron from the musical production *Evita*. This Andrew Lloyd Webber production



ple were subjected not only to political instability, but also to economic and social distress. This history seemingly has prevented the Argentine citizenry from developing a respect for constitutional rule.

### B. *President Menem and the Dollar Peg*

Carlos Menem<sup>43</sup> was elected President of Argentina on May 14, 1989 during a period of extreme hyperinflation.<sup>44</sup> During the 1980's, dubbed the "Lost Decade of Development,"<sup>45</sup> all of Latin America, including Argentina, suffered a debt crisis that stagnated the region's economies.<sup>46</sup> In a bid to curtail the overwhelming inflation rates and to reverse a deepening recession, President Menem's government instituted a series of economic reforms, including the privatization of various state-owned enterprises, the opening of the Argentine economy to foreign investment, and the reduction of trade barriers.<sup>47</sup> One of its most dramatic reforms was to institute a Convertibility Law<sup>48</sup> that fixed, or pegged, the Argentine peso ("peso")<sup>49</sup> to the United States dollar ("dollar" or "U.S.\$") at a one-to-one fixed exchange rate.<sup>50</sup> This dollar peg initially was an enormous success; it helped tame the country's ram-

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memorialized Peron's glamorous and popular wife. For details of Peron's life, see JOSEPH A. PAGE, *PERON, A BIOGRAPHY* (1983). For a view of his ideology, see JUAN DOMINGO PERON, *LATINOAMERICA, AHORA O NUNCA* (1967).

43. Menem was a prisoner during Argentina's "Dirty War," the time period between 1976-83 when the military ruled the country and thousands of Argentineans disappeared or were detained, tortured, or killed without legal process. See Jordan Stein, *25 Years and a Couple Blocks Away*, at <http://www.theglimpse.com/newsite/viewarticle2.asp%3farticleid=72> (n.d.).

44. *Basic Timeline: Argentina*, at [http://icg.harvard.edu/~ca4241/handouts/Argentina\\_Timeline](http://icg.harvard.edu/~ca4241/handouts/Argentina_Timeline).

45. Enrique R. Carrasco, *Part One: Pursuing the Good Life: The Meaning of Development as It Relates to the World Bank and the IMF*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 119, 124 (1999) (part of a Symposium entitled, *The E-Book on International Finance and Development*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 35 (1999)).

46. *Id.*

47. See *Hearing on Argentina's Economic Crisis Before the Senate Subcomm. on Int'l Trade and Fin.*, 107th Cong. (2002) (statement of John B. Taylor, Under Sec'y of the Treasury for Int'l Affairs) [hereinafter Statement of John B. Taylor].

48. Cód. Civ. art. 2459.

49. The austral actually was the Argentine currency when article 2459 was enacted, and the law fixed the exchange rate at 10,000 austral per United States dollar ("dollar" or "U.S.\$"). The peso replaced the austral as Argentina's currency in 1992, and the pegged rate was one peso per one dollar. See, e.g., Caroline R. Hurtado, *Fiscal Policies as Decisive Solutions for Troubled Economies: Differing Legislative Enactments in Argentina and Ecuador*, 24 LOY. L.A. INT'L & COMP. L. REV. 391, 418 n.144 (2002).

50. *Id.* at 406-08.

pant inflation<sup>51</sup> and stimulated growth.<sup>52</sup> So successful was the country's economic transformation that the IMF and other Western financial institutions used Argentina as a poster child for instituting their favored reform packages.<sup>53</sup>

A series of calamitous events in the 1990's, however, led Argentina into a deep recession.<sup>54</sup> Within Argentina, budget deficits began to increase and public debt began to rise as officials failed to rein in profligate public spending.<sup>55</sup> The country also began to accumulate a trade deficit. The nation's Convertibility Law, coupled with the appreciation of the dollar, made Argentina's products more expensive, and exports fell precipitously.<sup>56</sup> Further, Brazilian imports into Argentina soared when this Argentine neighbor devalued its currency, the real, in part as a response to the 1998-99 Asian financial crisis and its resulting spread to Latin America.<sup>57</sup>

### C. *Post-Menem Perils*

On December 10, 1999, after President Menem departed the executive office,<sup>58</sup> Argentineans elected Fernando de la Rúa as

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51. Inflation in Argentina decreased from a staggering 5000 percent in 1989 to less than five percent in 1994. *Id.* at 408.

52. See Statement of John B. Taylor, *supra* note 47.

53. See Larry Luxner, *Ambassador of Argentina Diego Guelar: Overcoming the Crisis*, THE WASHINGTON DIPLOMAT, available at [http://www.washdiplomat.com/02-04/a8\\_02\\_04.html](http://www.washdiplomat.com/02-04/a8_02_04.html).

54. See *Argentina Hearing Before the House Subcomm. on Int'l Monetary Pol'y and Trade*, 107th Cong. (2002) (opening statement of the Hon. Doug Bereuter, Chairman, House Subcomm. on Int'l Monetary Pol'y and Trade) [hereinafter Opening Statement of Hon. Doug Bereuter].

55. *Id.* See also Statement of John B. Taylor, *supra* note 47.

56. See Opening Statement of Hon. Doug Bereuter, *supra* note 54.

57. See Roman Terrill, *Part Three: Private Capital and Development: Challenges Facing International Institutions in a Globalized Economy: VI: 1998/1999 Update: The Asian Crisis Goes Global*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 325, 325 (1999) (part of a Symposium entitled, *The E-book on International Finance and Development*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 35 (1999)).

58. Menem's exit, while a democratic one, was not particularly graceful. He desperately wanted to serve a third term, but was constrained by the Constitution. ARG. CONST. art. 90. Ironically, this provision was a product of Menem's own ambition. The original constitutional term limit was a single six-year term. In order to extend his own political life, Menem's Peronist Party and the Radical Party negotiated the "Pacto de Olivos" that resulted in the Argentina Constitutional Reform of 1994. This reform provided for four-year presidential terms, with the possibility of one *consecutive* reelection. Despite this clear, and agreed, compromise, his supporters insisted that the Constitution authorized Menem to seek a third term. For a fascinating account of this drama, see Jonathan M. Miller, *Evaluating the Argentine Supreme Court under Presidents Alfonsín and Menem (1983-1999)*, VII Sw. J. L. & TRADE AM. 369, 369-73 (2000) [hereinafter Miller II].

their Executive. The new President faced a bleak state of economic affairs. By the end of 2001, Argentina had debts totaling U.S.\$132 billion.<sup>59</sup> The state of affairs degenerated even further when the government's "zero deficit" policy failed to impose discipline upon public spending.<sup>60</sup> As a result, Argentina's borrowing rose sharply,<sup>61</sup> and the IMF stopped releasing funds to Argentina in December 2001 when the government failed to meet previously agreed targets.<sup>62</sup> President de la Rúa announced that Argentina's debt would have to be restructured, forcing Argentina into the largest sovereign default in history.<sup>63</sup>

While the restructuring effort was underway, uncertainty prompted bank depositors to withdraw their funds, particularly dollar-denominated funds, from Argentine banks, thereby threat-

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59. See Opening Statement of Hon. Doug Bereuter, *supra* note 54.

60. See Statement of John B. Taylor, *supra* note 47. See also Manuel Pastor & Carol Wise, *From Poster Child to Basket Case*, FOREIGN AFFAIRS, Nov.-Dec. 2001, at 67.

61. See Statement of John B. Taylor, *supra* note 47.

62. See *Argentina: More Chaos*, *supra* note 9.

63. *Id.* Argentina's historical default once again focused attention on the increasingly compelling need for institutional architecture to ensure the predictable and orderly restructuring of unsustainable sovereign debt. See Augusto Lopez-Claros, *Issues in Sovereign Debt Restructuring*, INST. FOR THE ECON. IN TRANSITION, (June 20, 2002), at <http://www.iet.ru/guest/lopez/20020614.htm>. Sovereign debt crises are not a new phenomenon. However, because of the greater integration of capital markets, the complexity of debt work outs has increased exponentially. Sovereigns now can access the capital markets in a range of jurisdictions, with a number of sophisticated debt instruments and with a geographically and organizationally diverse group of creditors. ANNE O. KRUEGER, INTERNATIONAL MONETARY FUND, A NEW APPROACH TO SOVEREIGN DEBT RESTRUCTURING 1 (2002). While the so-called Paris and London Clubs offer a forum for rescheduling public sector debt, there is no equivalent mechanism to restructure debt held by the private sector. See Lopez-Claros, *supra*. Current procedures to handle sovereign defaults have been ad hoc, but consensus has been building for an organized approach to the problem. See Martin Wolf, *Comment & Analysis: Debt to the World: The Crisis in Argentina Lends Support to Calls for Better Sovereign Bankruptcy Procedures. But Reform of Debt Restructuring is Long Overdue*, FIN. TIMES, Apr. 24, 2002, available at <http://www.ft.com>. Anne O. Krueger, First Deputy Managing Director of the IMF, is one articulate proponent of an improved process that she has nominated the Sovereign Debt Restructuring Mechanism ("SDRM"). KRUEGER, *supra*. Only one of several ideas being debated, the SDRM is patterned loosely upon U.S. domestic bankruptcy laws. It seeks to incorporate into future debt contracts new contingency clauses that would authorize binding super-majority decisionmaking by creditors; would permit the sovereign to initiate the restructuring, with a standstill provision; and would describe how creditors would engage with debtors. See Wolf, *supra*. The SDRM and other proposals still are being debated, but both creditors and debtors appear to recognize that reform is required to prevent what Anne Krueger has called the "unpalatable choice between disruptive and potentially contagious unilateral default, or bailing out private creditors and thereby contributing to moral hazard." Lopez-Claros, *supra* (quoting Anne O. Krueger).

ening the nation's foreign currency reserves.<sup>64</sup> Fearful of a collapse of the banking system, President de la Rúa issued a decree that imposed restrictions on the amount of money that could be withdrawn from banks.<sup>65</sup> These restrictions, referred to colloquially as the *corralito*,<sup>66</sup> proved wildly unpopular. Not only did thousands of Argentine savers petition the nation's courts to declare the *corralito* unconstitutional,<sup>67</sup> the restrictions also sparked violent protests, during which some twenty-seven people were killed.<sup>68</sup> With Argentina on the verge of chaos, de la Rúa resigned as President on December 20, 2001.<sup>69</sup>

Over the next ten days, the Argentine Congress selected a series of four interim presidents, including the final interim Executive, President Eduardo Duhalde.<sup>70</sup> Argentina also declared a moratorium on payment of nearly U.S.\$95 billion-U.S.\$115 billion in commercial debt held by private investors,<sup>71</sup> the largest ever country default. One of President Duhalde's first actions was to implement another round of economic reforms.<sup>72</sup> This reform package continued the suspension of public debt payments, maintained the *corralito* restrictions, ended the dollar peg, and devalued the peso by twenty-nine percent.<sup>73</sup>

The Argentine Supreme Court complicated President Duhalde's task when it ruled, on February 1, 2002, that the *cor-*

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64. See *Argentina Unveils Crisis Package*, *supra* note 3.

65. Executive Decree 1570/01, B.O. (Arg.), 3 Dec. 2001. Decree 1570/01 limited cash withdrawals to two hundred and fifty dollars per week per financial institution. This forced Argentineans to utilize financial instruments such as checks or debit and credit cards to conduct financial transactions.

66. *Corralito* translates into English as "little fence." See Valente, *supra* note 8.

67. See generally *Argentina: More Chaos*, *supra* note 9. Because Argentina does not recognize class action lawsuits, savers must seek individual remedies. See *Argentine Lawmakers to Begin Judge Impeachment Process*, Dow Jones Int'l News, (Feb. 4, 2002), WL DJINS database.

68. Le Gras, *Courts Threaten Argentina's Banks*, *supra* note 1.

69. See Perez, *supra* note 12, at 362.

70. See *New Man Takes Helm in Argentina*, *supra* note 4.

71. See *Argentina Blames IMF for Latest Debt Default*, at <http://www.dailytimes.com> (last visited Nov. 18, 2002); see also *Argentina Eases Freeze As Economy Warms Up*, FIN. TIMES, (Dec. 2, 2002), available at <http://news.ft.com>.

72. Matt Moffett & Michelle Wallin, *Argentina Picks Peronist Duhalde as Fifth President in Two Weeks*, WALL ST. J., Jan. 2, 2002, at A3. See also Opening Statement of Hon. Doug Bereuter, *supra* note 54.

73. The Argentine Congress sanctioned President Duhalde's new reforms in Ley 25.561, B.O. (Arg.), 7 Jan. 2002. The President instituted a dual exchange rate system that allowed the peso to float for financial transactions and fixed the peso's value at 1.4 pesos to the dollar for foreign trade. See Opening Statement of Hon. Doug Bereuter, *supra* note 54.

*ralito* was unconstitutional.<sup>74</sup> The Court ruled that the banking restrictions violated Article 17 of the Argentine Constitution because they ignored the right of individuals to dispose freely of their assets.<sup>75</sup> The Duhalde government immediately denounced the decision as “politically motivated”<sup>76</sup> and launched an impeachment inquiry against the justices of the Court.<sup>77</sup> The government also declared a bank holiday to prevent a run on the banks,<sup>78</sup> then suspended all legal actions against the *corralito* for six months.<sup>79</sup>

Making yet another highly controversial move, President Duhalde’s government announced, on February 3, 2002, that all bank deposits denominated in dollars would be “pesified,” or converted to pesos at the government-imposed rate of 1.4 pesos to the dollar.<sup>80</sup> Further, under the government’s pesification plan, all bank loans or other dollar debts would be converted into pesos at a rate of one-to-one.<sup>81</sup> Considering that the market exchange rate was approximately two pesos to the dollar at this point in time,

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74. Takko c. Freddo S.A., \_\_ FALLOS \_\_ (Arg. CSJN 2002), available at [http://www.estudiojbonicatto.com.ar/corralito/corral\\_juris/CSJN\\_020201.htm](http://www.estudiojbonicatto.com.ar/corralito/corral_juris/CSJN_020201.htm).

75. See *Top Argentina Court Rules Bank Limits Illegal*, Dow Jones Int’l News, (Feb. 1, 2002), WL DJINS database. As noted *supra* note 25, ARG. CONST. art. 17 states that “[p]roperty may not be violated, and no inhabitant of the Nation can be deprived thereof except by virtue of a sentence based on law. Expropriations in the public interest must be authorized by law and previously compensated.”

76. See *Argentina Court Faces Challenge*, BBC News, (Feb. 2, 2002), at <http://news.bbc.co.uk/2/hi/americas/1797868.stm>.

77. *Id.* See also Opening Statement of Hon. Doug Bereuter, *supra* note 54; *Argentine Lawmakers to Begin Judge Impeachment Process*, *supra* note 67; *Argentina: More Chaos*, *supra* note 9; *Press Attacks Supreme Court Decision*, BBC News, (Feb. 2, 2002), at [http://news.bbc.co.uk/2/hi/world/monitoring/media\\_reports/1798020.stm](http://news.bbc.co.uk/2/hi/world/monitoring/media_reports/1798020.stm). Some observers question whether the impeachment proceedings were instituted solely in response to the Court’s *corralito* ruling. As discussed *infra* Part III.D, the threat of impeachment is somewhat of a constant for this Court. In fact, it has been suggested that the Court’s *corralito* ruling was a warning shot across the Duhalde government’s bow to prevent further impeachment inquiries. See generally *Press Attacks Supreme Court Decision*, *supra*.

78. See *Argentina Court Faces Challenge*, *supra* note 76.

79. See *Argentina: More Chaos*, *supra* note 9. The Argentine government announced in late March 2003 that it was lifting the unpopular *corralito* restrictions. Tony Smith, *Argentina Hopes for Rebound as Banking Freeze Ends*, INT’L HERALD TRIB., (Mar. 29, 2003), available at <http://www.ihl.com> (last visited Apr. 2, 2003). It is estimated that approximately sixteen billion pesos (U.S.\$5.57 billion) were frozen in the financial system. *Id.*

80. See Claudio Campuzano, *Enron Nation: Only Recourse for Argentina May Be An Authoritarian Government*, WORLD TRIB., (Feb. 8, 2002), available at [http://216.26.163.62/2002/c02\\_07.html](http://216.26.163.62/2002/c02_07.html).

81. See also Opening Statement of Hon. Doug Bereuter, *supra* note 54. The *San Luis* case did not address the constitutionality of the pesification of dollar-denominated debt and loans. *San Luis, Provincia de*, \_\_ FALLOS \_\_ (Arg. CSJN Mar. 5, 2003), *supra* note 2.

this forced conversion infuriated the Argentine middle class, who immediately saw a steep drop in the value of their savings.<sup>82</sup> And, while the pesification did help debtors by reducing the value of their loans, creditors and banks suffered concomitant losses.

Constitutional challenges to the government's pesification measures began to flood the lower courts, with mixed results.<sup>83</sup> When these cases began to reach it,<sup>84</sup> the Supreme Court, however, did not rush to declare itself on the issue. Indeed, it certainly was aware of the public and governmental scrutiny.

Not content to await the Court's ruling, President Duhalde and other officials went on the offensive, prognosticating publicly that the nation could be plunged into anarchy should the Court strike down the pesification measures.<sup>85</sup> Their seemingly hyperbolic threats did not appear extreme in light of the country's economic condition. Since the pesification decree, the peso had fallen seventy-three percent against the dollar.<sup>86</sup> By August 1, 2002, the value of the peso had dropped to four pesos to the dollar.<sup>87</sup> Using aggressive tactics, government lawyers at one point sought to disqualify two members of the Court.<sup>88</sup> The government also

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82. See Campuzano, *supra* note 80.

83. Because the Argentine legal system does not have a general class action procedural device, see *supra* note 2, the claims of individual depositors were being analyzed in a myriad of lower courts, and these courts did not rule on the constitutional issue consistently. See Carlos J. Colomba, *Pesificación: Panorama Jurisprudencial*, L.L. 4 (Arg. 2002).

84. Parties used the *amparo* procedural device to bring these cases to the Supreme Court. This summary constitutional remedy may be brought against acts or omissions of both public authorities and private parties that allegedly injure constitutionally protected rights. See Keith S. Rosenn, *Federalism in the Americas in Comparative Perspective*, 26 U. MIAMI INTER-AM. L. REV. 1, 41 (1994) [hereinafter Rosenn, *Federalism in the Americas*].

85. See Le Gras, *Argentine Leader Says Court Ruling May Bring Chaos*, *supra* note 5. See also Campuzano, *supra* note 80.

86. See Le Gras, *Courts Threaten Argentina's Banks*, *supra* note 1.

87. See Doug Casey, *What's Next For Argentina*, (Aug. 1, 2002), [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=28481](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=28481). The peso has since stabilized at approximately 2.81 - 3.3 pesos to the dollar. See, e.g., Rohter, *Policy on Peso is Overturned in Argentina*, *supra* note 6.

88. See Rohter, *Policy on Peso is Overturned in Argentina*, *supra* note 6. The government claimed that one member of the Court had improperly disclosed publicly that he would vote against the decree. The other justice had a conflict, in the government's view, because he previously had held dollar deposits in an Argentine bank. This justice sought to recuse himself from the pesification deliberations. Yet another justice even resigned his seat on the court. See Eliana Raszewski & Daniel Helft, *Argentina Appoints Senate President Maqueda to Supreme Court*, (Dec. 27, 2002), available at <http://quote.bloomberg.com>. This justice, Justice Gustavo Bossert, resigned in October 2002, stating that he was "tired of being accused of corruption for not supporting government policies." *Id.*

appointed the president of the Argentine Senate, an attorney and a member of the ruling Peronist party, to fill an open seat on the Court.<sup>89</sup>

Against this tumultuous backdrop, Argentina struggled to negotiate a much-needed loan package with the IMF. Before wresting a grudging interim rescheduling of its repayments from the Fund,<sup>90</sup> Argentina defaulted on its payment commitments to the World Bank.<sup>91</sup> In December 2002, Argentine officials announced that Argentina was suspending future payments on the World Bank debt,<sup>92</sup> further isolating itself from the international financial community. Despite its pique for the Supreme Court, the Duhalde administration even abandoned its impeachment efforts against the justices at the urging of the international financial community, which demanded political consensus in the

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89. See Raszewski & Helft, *Argentina Appoints Senate President Maqueda to Supreme Court*, *supra* note 88. Press reports claim that this appointment will make the Court friendlier to the Duhalde administration and its economic reforms. See *id.*

90. See *Argentina, IMF Agree On Loan*, (Jan. 24, 2003), at <http://money.cnn.com/2003/01/24/news/international/argentina> (last visited Jan. 24, 2003). Not everyone is pleased with the transitional agreement. The interim deal only defers the U.S.\$6.8 billion due to the IMF through August of 2003, allowing Argentina to hold elections in April 2003 without falling further behind on payments. Argentina complains that the IMF has been "hostile" and has not helped the nation in its time of need. See Mark Drajem & Helen Murphy, *Debt-laden Argentina Given IMF Reprieve*, (Jan. 25, 2003), <http://www.miami.com/mld/miamiherald/2003/1/25/business/5026532.htm>. Conversely, resentful sources at the IMF claim that Argentina played a blatant, and dangerous, game of "chicken" with the Fund in order to secure debt relief. See *Argentina Will Get Its Roll-Over, But Some At The IMF Are Unhappy*, (Jan. 23, 2003), <http://www.bdfm.co.za/cgi-bin/pp-print.pl>. Argentina has, according to IMF officials, broken most of the codes of conduct of international finance and used the threat of default with the IMF and the World Bank to "blackmail" the institution into extending its debt obligations. *Id.* Some strongly believe that the IMF's acquiescence to the Argentina rollover deal undermines the Fund's credibility on debt repayment with delinquent borrowers. *Id.* This is a credible claim considering that, since Argentina entered the IMF, it has negotiated nineteen agreements with the funding agency, fifteen of which have failed. See *EFE News Service: Argentina-Economy: Economy Minister Says Argentina Reached "Realistic" Deal With IMF*, (Jan. 17, 2003), at <http://hoovnews.hoovers.com>.

91. See *Argentina's Financial Crisis: What is the Solution*, *supra* note 10. On November 14, 2002, Argentina did make a partial payment of U.S.\$79 million to the World Bank. See Press Release No.: 2002/140/LCR, World Bank, Argentina Makes Partial Payment, World Bank Confirms, (Nov. 14, 2002), at <http://www.worldbank.org>.

92. See *Argentina Won't Repay \$726M to World Bank*, (Dec. 13, 2002), at <http://hoovnews.hoovers.com>. However, after it finally reached an agreement with the IMF to reschedule its repayments to that institution, Argentina made critical payments to the World Bank and to the Inter-American Development Bank that will allow these two entities to resume lending to the impoverished nation. See *Argentina, IMF Agree On Loan*, *supra* note 90.

country as a condition to any additional aid.<sup>93</sup> Before its IMF reprieve, Argentina's default threatened to cut off one of the nation's last sources of funding and would have placed it in the company of such countries as Somalia and pre-Operation Iraqi Freedom Iraq.<sup>94</sup>

In 2002, the nation registered a staggering forty-one percent inflation rate, and government officials warned that, even if the Supreme Court were to issue a positive ruling on pesification, Argentina would be bankrupt by May 2003 if it did not obtain outside financial assistance.<sup>95</sup>

Meanwhile, there appeared to be no end in sight to the plight of the Argentine people. On December 20, 2002, thousands marked the first anniversary of the violent protests that ended the Presidency of Fernando de la Rúa.<sup>96</sup> Official unemployment is now at a near-record seventeen percent, although most economists say it is closer to twenty-five percent,<sup>97</sup> and the poverty rate has climbed to sixty percent of the population.<sup>98</sup>

### III. ARGENTINA'S LEGAL TEMPLATE

#### A. *The Constitution: An Enduring Document*

Argentina's Constitution, first drafted in 1853,<sup>99</sup> is the second oldest constitution in the Americas.<sup>100</sup> The drafters were strongly influenced by the U.S. Constitution, and the Constitution of Argentina guarantees a list of civil, social, and political rights far more extensive than the relatively tersely worded protections set forth in the U.S. Constitution's Bill of Rights.<sup>101</sup> It also deviates

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93. See *Argentina Ditches Bid to Impeach Judges*, *supra* note 16.

94. See *Argentina: World Bank Extends Loan Deadline*, (Nov. 3, 2002), at [http://www.money.iwon.com/jsp/nw/nwdt\\_rt.jsp?cat=USMARKET&src=201&feed=reu&section=news\\_id=reu-n0360010&date=20021103&alias=/alias/money/cm/nw](http://www.money.iwon.com/jsp/nw/nwdt_rt.jsp?cat=USMARKET&src=201&feed=reu&section=news_id=reu-n0360010&date=20021103&alias=/alias/money/cm/nw). These countries are among the most economically isolated nations in the world.

95. See *Argentina Warns of Bankruptcy Threat*, at <http://www.cnn.com/2002/World/Americas/11/21/argentina.economy.ap/index.html> (last visited Nov. 25, 2002). Argentina finally did receive this critical outside funding. See *supra* notes 90-92.

96. See *Protests Mark Argentine Anniversary*, BBC News, (Dec. 20, 2002), at <http://news.bbc.co.uk/2/hi/americas/2592661.stm>.

97. Associated Press, *Menem Forces Run-Off in Argentina*, (Apr. 28, 2003), available at <http://www.timesonline.co.uk>.

98. Larry Rohter, *Old and New Argentina Headed for a Runoff Vote*, INT'L HERALD TRIB., (Apr. 29, 2003), available at <http://www.ihl.com>.

99. See Garay, *supra* note 22, at 162.

100. Dupre, *supra* note 31, at 8.

101. See Banks & Carrio, *supra* note 3, at 12-13. Several of these guarantees are aspirational in nature and are virtually unenforceable. See Rosenn, *Latin American Constitutionalism*, *supra* note 32, at 26. For example, Article 19 of the Argentine



from the U.S. model by retaining the Spanish colonial emphasis on the centralization of power.<sup>102</sup>

A remarkably enduring and flexible document, the Argentine Constitution was relatively stable during most of the period from 1860 through 1994.<sup>103</sup> However, its endurance faced challenges between 1930 and 1983 when Argentina experienced a number of military coups.<sup>104</sup> While the Supreme Court's apparent judicial approval of these political revolts may have averted further social unrest, it certainly did not encourage constitutional respect amongst the Argentine public.<sup>105</sup> Despite this seeming disregard for its content, the Constitution has remained in force, at least nominally, until today, with the exception of the enactment of a Peronist constitution during Juan Peron's Presidency between 1949 and 1956.<sup>106</sup>

Maintaining its relevance throughout Argentina's history, and occupying the central position in Argentina's legal hierarchy, the Constitution was revised extensively in 1994 to even more strongly emphasize economic and social rights.<sup>107</sup> This author argues, however, that the Constitution, while an exceptional and durable text, has suffered from situational interpretation in the hands of the Argentine judiciary.

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Constitution states in part that the private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempt from the authority of judges. ARG. CONST. art. 19.

102. See Banks & Carrio, *supra* note 3, at 13.

103. See Miller, *supra* note 12, at 81.

104. See Banks & Carrio, *supra* note 3, at 25. Since a military coup in 1930 toppled the elected government, there have been five more military coups in Argentina. *Id.*

105. Following a military coup in 1930, the Argentine Supreme Court was asked to rule upon the legitimacy of the new military government. Facing yet another Morton's Fork, the Court declared that *de facto* the new government was capable of carrying out the tasks of an elected government, thereby recognizing the legality of the military regime despite its unconstitutional origin. See Decree of Sept. 10, 158 FALLOS 290 (Arg. CSJN 1930). This *de facto* doctrine granted the government legal sanction on the basis of "necessity" and "public policy." See *id.* For an interesting discussion of how a constitutionally elected government should treat *de facto* laws, see 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 (1996). See also Banks & Carrio, *supra* note 3, at 27-28.

106. *More Information on . . . the Argentine Constitution of 1994*, at <http://www.hrcr.org/chart/annotations&references/Argentina.html>.

107. *Id.* The 1994 amendments to the Constitution incorporated a number of ratified human rights treaties and other such accords, including the Universal Declaration of Human Rights, elevating these documents to constitutional status in Argentina. *Id.*

### B. *The Evolution of the Supreme Court*

The fortunes of the La Corte Suprema de Justicia de la Nación are susceptible to the political winds that have swept Argentina since its earliest beginnings. In the nation's infancy, the executive branch established its dominance over the judiciary.<sup>108</sup> Despite a constitutional guarantee of virtual lifetime tenure pending good behavior,<sup>109</sup> the Court has been wholly or partially restructured on seven different occasions.<sup>110</sup> For example, each *coup d'état* and the corresponding return to democracy generally have been followed by the removal or resignation of the justices of the Court and the appointment of new members.<sup>111</sup>

Some trace the disrepair of Argentina's judicial institutions to the country's Peronist past. Prior to Juan Peron's administration, the justices of the Supreme Court enjoyed long, constitutionally protected tenures, undisturbed by political interference.<sup>112</sup> However, since Peron's first administration, beginning in 1946, Supreme Court justices average only twelve years on the bench.<sup>113</sup>

Peron rose to power through the military government, a government that frequently clashed with the nation's Supreme Court on many issues, including individual political and property rights.<sup>114</sup> Peron's government began impeachment proceedings against the Court in 1946, voting to remove the justices in 1947.<sup>115</sup> Since Peron's Presidency, virtually every civilian President of Argentina has been able to choose a majority of the members of the Supreme Court early in his term.<sup>116</sup>

Since 1960, the average tenure of a Supreme Court justice in

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108. See Banks & Carrio, *supra* note 3, at 16.

109. Article 110 of the Argentine Constitution provides that justices of the Supreme Court and lower courts shall hold office as long as they maintain their good conduct and shall receive a compensation for their services that shall be determined by law and that cannot be diminished in any way during their tenure. ARG. CONST. art. 110.

110. See Garay, *supra* note 22, at 189.

111. *Id.* This occurred in 1955, 1966, and 1976.

112. See Brink Lindsey, *How Argentina Got Into This Mess*, at <http://www.cato.org/research>. See also Miller, *supra* note 12, at 152-61.

113. See Lindsey, *supra* note 112.

114. See Miller, *supra* note 12, at 153-62.

115. All of the members of the Court were charged except for a recent appointee who largely favored the ideals of the Peronist movement. The bill of impeachment raised numerous issues, but it accused the Court broadly of exceeding the judicial function with political improprieties and prejudice against labor. *Id.* at 155-61.

116. *Id.* See also Lindsey, *supra* note 112 ("After Peron (he left the Presidency for the second time in 1974), five of 17 presidents named every member of the court during their term, a distinction that had previously been limited to Bartolomé Mitre, the country's first constitutional president . . .").

Argentina has declined to below four years,<sup>117</sup> and the Court basically has served at the whim of the government in power. The 1966 and 1976 military takeovers in the nation resulted in the summary dismissal of the entire Court.<sup>118</sup> The return of democracy to Argentina in 1983 once again resulted in the complete replacement of the Supreme Court membership.<sup>119</sup>

A striking example of another civilian President engaging in such a wholesale purge occurred in 1990. Then President Menem successfully packed the Court by increasing its membership from five to nine.<sup>120</sup> As a vacancy already existed on the Court and as one Justice resigned in protest, Menem succeeded in appointing six of his close allies and political supporters to the new nine-member Court.<sup>121</sup> The Menem administration openly expressed its opinion that every Argentine President over the previous fifty years "had" his own Supreme Court, and a Court that is out of line with the policies of the Executive would cause instability.<sup>122</sup> Since Menem's Presidency, the situation of the Court has only declined.<sup>123</sup> It remains to be seen whether its pesification ruling will restore the public's confidence in the Court on a sustained basis.

### C. *The Court's Constitutional Jurisprudence*

In Colonial Spanish America, and prior to the adoption of a Civil Code in Argentina, separation of powers did not exist, and functional appellate judges, known as judges of the colonial *audencias*, were members of the Crown bureaucracy.<sup>124</sup> The Spanish Crown promulgated much of the law for its Argentine colony, and these laws often were confusing, contradictory, and largely unavailable to the populace.<sup>125</sup> This resulted in a "highly

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117. See Lindsey, *supra* note 112.

118. See Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1, 27 (1988) [hereinafter Rosenn, *Protection of Judicial Independence*].

119. *Id.*

120. Ley 23.774, A.D.L.A. 1256 (Arg. 1990), B.O. (Arg.), 16 Apr. 1990. See also Miller, *supra* note 12, at 151-52.

121. Miller, *supra* note 12, at 152. See also Perez, *supra* note 12, at 359; Lindsey, *supra* note 112. For example, one of these new justices reportedly was Menem's law partner. See Helft & Raszewski, *Argentina Supreme Court's Politics Play Into Ruling on Peso*, *supra* note 24.

122. See Miller, *supra* note 12, at n.377.

123. See discussion *infra* Part III.D. For an enlightening account of the Court's loss of authority, see Miller II, *supra* note 58, at 369-76, 394-433.

124. See Miller, *supra* note 12, at 99-103.

125. See Rosenn, *Latin American Constitutionalism*, *supra* note 32, at 25.

unpredictable and personal legal system” in which judges enjoyed virtually unfettered discretion.<sup>126</sup> These judges routinely considered the interests of the Crown when interpreting the widely scattered and diversely derived legal norms, including societal perceptions of fairness.<sup>127</sup>

Argentina’s declaration of political independence in 1816 and its adoption of a Constitution in 1863 altered the legal landscape. Modeled upon its U.S. counterpart, the Argentine Constitution established an “independent” judiciary with the authority to hear and decide all cases arising under the Constitution.<sup>128</sup> The early Supreme Court drew upon U.S. constitutional principles and jurisprudence as strong authority for its interpretation of the Argentine Constitution. This U.S. authority, however, was merely persuasive, and reference thereto inconsistent.

Prior to and following these events, Argentina’s legal culture clearly identified with the civil law tradition.<sup>129</sup> This tradition coexists uneasily with the U.S. constitutional jurisprudential model. Civil law courts are bound only by enacted Constitutions, codes, statutes, or decrees. The Anglo-American doctrine of *stare decisis* is not applicable in a civil law setting. Very generally speaking, countries subscribing to the civil law tradition recognize *jurisprudencia*, or precedents, as a persuasive, rather than a binding, source of authority. Prior decisions in like-cases assist judges in responding to legal problems, but courts are not constrained to follow these decisions. Instead, they may adopt alternate ratio-

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126. *Id.*

127. *Id.*

128. ARG. CONST. arts. 100-01. This independence, however, has proved illusory, perhaps due to Argentina’s *caudillo* tradition of dominant Executives and its tumultuous political and economic reality. In a thoughtful article, Professor Keith S. Rosenn explores the definition of the oft-used term “judicial independence.” See Rosenn, *Protection of Judicial Independence*, *supra* note 118. Professor Rosenn begins his analysis with Professor Theodore Becker’s commonly cited proposal that ‘judicial independence is (a) the degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values, and conceptions of the judicial role (in their interpretation of the law), (b) in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and (c) particularly when a decision adverse to the beliefs or desires of those with political or judicial power may bring some retribution on the judges personally or on the power of the Court.’ *Id.* at 4. He then further refines this definition and elaborates on the desirability of such a proposition. *Id.* at 7. For another erudite analysis of the concept of judicial independence, see Thomas E. Plank, *The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia*, 5 WM. & MARY BILL RTS. J. 1 (1996).

129. See Garay, *supra* note 22, at 185.

nales, so long as they are not incoherent or capricious.<sup>130</sup>

Despite its civil law roots, the early Argentine Supreme Court appeared to embrace U.S. constitutional cases as genuine interpretations of the Argentine Constitution, accumulating decisions that were applied as authority for subsequent rulings.<sup>131</sup> The Court's initial approach to constitutional interpretation can be summarized by its statement that it would be extremely inconvenient if precedents were not duly considered and consequently followed, consistent with the civil law doctrine of *jurisprudencia constante*.<sup>132</sup>

However, a close examination of the Court's cases reveals that it has failed strictly to apply its relevant precedents.<sup>133</sup> Beginning in the 1930's, the Court experienced a sort of philosophical conversion<sup>134</sup> that led it to drift away from its rational approach to constitutional interpretation<sup>135</sup> toward a more expansive view of the constitutional text.<sup>136</sup> Responding to significant social changes, the Court began to look beyond the four corners of the document itself, conceptualizing the Constitution as a "political instrument endowed with extreme flexibility to adapt itself to all times and all future circumstances."<sup>137</sup>

This adjudicative inconsistency is strikingly illustrated in the Court's case law on legislative activity affecting commerce. By way of background, the Argentine Constitution protects freedom of commercial activity in a more explicit manner than does its U.S. counterpart. Its Article 14 provides that "[a]ll the inhabitants of

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130. For a more detailed description of the civil law tradition, see generally CIVIL LAW (Ralf Rogowski ed. 1996). See also A PRIMER ON THE CIVIL LAW SYSTEM (Fed. Judicial Ctr. 1995).

131. See Garay, *supra* note 22, at 185-86.

132. *Id.* at 187-88 (paraphrasing Baretta c. Provincia de Cordoba, 183 FALLOS 409 (Arg. CSJN 1939)). *Jurisprudencia constante* represents the continuum of stable and settled rules.

133. *Id.*

134. See, e.g., *id.* at 193.

135. The descriptive phrase "a discourse of rationality" has been coined to describe such inconsistent jurisprudence. Cf. Frederick E. Snyder, *State of Siege and Rule of Law in Argentina: The Politics and Rhetoric of Vindication*, 15 LAW. OF THE AM. 503, 518 (1984). "That the courts have on occasion rendered decisions restraining the government and protecting individual rights may have served only to establish what Frederick Snyder calls a 'discourse of rationality.'" Banks & Carrio, *supra* note 3, at 30. Similarly, these two authors argue that, in the context of the governmental exercise of emergency powers, the Argentine Supreme Court has "abdicated its responsibility to measure official conduct against legal norms." *Id.* at 28.

136. See Miller, *supra* note 12, at 110-51.

137. *Id.* at 163 (quoting Peralta c. Nacion Argentina, 313 FALLOS 1513, 1537 (Arg. CSJN 1990)).

the Nation are entitled to the following rights . . . , namely . . . to use and dispose of their property . . . .”<sup>138</sup> The Constitution’s Article 17 further provides that “[p]roperty may not be violated, and no inhabitant of the nation may be deprived of it, except by virtue of a judgment based on law. Expropriation for reasons of public interest must be authorized by law and previously compensated.”<sup>139</sup>

Until 1930, the Argentine Supreme Court’s interpretation of these terms matched the clarity of the language itself.<sup>140</sup> During this time, the Court strictly protected private economic rights against a wide variety of regulations. After 1930, however, the case law changed, and the Court allowed virtually unlimited governmental regulation of the economy.<sup>141</sup> As the country suffered the effects of the Great Depression, the Argentine Court adopted a more tolerant view of governmental interference with economic activity. The Court’s new “responsive” approach to constitutional interpretation recognized that societal needs could influence the judicial function and allowed the Court to approve governmental measures designed to respond to the country’s economic emergency.<sup>142</sup>

Since it began responsively interpreting the Constitution in the 1930s, the Court found that numerous interventionist economic programs passed constitutional muster. Unfortunately, the country has suffered a continuing series of economic crises, and most of these measures were implemented during states of emergency. For example, in 1990, in the much-debated and “politically crucial”<sup>143</sup> *Peralta c. Nacion Argentina*, a ruling that is particularly relevant to the government’s recent pesification decree, the Court upheld a presidential decree<sup>144</sup> that converted bank accounts over a certain value into long-term government bonds.<sup>145</sup> At the time, the Argentine government was facing a declaration of insolvency or a massive devaluation, and the bond conversion was

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138. ARG. CONST. art. 14.

139. ARG. CONST. art. 17.

140. See Miller, *supra* note 12, at 134-43 (discussing and citing a number of representative cases pertaining to economic regulation during this era, including the seminal *Hileret c. Provincia de Tucuman*, 98 FALLOS 20 (Arg. CSJN 1903)).

141. *Id.* at 131.

142. *Id.* at 143-52.

143. Miller II, *supra* note 58, at 400.

144. Presidential Decree No. 36/90, 2 E.D.L.A. 11 (Arg. 1990).

145. *Peralta c. Nacion Argentina*, 313 FALLOS 1513 (Arg. CSJN 1990). For a discussion of the *Peralta* case, see Miller II, *supra* note 58, at 400.

its last resort.<sup>146</sup> Despite the obvious questions concerning the constitutionality of this forced conversion, the Court found that, while the government's emergency powers are limited to situations of dire necessity, the bond conversion measure was proportionally tailored to address the particular economic necessity.<sup>147</sup>

As previously discussed, the most recent economic crisis also has engaged the Court. In one of the first cases to reach the Court on the issue of the *corralito*, the Court seemingly approved the unpopular governmental banking controls, invalidating a preliminary injunction ordering various banks to release frozen funds and ordering one plaintiff to redeposit funds already removed.<sup>148</sup> Shortly after this first review, the Court again suspended similar preliminary injunctions allowing cash withdrawals.<sup>149</sup> However, in a surprising move, the Court acknowledged the possibility that the controls could be constitutionally invalid.<sup>150</sup> This possibility came to pass in the *Takko c. Freddo S.A.*<sup>151</sup> ruling, in which the Court held that the *corralito* banking controls were unconstitutional.

The *Takko c. Freddo S.A.* decision seemingly ignored prior, and even very recent, precedents, such as *Peralta c. Nacion Argentina*. Disregarding the striking similarities, the Court in *Takko* did not even attempt to distinguish *Peralta c. Nacion Argentina* or to justify the dissimilar results, except to summarily declare that the *corralito* was unreasonable, while the *Peralta* bond conversion was reasonable.<sup>152</sup>

The Court's opinion declaring the pesification decree to be unconstitutional continues this trend.<sup>153</sup> Query, however, whether these abrupt about-faces actually herald the Court's return to legal rationalism, a text-based approach to constitutional interpretation, or whether they are, as some vehemently insist, a politically calculated stab at the Executive.<sup>154</sup>

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146. See Miller II, *supra* note 58, at 400.

147. *Peralta*, 313 FALLOS at 1552 (Arg. CSJN 1990).

148. *La Corte Suprema salió a sostener el corralito*, CLARIN, (Dec. 29, 2001), *Economía*, available at <http://www.clarin.com.ar/diario/2001-12-29/e-01601.htm>.

149. Silvia Boschi, *La Corte emitió un nuevo fallo en favor del corralito financiero*, CLARIN, (Jan. 9, 2002), *Economía*, available at <http://www.clarin.com.ar/diario/2002-01-09/e-00401.htm>.

150. *Id.*

151. *Takko*, \_\_ FALLOS \_\_ (Arg. CSJN 2002), *supra* note 74. See also *Banco de Galicia y Buenos Aires (Carlos Smith) c. P.E.N., L.L.* 768 (Arg. CN Com. 2002).

152. *Takko*, \_\_ FALLOS \_\_, *supra* note 74. See also *Perez*, *supra* note 12, at 368-70.

153. *San Luis, Provincia de*, \_\_ FALLOS \_\_ (Arg. CSJN Mar. 5, 2003), *supra* note 2.

154. See *supra* note 24. See also David DeRosa, *Currency Missteps Haunt*

A number of causes have been cited for the Court's unpredictable doctrinal shifts from an autonomous, text-based approach to interpreting the text of the Constitution to one that is more responsive. Personnel changes clearly have influenced all of the Court's jurisprudence,<sup>155</sup> as has political instability, a cause of Court personnel changes not attributable to normal attrition.<sup>156</sup>

One commentator intriguingly suggests that, while it might appear implausible, jurisprudential inconsistencies might be due to the Court's lack of familiarity with its own prior decisions. Amazingly, until 1990, the Court's jurisdiction was mandatory, and it decided an astounding average of four thousand cases per year.<sup>157</sup>

Another possible explanation of the Court's inconsistent application of prior case law might lie in Argentina's adoption of the Civil Code in 1869. The role of the judiciary changed dramatically, if gradually, with codification. The structure of the new Code virtually eliminated judicial discretion. Thus restrained, Argentine judges began mechanically performing legal exegesis, deferring to the Executive and approaching their tasks as mere technicians. This legal mentality informed the Court's constitutional jurisprudence until its experiment with responsiveness.<sup>158</sup>

Evolving societal attitudes and conditions also are undeniable extra-constitutional influences on the judicial function. Courts operate smoothly in times of relative stability and calm,<sup>159</sup> but Argentine courts have not had the luxury of existing in such a climate. The nation has, in the words of one scholarly text, "stumbled from crisis to crisis[,]"<sup>160</sup> with concomitant legal challenges and crises. Faced with complex and often competing societal demands, arguments based upon national security and emergency

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*Argentina*, (Mar. 14, 2003), available at <http://www.bloomberg.com> ("Interestingly, [then Argentine President] Duhalde's people are spinning the court's actions [in the pesification case] to say that the judiciary is playing politics, trying to discredit the government by destroying what is left of Argentina's battered economy. They say this favors former President Carlos Menem's chances of defeating Duhalde[']s hand-picked successor] in the election. And leave no doubt about it, Menem is out front and center in favor of the court's ruling.").

155. For example, the appointment of Antonio Bermejo to the Court in 1903 augured a "generational shift" in the Court's mentality. See Miller, *supra* note 12, at 112.

156. For a discussion of the Court's turbulent restructuring in the wake of political upheaval, see *supra* Part III.

157. Garay, *supra* note 22, at 188.

158. Cf. Miller, *supra* note 12, at 112.

159. Cf. Miller II, *supra* note 58.

160. See Banks & Carrio, *supra* note 3, at 69.



conditions have influenced the Argentine Supreme Court, often overwhelming even explicit constitutional limitations.<sup>161</sup>

As sympathetic as one might be to the Court's "responsive" approach to constitutional mandates in times of crisis, serious questions arise from the Court's uneven jurisprudential continuity.<sup>162</sup> One might well ask whether the Court's interpretational inconsistencies undermine the legitimacy of the Court itself, its constitutional adjudications, and, at the risk of appearing histrionic, perhaps even the very concept of a binding written Constitution. For, if the highest judicial authority in Argentina ignores the text of the Constitution and decisions interpreting that document, need the executive and legislative branches of the government be constrained by its text?<sup>163</sup>

#### *D. The Court: Perception and Reality*

Unlike the prestige and standing accorded by the U.S. public to our Supreme Court,<sup>164</sup> the Argentine citizenry appears to lack confidence in the institutional legitimacy of that nation's high Court.<sup>165</sup> Prior to the Court's pesification ruling, a public opinion poll reported that eighty-eight percent of Argentines had a negative view of the judiciary.<sup>166</sup> Another such poll calculated that two thirds of respondents viewed the Argentine Court as politicized and lacking independence from the Executive.<sup>167</sup> Nearly the same number considered the Court to be "very corrupt" or 'corrupt', and a plurality of forty-seven percent even con-

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161. *Id.* at 76. See also Miller II, *supra* note 58, at 426. ("There is no question that the Menem Court faced some enormous public pressures that would have hurt any Court.").

162. *Cf.* Miller II, *supra* note 58, at 427 ("The simplest explanation for what happened is one of crude politics and personal loyalties.").

163. See generally Garay, *supra* note 22, at 201-02.

164. The U.S. Supreme Court is not wholly immune from critical scrutiny. Consider the public outcry following that Court's ruling in *Bush v. Gore*, 531 U.S. 98 (2000). That decision left many observers with "the overwhelming impression [that] the Court [acted] as a partisan institution." Michael Herz, *The Supreme Court in Real Time: Haste, Waste, and Bush v. Gore*, 35 AKRON L. REV. 185, 193 (2002). "If the Court accelerates its ordinary processes in order to solve a political crisis, it will inescapably be perceived as deciding on political grounds, for that is how political problems are decided. Not only was the Court in *Bush v. Gore* ruling on a political battle, it had become a participant in that battle. The usual insulation and distance had evaporated." *Id.* at 194.

165. See Helft & Raszewski, *Argentina Supreme Court's Politics Play Into Ruling on Peso*, *supra* note 24 ("The public perception of judges among Argentines is also at an all-time low.").

166. *Id.*

167. Miller, *supra* note 12, at 151-52.

sider[ed] the Court institutionally 'obsolete.'"<sup>168</sup>

The international community had a similarly low opinion of the Argentine judiciary.<sup>169</sup> In a survey of ninety-one countries, Argentina ranked fifty-fourth in the independence of judiciary category, fifty-fifth in litigation costs, and forty-fifth for corruption in the legal system.<sup>170</sup>

In Argentina, this simmering resentment of the judiciary reached the boiling point when a Court decision resulted in the dismissal of charges against former President Menem on charges of illegal arms trafficking.<sup>171</sup> The Court's initial decision in favor of the *corralito* further enraged the public, making the Court the subject of street protests. Astoundingly, protestors threw rocks and eggs at the homes of individual justices to demonstrate their dissatisfaction with the state of the judiciary in general, and with the Supreme Court's jurisprudence in particular.<sup>172</sup>

The Court's pesification ruling appears to have mollified its critics for the moment. Crowds cheered the ruling and hailed the Court as a protector of private property rights.<sup>173</sup> Not everyone is convinced, however, that the Court's motivations were pure.<sup>174</sup>

These critics and others perceive the current Supreme Court

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168. *Id.* at 152 (quoting Christopher Larkins, *The Judiciary and Delegative Democracy in Argentina*, 30 COMP. POL. 423, 424 (1998)). In a footnote, Miller cites polling data indicating that only 12.7 and 14.6 percent of Argentineans had a positive image of the judiciary and that the Supreme Court was the institution that most frustrated the public as compared to Congress, the police, the Catholic Church, and other political and cultural institutions. Miller, *supra* note 12, at 152 n.366.

169. See Lindsey, *supra* note 112. This article cites the 2000 Global Competitiveness Report co-produced by Harvard University and the World Economic Forum. This Report surveys business leaders from over four thousand firms in fifty-nine countries on their perceptions of business conditions in various nations. The article also references Transparency International's index of corruption levels, which surveys the business community, academics, and risk analysts.

170. *Id.*

171. Alejandro Carrio, *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, 276 (2001-2002).

172. *La protesta no para: Cacerolazo de Tribunales al Congreso*, CLARIN, (Jan. 18, 2002), Politica, available at <http://www.clarin.com.ar/diario/2002-01-18/p-337443.htm>.

173. See, e.g., Waldie, *supra* note 24.

174. See *supra* note 24. See also Enrique Medina & Kevin Hall, *Argentine Court Rules Unconstitutional Forced Conversion of Dollar Bank Accounts into Local Currency*, (Mar. 5, 2003), available at <http://www.thestate.com/mld/thestate/news/world/5323181.htm> (last visited Mar. 6, 2003) ("The decision was a blow to [Argentina's then] President Duhalde, who days before the ruling accused the judges, mostly appointed by his rival, former President Carlos Menem, of 'wanting to govern.'"). See also *supra* notes 24, 154.

to be one of the weakest in Argentine history.<sup>175</sup> However, one may question whether this perception reflects the Court's reality. Consider the following data on the qualifications<sup>176</sup> and experience of the Argentine justices. Between 1862 and 1946, forty-one judges served on the Supreme Court.<sup>177</sup> Twelve of these justices, or twenty-nine percent, previously had served as Cabinet Ministers.<sup>178</sup> Additionally, eight justices, or twenty percent of the forty-one, had served as provincial governors.<sup>179</sup> Twenty-eight of these justices, or sixty-eight percent, had been members of one or both Houses of Congress.<sup>180</sup> In contrast, none of the sixty-one justices who served on the Court since 1947 was a Cabinet member, and only two had experience in the Congress.<sup>181</sup>

Several reasons may account for this apparent decline in judicial quality. First, the Court's waning prestige may have made the position less desirable. Also, despite a constitutional guarantee against reducing or diminishing judicial salaries,<sup>182</sup> salaries for Argentine judges are chronically low.<sup>183</sup> The country's inflation on occasion has so reduced the real economic value of judicial salaries that restaurant servers in Buenos Aires earned more than the President of the Supreme Court.<sup>184</sup>

In addition, consider also the inference that there may prove to be a causal relationship between the Court's constitutional interpretive inconsistencies and its declining prestige.<sup>185</sup> Relevant to this issue are two, seemingly contradictory, themes that emerge

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175. Miller, *supra* note 12, at 153-54. See also Miller II, *supra* note 58, at 430. "Never, ever in Argentine history have we had such a politicized Supreme Court." (quoting an Argentine constitutional lawyer). Helft & Raszewski, *Argentina Supreme Court's Politics Play Into Ruling on Peso*, *supra* note 24 ("The public perception of judges among Argentines is also at an all-time low."). *Id.*

176. "The qualifications of some of the members of this [Supreme C]ourt are appalling and without simple political calculation they would have never made it to such an important position." See Helft & Raszewski, *Argentina Supreme Court's Politics Play Into Ruling on Peso*, *supra* note 24 (quoting an Argentine constitutional lawyer).

177. Miller, *supra* note 12, at 155.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* Americans, recognized as having a somewhat cynical view of politics, may question whether political service qualifies one for the bench. In Argentina, cynicism aside, national political candidates generally are drawn from the very well educated, many of whom are internationally renowned intellectuals.

182. ARG. CONST. art. 110, *supra* note 109.

183. See Rosenn, *Protection of Judicial Independence*, *supra* note 118, at 29.

184. *Id.*

185. For a discussion of the Court's constitutional jurisprudence, see *supra* Part III.C.

from the public debate surrounding the Court. First, there has been and continues to be broad public support for textually unconstitutional methods of addressing Argentina's economic and political crises. In such a climate, the Court might be excused for considering social exigencies when examining the law, thereby matching its expectations to those of the most politically significant groups in society.<sup>186</sup> Even Argentine scholars ascribe to the Court the power to engage in extra-textual constitutional interpretation.<sup>187</sup> This national recognition that the judiciary engages in contextual interpretation of the Constitution certainly creates a permissive atmosphere in which responsive law has thrived.

However, while social forces may clamor for legal instrumentalism to advance societal goals, Argentines openly question the Court's independence and ethics. While this national cognitive dissonance appears hypocritical, at times the Court's responsiveness and its obedience to the Executive have bordered on the burlesque.<sup>188</sup> The "stolen decision" scandal<sup>189</sup> exemplifies the lengths to which the Court has gone to accommodate the Argentine government. In the case of *Banco Patagonico c. Metalurgica Skay Soc. de Hecho*, six justices of the Court denied the Central Bank's request for a rehearing in a case in which it had ordered the Central Bank to pay fees to attorneys who had assisted it in liquidating a bank.<sup>190</sup> According to reports of the incident, the Minister of the Economy considered the fee award a dangerous precedent, and he sought the assistance of the President of the Court. The President allegedly had his law clerk remove the final judgment from the Clerk's office, after which he circulated a new decision that favored the government. The old decision simply disappeared.<sup>191</sup>

When the Court seemingly has abandoned impartiality and subordinated itself to the demands of the Executive,<sup>192</sup> it has learned that public support for its responsive style is superficial.<sup>193</sup> As one scholar noted in a somewhat different context, the Court "is both too 'political' in that it developed de facto doctrine with no constitutional authority, but also [may] not [be] 'political' enough,

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186. Miller, *supra* note 12, at 78.

187. *Id.* at 162-63.

188. *Id.* at 152.

189. See Miller II, *supra* note 58, at 375, 396-97.

190. *Banco Patagonico S.A. c. Metalurgica Skay Soc. de Hecho*, 316 FALLOS 2321 (1993).

191. See Miller II, *supra* note 58, at 375, 396-97.

192. Miller II, *supra* note 58, at 375, 394.

193. See *supra* Part I.

[if] it [had] failed to consider important social needs when interpreting the Constitution.”<sup>194</sup> This standard creates yet another Morton’s Fork for an already oppressed Court.

Interestingly, Argentines once cheered loudly for former President Menem’s economic successes and his flamboyant personal style, and they nearly elected him to a third Presidential term.<sup>195</sup> Yet this very same public recently evinced great disgust for the Court’s apparent abject loyalty to former President

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194. Miller, *supra* note 12, at 162.

195. After winning the first round of voting, former President Menem “quit Argentina’s presidential race to avoid a humiliating defeat in a runoff, paving the way for Nestor Kirchner to win by default.” Mary Milliken, *Menem Quits Argentina Race*, (May 14, 2003), available at <http://news.ft.com>. See also Jon Jeter, *Voters in Argentina Atwitter Over Menem*, WASH. POST, April 29, 2003, at A17 (“[Former President] Menem emerged from Sunday’s presidential balloting with 24 percent of the vote, topping a crowded field of 18 candidates. He will face Nestor Kirchner[, then President Duhalde’s hand-picked successor], who took 22 percent, in a May 18[, 2003] runoff. . . . Throughout his campaign, Menem portrayed himself almost as a messianic figure in Argentina politics, frequently comparing himself to Peron. . . . ‘Sixteen months ago I was in jail,’ he said as he stood with his wife, a former Chilean beauty queen half his age.”). See also Simon Gardner, *Feud Rips Argentina’s Peronists Apart as Vote Looms*, (Feb. 23, 2003), available at <http://www.reuters.com> (last visited Feb 24, 2003) (“Menem can still pull in votes, even with recent inquiries into his 1989-1999 mandate. Last year, he served five months of house arrest during an arms-trafficking probe and allegations surfaced he covered up a deadly bombing for a [U.S.]\$10 million bribe.”); Jon Jeter, *He’s Back on the Ballot: Argentina’s Former President Seeks Return*, WASH. POST, (Feb. 9, 2003), available at <http://www.newsday.com/news/nationworld/world/ny-wolati093122677feb09,0,1052099.story?coll=NY-orl-dnews-print> (last visited Feb. 16, 2003) (“‘He’ is Carlos Menem, 72, the ex-president who is Argentina’s most dominant and divisive politician since Juan and Eva Peron and the pivotal figure in the presidential election set for April. Amid Argentina’s worst economic crisis in history, polls show Menem within striking distance of his rivals in the ruling Peronist party.”). Many are appalled at Menem’s return to Argentine politics. “Argentines went to the polls to elect their first president of the 21st century. The final tally in that tragicomedy known as Argentina indicated that the narrow plurality of the populace who voted for Carlos Menem were largely unwilling to embrace the future, but instead remain a prisoner of a shameful past and a wretched legacy left by the former president. Menem’s dark and forbidding bestowals on the nation consists of indescribable scandals, the further corruption of the judiciary and other dire consequences of an economic policy that directly led to the worst economic crisis that Argentines have seen in more than a century . . . . In most seasoned and self-respecting nations that uphold the rule of law, . . . the public would have clamorously demanded that Menem’s numerous indiscretions land him in prison instead of being on the verge of again experiencing his third inauguration. In 2001, the former president spent 5 months under house arrest on account of arms-trafficking for personal aggrandizement and is also alleged to have accepted a [U.S.]\$10 million bribe from Arab terrorists in exchange for covering up details surrounding the bombings of Buenos Aires-based Jewish facilities in the 1990’s.” Press Release, Council on Hemispheric Affairs, *Argentina’s Presidential Election: A Populace That Has Lost Its Head, Heart and Compass Direction*, (Apr. 29, 2003), available at <http://www.coha.org>.

Menem.<sup>196</sup> Is it possible to logically explain this seeming contradiction? Perhaps it is explicable, if the Argentine public perceives, and is entitled to expect, that the Supreme Court and all other Argentine judicial institutions, will function rationally, objectively, and independently, unmoved by the inevitable swings in public opinion. This author questions, however, whether such expectations are reasonable in light of the societal and historical constraints upon the Argentine Court.

Thus, the Court's reputational reality and its authority are not so easily described or categorized. While its constitutional jurisprudence does suffer from interpretive inconsistencies, the Court, like its predecessors, is a product of the environment in which it operates. Given the Court's role in the constitutional order, its relationship to the Executive, and its struggle to survive and to remain relevant in the face of cataclysmic political upheaval throughout the nation's history, interpretive themes might be expected to be somewhat discordant.

Complaints about the Argentine judicial system often focus on the justices and judges populating the bench instead of addressing the weakness of the institution itself.<sup>197</sup> Individual Argentine judges stand up well to this scrutiny. Indeed, a number of Latin American judges enjoy international recognition for their scholarship.<sup>198</sup> Many also actively participate on international legal projects and make significant contributions to legal reforms worldwide.<sup>199</sup>

Perhaps, then, the problem lies not with the Argentine Supreme Court or even with the country's judicial system, but with all Argentine institutions. As noted by one Argentine author, "It's the state, stupid."<sup>200</sup> The fragility of the nation's public institutions is widely acknowledged.<sup>201</sup> When "anarchy" and "chaos"

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196. See *supra* Part I.

197. A discussion of the systemic problems with Latin American judicial systems is beyond the scope of this Article, but see Rosenn, *Protection of Judicial Independence*, *supra* note 118. See also Symposium, *The Role of Legal Institutions in the Economic Development of the Americas*, *supra* note 20.

198. See Rosenn, *Protection of Judicial Independence*, *supra* note 118, at 32.

199. *Id.*

200. Santiago Real de Azua, *In Other Words: Anxious in Argentina*, FOREIGN POL'Y, available at [http://www.ciaonet.org/olj/fp/fp\\_novdec02\\_res01.html](http://www.ciaonet.org/olj/fp/fp_novdec02_res01.html) (last visited May 30, 2003) (quoting MARIANO GRONDONA, *LA REALIDAD, EL DESPERTAR DEL SUEÑO ARGENTINO* (2001)).

201. See Lindsey, *supra* note 112. See also Campuzano, *supra* note 80 ("[T]he wheels of government power [in Argentina] are coming off.").

are common terms in the national dialogue,<sup>202</sup> one must question whether the Court truly merits the particularized attention that it has drawn. While courts can and do have significant impacts on the communities in which they operate, it would be “absurd” to expect the Argentine Supreme Court to take the lead in instituting widespread and profound societal change throughout the nation.<sup>203</sup>

#### IV. CONSEQUENCES: A MORTON’S FORK AND A MORAL HAZARD

##### A. *A Morton’s Fork – Which Pitch to Choose?*

Given the notoriety of the tribunal and the highly publicized nature of the issue, the pesification appeal hoisted the Argentine Supreme Court upon a Morton’s Fork.<sup>204</sup> Logically, this Fork had at least three prongs that the Court might grasp.<sup>205</sup> First, the Court might have upheld the pesification decree. Conversely, the Court’s deliberations might have consumed so much time that events would have overtaken it and mooted the issue. This tactic would have allowed the Court to abstain from making any pronouncements on the constitutionality of the decree, a tergiversation that, while ostensibly removing the Court from the immediate fray, of course would have had its own consequences. Finally, the Court could have decided, and did decide, that the pesification decree is unconstitutional.<sup>206</sup> These prongs are considered in turn.

A Court ruling upholding the pesification decree would have presented a Janus-faced duality. The positive face of such a ruling clearly would have been a victory and a boon for the Argentine executive branch, allowing it to pursue its economic reform package unhindered. A declaration that pesification was constitutional would have preserved the status quo and prevented dramatic and potentially cataclysmic reversals in the slow, but steady, recovery that the nation’s economy has been experienc-

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202. Cf. *Argentina: More Chaos*, *supra* note 9; Le Gras, *Argentine Leader Says Court Ruling May Bring Chaos*, *supra* note 5.

203. Garay, *supra* note 22, at 193.

204. The derivation of the phrase Morton’s Fork is discussed *supra* note 17.

205. While John Morton’s original Fork had only two prongs, the author has taken artistic license and expanded its design. For brevity’s sake, the author will forego the opportunity to explore the myriad procedural positions that the Court may have taken in such an appeal and will focus on the substantive alternatives.

206. See *San Luis, Provincia de*, \_\_ FALLOS \_\_ (Arg. CSJN Mar. 5, 2003), *supra* note 2.

ing.<sup>207</sup> The government might have been so pleased that it would have given the Court some relief from the continuing public criticisms and impeachment threats, although, based upon the tense relationship between these governmental branches, any such reprieve likely would have been temporary.<sup>208</sup>

The negative gaze of a “constitutional” ruling on pesification would have fallen on the hapless Argentineans who would lose all hope of recovering the value of their converted deposits.<sup>209</sup> This ruling would have served only to confirm the disenchanted public’s cynical view of the Court as a corrupt puppet of the Executive and to further erode their confidence in the judicial system.<sup>210</sup> Courts which do not themselves pay tribute to the law of the land cannot compel others to do so, thereby discouraging parties from using the judicial system to resolve disputes. In this event, public concerns that the Argentine courts are “obsolete” would not have appeared overly hyperbolic.<sup>211</sup>

A “constitutional” ruling by the Court also would have had an impact extending well beyond Argentina’s borders. Argentina’s prospects for continued international financing might have been complicated by the protests of the membership of multilateral development institutions.<sup>212</sup> Too, foreign banks and investors would have been forced to confront the negative face of a Janus-like “constitutional” ruling as their once dollar-denominated investments would be fixed at the value of the much-weakened peso. This result certainly would have increased the legal risk factor for parties considering investments in Argentina, further isolating the nation from the much-needed capital that international investors can offer to stable and investor-friendly environments.<sup>213</sup> As one Argentine lawyer mourned, “I see deals collapse – I see potential investors who decide not to come to [Argentina] –

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207. See *infra* note 239.

208. See *supra* notes 11-16 and accompanying text.

209. See *Argentine Judges Face Corruption Probe*, *supra* note 11.

210. See, e.g., Perez, *supra* note 12, at 372. See also Miller, *supra* note 12, at 151-52.

211. See Miller, *supra* note 12, at 151-52.

212. For an enlightening discussion on how the governments of individual member States influence the policies and procedures of multilateral institutions, see Ian A. Bowles & Cyril F. Kormos, *Environmental Reform at the World Bank: The Role of the U.S. Congress*, 35 VA. J. INT’L L. 777 (1995).

213. See, e.g., Helft & Raszewski, *Argentina Supreme Court’s Politics Play Into Ruling on Peso*, *supra* note 24 (“The effect of the judiciary’s lack of independence now extends beyond politics and risks further discouraging foreign investment and stunting economic growth after the economy shrank 12 percent last year, analysts said.”).



because of the legal risks."<sup>214</sup>

Delay was yet another prong on the Court's Morton's Fork. The Court's continuing delay in ruling on the pesification decree's constitutionality might have obviated any need for it to rule on the issue.<sup>215</sup> The government is reported to have pressured the Court to postpone a ruling until the country's financial picture had improved to the point that it could manage the format and the timing of a return of dollar deposits.<sup>216</sup>

There is historical precedent for such tactical maneuvering on the part of the Argentine Supreme Court. For example, in the late 1980's, the Argentine Executive issued a decree establishing social security pension levels.<sup>217</sup> When challenges to the pension decree reached the Supreme Court, it ruled against the Executive.<sup>218</sup> In response, the Executive issued an emergency decree that froze pension levels, suspended all litigation and executions of judgments against the State for failure to pay the amounts required by law, and suspended the filing of any new administrative or judicial actions on the issue.<sup>219</sup> Of course, these actions were challenged all the way to the Court, yet, somehow, the Supreme Court delayed issuing any decisions in the relevant cases pending before it and avoided ruling on the validity of the suspension decree. When the suspension was lifted and a new law passed that reorganized the pension system, the Court held both the suspension on litigation and on executions of judgments as moot.<sup>220</sup>

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214. See Lindsey, *supra* note 112. See also Helft & Raszewski, *Argentina Supreme Court's Politics Play Into Ruling on Peso*, *supra* note 24 ("Some foreign investors say the courts are unpredictable. A local unit of AES Corp. is among foreign-owned utilities that have threatened to leave Argentina after courts blocked rate increases they said were needed to compensate for the currency's 70 percent drop last year. 'The blatant politics in the judicial system stops foreign investors on [sic] their tracks[,]'" (quoting a partner at a prominent Miami law firm that recently established an Argentine unit)).

215. Speculation was rampant that the Court might grasp the delay Fork. A news report dated September 14, 2002 noted that a "Supreme Court decision over an earlier case by one saver against 'pesification' has been expected for weeks." Le Gras, *Argentine Leader Says Court Ruling May Bring Chaos*, *supra* note 5. Later news reported that the Court had again delayed its ruling until February 2003. See *Argentine High Court Postpones Peso Ruling Until Feb*, *supra* note 6.

216. *Argentine High Court Postpones Peso Ruling Until Feb*, *supra* note 6 ("[T]he government could issue bonds with long term maturity dates to Argentines, to spread the cost over time.").

217. Executive Decree 2196, A.D.L.A. 4180 (Arg. 1986), B.O. (Arg.), 2 Dec. 1986. For a detailed and scholarly discussion of this event, see Miller, *supra* note 12, at 164-67.

218. Rolon Zappa, 308 FALLOS 1848 (1986).

219. Executive Decree 2196, *supra* note 217, at 4182.

220. Humberto Gomez, 311 FALLOS 2238 (1988). For an account of other examples

Consider also the Court's unfortunate "approval" of the intermittent military coups that have intervened in Argentina's civilian governmental processes.<sup>221</sup> More recently, the Court sidestepped a controversial issue by ruling that families of the *desaparecidos*<sup>222</sup> lacked the standing to sue,<sup>223</sup> thereby refusing to consider the legality of former President Menem's pardons of military officers charged with abuses during the nation's "Dirty War" and implicitly validating the brutal torture and murder of thousands of Argentines.<sup>224</sup> These maneuvers, however, have had their own consequences, as would have a continuing delay on the pesification issue.

While a delay or a similar tactical maneuver in the pesification appeal might have proven to be politically expedient, and, ultimately, might merely have prolonged the Argentine public's agony and not caused it greater harm than that which it already had suffered, it certainly would have raised philosophical questions about the role of the rule of law, in the form of the Constitution, and that of the nation's courts, in Argentina's constitutional democracy. What is the Court's duty in this instance? Should necessity, as perceived by elected officials, prevail over the normative rule of law, and are courts the proper body to resolve that question? Is the Court bound to strictly enforce the language of the nation's Constitution without regard to societal concerns? Or is the Court permitted, or even obliged, to consider social interests

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of "deference through delay," see Miller II, *supra* note 58, at 383-85 ("Virtually the same tactic of deference through delay was used by the Supreme Court to avoid questioning the emergency decree that changed the national currency from the Argentine Peso to the Austral. . . . The tactic of judicial deference through delay was also used by the judiciary generally to avoid several potential confrontations. For example, due to delays in the lower courts, the court system took nearly two years to resolve an action complaining of the seizure of the client files of a major law firm by a Congressional committee. . . . Ultimately, the case ended with the Supreme Court holding it moot.").

221. See *supra* note 105.

222. During Argentina's so-called *Guerra Sucia*, or Dirty War, between 1976 and 1983, it has been estimated that between 10,000-30,000 people either died or disappeared without a trace, giving rise to the oft-used phrase, the *desaparecidos*. See generally IAIN GUEST, *BEHIND THE DISAPPEARANCES: ARGENTINA'S DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS* (1990). See also <http://www.desaparecidos.org/arg>; <http://www.yendor.com/vanished>.

223. Riveros, Omar S. y Otros, [1991-I] J.A. 306 (1991).

224. For a discussion of the legal response to the chilling *desaparecidos* phenomenon and of Menem's pardons, see Banks & Carrio, *supra* note 3, at 34-40. See also Sergio L.B. Pulcini y Oscar A. Dobra, L.L. 421 (Arg. CN Com. 1990) (The Supreme Court dismissed an appeal, or a *recurso de apelacion*, for lack of jurisdiction in a case involving criminal convictions that clearly were a violation of an existing Court precedent).

when interpreting constitutional text? Only when these questions are resolved can one determine whether the Argentine Court would have been shirking its constitutional duty by delaying a ruling so as to moot the pesification issue. All constitutional democracies must decide this issue, and any one country's decision may vary greatly from that of its neighbor depending upon its history and cultural predilections.

What the Court did, however, was strike down the pesification decree on constitutional grounds.<sup>225</sup> In a five-to-three vote, the justices ruled that the compulsory conversion violated fundamental property rights of bank depositors.<sup>226</sup> Citing Article 17 of the Constitution,<sup>227</sup> the Court stated that the decree "trampled private property in a way that is incompatible with the protection that the constitution warrants as it exceeds the limits allowed by the court's jurisprudence when faced with economic emergencies."<sup>228</sup>

Might the Court not, therefore, claim a moral victory? It legitimately can wrap itself in the clear text of the Constitution, embracing a rationalist approach to constitutional interpretation that many claim it had all but abandoned.<sup>229</sup> This ruling also is an apparent victory for Argentine depositors whose savings were devastated by the law's forced conversion.<sup>230</sup> Thus soothed, the public might view the Court in a more favorable light, interpreting its ruling as an exercise of the Court's independence from a domineering Executive.<sup>231</sup>

The international financial community also likely will respond positively to the Court's ruling invalidating the pesifica-

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225. *San Luis, Provincia de*, \_\_ FALLOS \_\_ (Arg. CSJN Mar. 5, 2003), *supra* note 2.

226. *Id.* See also Rohter, *Policy on Peso is Overturned in Argentina*, *supra* note 6.

227. *San Luis, Provincia de*, \_\_ FALLOS \_\_ (Arg. CSJN Mar. 5, 2003), *supra* note 2. See ARG. CONST. art. 17 ("Property may not be violated, and no inhabitant of the Nation can be deprived thereof except by virtue of a sentence based on law. Expropriations in the public interest must be authorized by law and previously compensated."). The members of the Court also cited numerous other decrees and laws in its ruling, including a 2001 law enacted to induce depositors to maintain their dollar accounts. *San Luis, Provincia de*, \_\_ FALLOS \_\_ (Arg. CSJN Mar. 5, 2003), *supra* note 2. As this is not a case comment, this author will leave a detailed analysis of the ruling to others and will focus on its ramifications.

228. *Argentina Court Orders Payback of Frozen Deposits*, (Mar. 7, 2003), available at <http://www.newsmax.com/archives/articles/2003/3/3/151927.shtml/> (quoting *San Luis, Provincia de*, \_\_ FALLOS \_\_ (Arg. CSJN Mar. 5, 2003), *supra* note 2).

229. For a discussion of the Court's constitutional jurisprudence, see *supra* Part III.C.

230. See *supra* Part I.

231. See, e.g., Perez, *supra* note 12. But see *supra* notes 24 and 154 for those taking a cynical view concerning the political implications of the Court's ruling.

tion decree.<sup>232</sup> Countless investments and loans<sup>233</sup> of international multilateral development institutions and of institutional and private international investors and lenders were affected by the pesification decree. These parties strenuously denounced the law, threatening legal action on the grounds that pesification unlawfully seized property and nullified existing contracts.<sup>234</sup> This Court ruling has the potential to restore the dollar-denominations to internationally-held investments<sup>235</sup> and likely will boost the international community's confidence in Argentina's legal framework.

Restored investor confidence potentially could result in substantial benefits for the Argentine market. If the Argentine Supreme Court is able to convince the international community that the nation's judicial system is impartial, is free from executive influence, and is protective of legal rights, money may begin

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232. However, the Court's ruling has the potential to complicate Argentina's relationship with the IMF. See Rohter, *Policy on Peso is Overturned in Argentina*, *supra* note 6. The debt-extension agreement that Argentina signed with the IMF in January 2003, see *Argentina, IMF Agree On Loan*, *supra* note 90, requires that the government reach a rapid settlement with the banks on pesification issues. Depending upon the scope of the Court's ruling, and depending upon what form the reimbursements take, i.e., cash or bonds, the cost of the redollarization to the Argentine government and the banks might be as low as U.S.\$9 billion or reach as high as U.S.\$35 billion. See *S&P Comments on San Luis, Argentina, Bank Deposits*, (Mar. 6, 2003), available at <http://www.reuters.com>. This could seriously compromise Argentina's financial position as its dollar reserves are estimated to be approximately U.S.\$10 billion. See, e.g., Gardner, *supra* note 6.

233. The *San Luis* ruling did not determine whether the pesification of dollar-denominated loans and debt is constitutional. *San Luis, Provincia de*, \_\_ FALLOS \_\_ (Arg. CSJN Mar. 5, 2003), *supra* note 2. See also Brooks, *supra* note 2. However, the Court apparently has hinted that it might not rule against pesification in the debt and loan cases. See, e.g., Gardner, *supra* note 6 ("In a sour note for banks, devalued loans are not likely to be turned back into dollars.").

234. See *Argentina: More Chaos*, *supra* note 9 ("By upsetting well-established property rights and nullifying contracts, the government is reducing Argentina's prospects for returning to economic growth," [Jim Saxton, chairman of the Joint Economic Committee of the U.S. Congress] said in a statement that referred to the U.S. Code's requirements to cut off aid when U.S. property is seized or contracts nullified. "Secure property rights are essential for economic growth . . . . The IMF and other international financial institutions should stress this message to Argentina's government."'). See also Helft & Raszewski, *Argentina Supreme Court's Politics Play Into Ruling on Peso*, *supra* note 24 ("Some foreign investors say the courts are unpredictable. A local unit of AES Corp. is among foreign-owned utilities that have threatened to leave Argentina after courts blocked rate increases they said were needed to compensate for the currency's 70 percent drop last year. 'The blatant politics in the judicial system stops foreign investors on [sic] their tracks.'" (quoting a partner at a prominent Miami law firm that recently established an Argentine unit)).

235. Recall that the *San Luis* ruling resolved only the dispute of the parties before it. See *supra* note 2.

to flow back into Argentina. A country's legal risk is a significant element of virtually every investor's risk assessment process.<sup>236</sup> Investors will be attracted to jurisdictions with strong legal systems, including not only well-developed and nondiscriminatory legal doctrine, but also efficient and impartial procedures for resolving disputes.<sup>237</sup>

A "moral" victory for the Court, however, could be a pyrrhic one. While legal scholars might debate whether such concerns are relevant to a court's constitutional deliberations, the economic impact of the ruling invalidating the pesification decree potentially could be catastrophic.<sup>238</sup> While there have been recent improvements in Argentina's economy,<sup>239</sup> the system still might not have the dollar reserves to survive a rush of dollar withdrawals. It has been estimated that Argentine banks would be forced to return between U.S.\$9 and U.S.\$35 billion to bank depositors,<sup>240</sup>

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236. See, e.g., International Country Risk Guide, *Information on the Rating System*, at <http://www.icrgonline.com/> [hereinafter ICRG]. The ICRG provides a quantitative measure of a country's risks, including a rating pertaining to each country's laws. Investors, multilaterals, and insurers utilize this Guide, as do others. Cf. Dun & Bradstreet, *Information on Country Report*<sup>TM</sup>, at <http://www.dnb.com/dbproducts>; Moody's, *Information on Sovereign Ratings*, at <http://www.moodys.com>; Standard & Poor's, *Corporate Ratings Criteria* 1, 35-37, available at <http://www.standardandpoors.com/europe/deutsch/content/resourcecenter/pdf/corpcrit2002.pdf>. See generally Symposium, *The Role of Legal Institutions in the Economic Development of the Americas*, *supra* note 20.

237. See generally Symposium, *The Role of Legal Institutions in the Economic Development of the Americas*, *supra* note 20.

238. "[T]he ruling is potentially ruinous for the banks that now face a huge liability." DeRosa, *supra* note 154.

239. Larry Rohter, *Signs of Economic Life in Argentina*, N.Y. TIMES, (Feb. 25, 2003), available at <http://query.nytimes.com/gst/abstract.html?res=F50612FA34590C768EDDAB0894DB404482> ("[T]he financial sector is finally showing tentative signs of recovery."); *Argentina's Nielson - Debt Restructuring Moves Ahead*, (Feb. 21, 2003), available at <http://www.reuters.com> (last visited Feb. 21, 2001) ("[Argentine Finance Secretary Guillermo] Nielson said the economic indicators were encouraging. The country's industrial output rose 16.4 percent in January from a year earlier. Last year the economy contracted about 11 percent amid the worst ever economic crisis. Inflation has slowed to near zero and bank deposits are recovering."); EFE News Service: *ARGENTINA-GOVERNMENT: Duhalde Thanks Aides for Saving Argentina from "Anarchy"*, (Dec. 30, 2002), at <http://hoovnews.hoovers.com> ("There is a new economy up and running, based on production and work for our people, following the collapse of the previous model[.]") (quoting then President Duhalde). But see Andres Oppenheimer, *Argentina's Economic Alchemy - Nonpayment of Debts Can't Be Written Off*, (Feb. 27, 2003), at [http://www.miami.com/mld/miamiherald/news/columnists/andres\\_oppenh](http://www.miami.com/mld/miamiherald/news/columnists/andres_oppenh) ("Stop the presses! Argentina is celebrating an economic recovery, which, if real, would be a first of its kind: It would prove that you can stop your foreign debt payments, insult your creditors, reject conditions from international financial institutions and get your country's economy back on its feet.").

240. The difference in these estimates pertains to the scope of the Court's ruling.

funds that many believe the Argentine system does not have.<sup>241</sup> A deepening liquidity crisis could scuttle Argentina's fragile economic recovery and threaten to send the nation into another economic tailspin.<sup>242</sup> None of the parties involved would benefit from this chain of events.

Even should the economy endure a run by depositors on dollar accounts, there are numerous practical difficulties implicit in the ruling that pesification is unconstitutional. While beyond the scope of a theoretical article, questions have arisen concerning how banks or others are to "re-convert" the converted peso accounts back into dollars. Would the conversion be required to take place immediately?<sup>243</sup> If not, does the Constitution imply some sort of deadline? At what exchange rate?<sup>244</sup> Could the banks offer bonds or some other instrument in lieu of dollars?<sup>245</sup> Would the banks or the government be forced to factor in lost opportunity costs, etc. . . ? Without considering the propriety of judicially addressing such details, courts generally are ill equipped to respond to such matters.

Further, while the Court appears to be enjoying a respite from the heated invective heaped upon it in public protests and could experience a boost in its public approval ratings, these benefits likely will be short-lived. After the initial euphoria has faded, the Argentine public inevitably will join the government and the

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Depending upon what date is chosen for compensation, the Court's holding might apply only to those with money trapped in the banking system as of the date of the ruling, or it potentially also could benefit those depositors who held balances at the time of the pesification decree. See *S&P Comments on San Luis, Argentina, Bank Deposits*, *supra* note 232.

241. *Argentine Gov Slams Court Ahead of Peso Ruling - Reports*, Dow Jones Int'l News, Dec. 24, 2002, WL DJINS database. See also *supra* note 238.

242. See *supra* Part I.

243. In the *San Luis* ruling, the Court ordered the parties to work out the terms of the settlement within sixty days. *San Luis, Provincia de*, \_\_ FALLOS \_\_ (Arg. CSJN Mar. 5, 2003), *supra* note 2. See also Rohter, *Policy on Peso is Overturned in Argentina*, *supra* note 6 ("Apparently recognizing the potentially disruptive effect of its decision, the Supreme Court gave the federal government and San Luis 60 days to work out the terms of a settlement.").

244. See *id.*

245. *Id.* The general consensus is that the government will issue five to ten year dollar-denominated bonds. See *Argentina Court Orders Payback of Frozen Deposits*, *supra* note 228. "Despite the peso's drastic devaluation last year and the conversion of all dollar accounts into local currency, [the Minister of the Economy] said savers would get back 80 percent of their money through compensation in government bonds." Smith, *supra* note 79. Commentators predict that this is likely to "anger depositors who note the government has defaulted on debt owed private creditors. Few investors with other choices would trust a new bond issue." Medina & Hall, *supra* note 174.

press in speculating about the Court's ulterior motives for the ruling.<sup>246</sup> Governmental attacks on the ruling already have appeared, as have editorials questioning the Court's loyalties<sup>247</sup> and calling to mind the charges of political blackmail leveled against the tribunal during the public debate on the pesification appeal.<sup>248</sup>

Too, Argentineans, like all Latin Americans, report a nearly legendary "traditional disrespect for law,"<sup>249</sup> an attitude that encompasses legal institutions. For example, surveys indicate that less than twenty percent of Latin Americans have confidence in their judicial systems.<sup>250</sup> Considering this systemic skepticism, it is highly unlikely that one ruling from a highly maligned Supreme Court will cause a paradigm shift in public opinion.

While it ultimately did not do so, grasping either the "constitutional" or "delay" prong may have offered the Argentine Court, the Executive, and perhaps even the Argentine public some of the short term benefits previously discussed. However, it also would have exacerbated the moral hazard<sup>251</sup> that exists in Argentina. The conduct of Argentine officials not only inspires cynicism among the Argentine public,<sup>252</sup> it also undermines the "very con-

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246. See, e.g., Helft & Raszewski, *Argentina Supreme Court's Politics Play Into Ruling on Peso*, *supra* note 24 ("The judges on the court just operate politically, . . . . They were appointed because they are friends and accomplices of [former President] Menem and their rulings have been contradictory and self-serving."). See also DeRosa, *supra* note 154 ("Interestingly, [then Argentine President] Duhalde's people are spinning the court's action [in the pesification case] to say that the judiciary is playing politics, trying to discredit the government by destroying what is left of Argentina's battered economy. They say this favors former President Carlos Menem's chances of defeating Duhalde[s hand-picked successor] in the election. And leave no doubt about it, Menem is out front and center in favor of the court's ruling."); Waldie, *supra* note 24 ("[A]n economist with Raymond James Argentina . . . said the ruling may have more political than economic consequences. The country is holding elections . . . . Mr. Duhalde tried to fight the ruling for fear that it would endanger stability ahead of the . . . vote. But . . . others say the Supreme Court is believed to be loyal to Mr. Duhalde's nemesis, former President Carlos Menem, a leading candidate in the election.").

247. See *supra* note 246.

248. See Perez, *supra* note 12, at 372. See also *Argentine Court Mulls Account Conversion*, (Dec. 2, 2002), at <http://www.washtimes.com/upi-breaking/20021128-041415-1305r.htm>; Le Gras, *Courts Threaten Argentina's Banks*, *supra* note 1.

249. Rosenn, *Latin American Constitutionalism*, *supra* note 32, at 25.

250. Panel Two, *Berenson Remarks*, Symposium, *The Role of Legal Institutions in the Economic Development of the Americas*, *supra* note 20, at 179, 183. See also *supra* notes 168-69.

251. See *supra* note 21.

252. See Helft & Raszewski, *Argentina Supreme Court's Politics Play Into Ruling on Peso*, *supra* note 24 ("Whatever the politics of this court, the way this government

cept of government by a written constitution[.]”<sup>253</sup>

### *B. A Moral Hazard*

Economists and scholars long have recognized the role that moral hazards play in causing severe financial crises.<sup>254</sup> In the context of a market crash, moral hazards result when investors or other actors assume that some enabling entity, such as a government or a multilateral such as the IMF, is providing a guarantee, implicit or explicit, against a portion of their losses. The belief in this guarantee distorts the market and creates incentives for these actors to take imprudent risks.<sup>255</sup>

This author posits that the moral hazard theory has a much wider application. Specifically, in the context of this Article, the moral hazard concept is relevant to the political dynamic that exists in Argentina. Because the Executive and other Argentine lawmakers perceive the nation’s Supreme Court to be a captive to their legal maneuverings, these officials have become emboldened to act outside of constitutional limits or the bounds of the rule of law, confident that their actions likely will be sanctioned by the Court.<sup>256</sup> Such are the consequences of a “compliant” Argentine Supreme Court.

Moral hazard problems may stem from the behavior of both the “actors” (the lawmakers) and the “enablers” (the Court).<sup>257</sup> As to the actors/lawmakers, a compliant and politicized Supreme Court creates incentives for officials to take excessive risks with little or no regard for Argentine law when fashioning remedies and defining policies in times of crisis. When the Supreme Court repeatedly ignores the plain language of the nation’s Constitution to validate governmental conduct, the Court creates a moral hazard for lawmakers, who suffer no consequences for their blatant failure to comply with Argentine law. “If [governments, corporations, or individuals] do not bear the full consequences of their actions, they will tend to be more careless because they can externalize the consequences of their action[, ]” thus shifting to others

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has broken contracts and rules is unprecedented . . . . Something had to be done about that.” (quoting Professor Ivan Cullen, University of Rosario)).

253. Cf. Garay, *supra* note 22, at 202.

254. See, e.g., Partnoy, *supra* note 21, at 757-58.

255. *Id.* at 754-60.

256. Cf. Banks & Carrio, *supra* note 3, at 1-6.

257. Cf. Partnoy, *supra* note 21, at 754-60.



the burden of their irresponsible conduct.<sup>258</sup>

In this instance, the victims of the government's pesification decree were the multilateral development institutions and their member countries, private banks and lenders, foreign investors, and, to a lesser extent, Argentineans with dollar accounts. And, while the Court's ruling striking down the pesification decree addresses this abuse of executive power, these victims still bore the brunt of Argentina's financial crisis, an economic ill for which pesification was only one attempted cure. Other treatments for this disease, such as the nation's default on its debts, also caused significant side effects for Argentina's investors and lenders, infecting them with a virulent strain of Argentina's symptoms. Spreading its disease to these third parties, even temporarily, allowed Argentina to escape with a much milder case of the disease to which many believe the country willingly exposed itself. Because Argentine lawmakers did not feel constrained even by the country's Constitution, it imposed the burden of its "profligate" spending and its unsustainable run-up of external debt on its lenders, investors, and citizens.<sup>259</sup>

The ramifications of shifting this burden onto the backs of the international financial community may prove to be long-term and severe. Despite the Court's pesification ruling, multilateral and foreign lenders and investors may seek safer and more profitable investment climates for the capital that Argentina very desperately needs, the "rush to the exits" and capital flight syndromes.<sup>260</sup> So too may Argentine financial, regulatory, and legal institutions find themselves isolated, perhaps even made obsolete, in the context of international financial transactions.<sup>261</sup> Foreign parties involved in any future financial dealings with Argentina likely will prudently demand the importation of foreign legal rules, procedures, and institutions to govern their arrangements. This potentially limits the types of financing available to Argentina

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258. Viet D. Dinh, *Remarks*, Symposium, *The Role of Legal Institutions in the Economic Development of the Americas*, *supra* note 20, at 20.

259. See Lindsey, *supra* note 112. See also Oppenheimer, *supra* note 239.

260. For example, according to the Argentina Statistics and Census Office, Indec, U.S.\$14.486 billion fled Argentina in 2002, a 246% increase over the U.S.\$4.668 billion in 2001. *11,5 Billion U.S. Dollars Fled Argentina in 2002*, (Mar. 29, 2003), at <http://www.falklands.com/Detalle.asp?NUM=2009&Palabra=11,5%20billion>. See also Partnoy, *supra* note 21, at 758-59.

261. "[T]he failure to provide an institutional framework that secures a high degree of compliance with law and security for personal liberties and private property only exacerbates the basic task of producing economic prosperity." See Rosenn, *Latin American Constitutionalism*, *supra* note 32, at 30.

and its citizens. For example, issuers of Argentine mortgage-backed securities or other similar financing vehicles might not attract foreign investors as the collateral necessarily would be governed by Argentine law, a risky proposition. The choice of New York law and of the procedure and forum of an international arbitral tribunal could become a common contractual demand, marginalizing Argentina's legal institutions and community.<sup>262</sup>

Because the Court's constitutional jurisprudence is unpredictable and occasionally reveals an utter disregard for the text of that venerable document, it exposes Argentine lawmakers and the Argentine public to serious moral hazards. If the Court is unconcerned with constitutional guarantees, surely one cannot expect public officials and Argentine citizens to evince much regard for its requirements. Excesses in the exercise of judicial power exacerbate the disrespect that lawmakers and citizens have for constitutional values, the rule of law,<sup>263</sup> and Argentine institutions in general.<sup>264</sup> The effects of general lawlessness and a "breezy indifference to rules and responsibilities"<sup>265</sup> stretch far beyond the confines of the country's financial markets.

The Court too is plagued by its own moral hazard as a result of its responsive rulings and its slavish devotion to certain executive conduct. Any judge who thwarts the will of a dominant Executive does so at great peril.<sup>266</sup> A responsive Court that fails to respond to the Executive or Congress "is simply too great a political risk to that Executive[ ]" or the congressional body.<sup>267</sup> In such

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262. See Lindsey, *supra* note 112. There are Argentines who would welcome this international isolation. "Let's live on our own," [some Argentines] say. This means to renounce competition and not try to fit into an uptight and difficult First World that demands certain disciplined behaviors." Carlos Alberto Montaner, *Argentina Can Be A Wealthy Nation Again*, (Oct. 30, 2002), at <http://www.miami.com/mld/miamiherald/news/opinion/4399356.htm>. In economic terms, this seems Utopian. "If I stop paying my debts, I would obviously have more disposable income to buy food, or go to the movies. But, eventually, the light would go out." Oppenheimer, *supra* note 239.

263. Cf. Banks & Carrio, *supra* note 3, at 4.

264. Cf. Rohter, *Signs of Economic Life in Argentina*, *supra* note 239 ("The long-term challenge facing banks of all types [in Argentina] is to regain the confidence of Argentine savers, who still feel that they have been defrauded by bankers and politicians. Even with the recent surge in deposits, economists estimate that Argentines have U.S.\$110 billion in savings stashed under mattresses or in accounts abroad, double the amount in the banking system.").

265. Santiago Real de Azua, *supra* note 200.

266. See Rosenn, *Protection of Judicial Independence*, *supra* note 118, at 31.

267. Miller, *supra* note 12, at 155.

a situation, lawmakers may defy the Court<sup>268</sup> or agitate for a change in the Court's membership,<sup>269</sup> leaving the Court with little or no dignity and with virtually no job security.<sup>270</sup>

The Court also subjects itself to a nearly constant barrage of criticism regarding its competence, qualifications, and bias.<sup>271</sup> Even when the Court does act to uphold the rule of law, as it appeared to do with regard to the pesification issue, its prior rulings expose it to speculation and doubt.<sup>272</sup>

What then is necessary to eliminate the moral hazards endemic in the Argentine system? Certainly, a single, and possibly aberrational, ruling will not eradicate these risks. Of course, maintaining the confidence of the relevant actors, or, in this context, public and international institutional confidence, is essential to solving moral hazard problems.<sup>273</sup> To accomplish this in Argentina, a commitment would be required not only from the judiciary, but also from Argentine civil society. A country's judiciary reflects the values of the culture in which it exists, and Argentineans long have expected, even demanded, that the Court defer to executive authority and respond to social needs when performing its judicial duties.<sup>274</sup>

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268. For a discussion of the Executive Decree that invalidated, at least temporarily, a Court decision on pension levels, see *supra* Part III.C.

269. As discussed *supra* Part III.B., every "civilian President since Peron has tried to choose a docile Supreme Court." Miller, *supra* note 12, at 153. While the Argentine Executive and the Congress did seek to impeach the justices of the Supreme Court in 2002, the impeachment charges were dropped in order to appease the IMF. See Helft & Raszewski, *Argentina Supreme Court's Politics Play Into Ruling on Peso*, *supra* note 24. The IMF was concerned that conflict between the various branches of the government would impede economic reform in the country. *Id.* This IMF scrutiny may provide the members of the Court with a margin of safety, alleviating their fears of governmental reprisals in the form of impeachment proceedings in cases in which the Court is not responsive to the government's litigation positions.

270. Miller, *supra* note 12, at 152. See also Rosenn, *Protection of Judicial Independence*, *supra* note 118, at 31.

271. See *supra* Part III.D.

272. See, e.g., Helft & Raszewski, *Argentina Supreme Court's Politics Play Into Ruling on Peso*, *supra* note 24.

273. Cf. Partnoy, *supra* note 21, at 760.

274. Of course, a basic question concerns the nature of the law, particularly the Argentine Constitution. In Latin America generally, and in Argentina specifically, constitutions may mean something far different to the populace than the U.S. Constitution means to residents of the U.S. In Argentina, the inclusion of a substantial number of utopian provisions in the Constitution that are either impossible or extremely difficult to enforce suggests that that the document is an aspirational writing rather than a serious limitation on governmental power. See Rosenn, *Latin American Constitutionalism*, *supra* note 32, at 26. If this is the case, Argentineans should expressly recognize this characterization and relent in their unrealistic demands of the Supreme Court.

## V. CONCLUSION

To conclude, the pesification issue raised a Morton's Fork before the Argentine Supreme Court, with a sharp and dangerous point topping each of the Fork's pitches. Regardless of the Court's ultimate ruling,<sup>275</sup> cries of outrage inevitably would have been heard from some quarter.<sup>276</sup>

One must empathize with these oppressed justices. Despite the extensive lip service paid to constitutional values in Argentina, a true commitment to the rule of law appears to be superficial.<sup>277</sup> The Court's position is untenable given the nation's strong authoritarian history and a societal willingness to free the Court from the textual constraints of the Constitution. Yet, paradoxically, the Court is scrutinized and criticized mercilessly when it rules responsively.

This paradox, however, does not excuse the Court's sporadic wholesale abandonment of its role in a democratic society. While civil law judges traditionally have far less power than their common law counterparts,<sup>278</sup> the Argentine Supreme Court long has declared itself to be the final interpreter of the Constitution.<sup>279</sup> To preserve this role, the justices must strive to maintain their independence and their adherence to that ideal. In so doing, they need not remain oblivious to social needs or political considerations,<sup>280</sup> nor should the Court be expected to initiate the institutional reforms that Argentina so desperately needs.

What is required, then, for such fundamental change is a societal commitment to good governance and the rule of law,<sup>281</sup> not simply one Supreme Court ruling. Securing effective institutional reform entails the inclusion of civil society in the reform efforts and a common understanding of the nature of the governing legal framework.<sup>282</sup>

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275. See *San Luis, Provincia de*, \_\_ FALLOS \_\_ (Arg. CSJN Mar. 5, 2003), *supra* note 2.

276. See *supra* notes 24, 246. One report quoted a source that called the ruling "nauseating." See Helft & Raszewski, *Argentina Supreme Court's Politics Play Into Ruling on Peso*, *supra* note 24.

277. Cf. Rosenn, *Protection of Judicial Independence*, *supra* note 118, at 35.

278. Rosenn, *Federalism in the Americas*, *supra* note 84, at 21.

279. See Garay, *supra* note 22, at 197.

280. See Rosenn, *Protection of Judicial Independence*, *supra* note 118, at 3.

281. James Spinner, *Remarks*, Symposium, *The Role of Legal Institutions in the Economic Development of the Americas*, *supra* note 20, at 47, 49.

282. Nancy Zucker Boswell, *The Law, Expectation, and Reality in the Marketplace: The Problems of and Responses to Corruption*, Symposium, *The Role of Legal Institutions in the Economic Development of the Americas*, *supra* note 20, at 139, 143.

Likewise, a confidant, charismatic<sup>283</sup> Supreme Court with a predictable body of textually defensible constitutional jurisprudence could provide an effective antidote to executive and congressional excesses<sup>284</sup> and could eliminate the moral hazards extant when the tribunal acts exclusively as a political instrument of these other governmental branches. This could breathe new life into the rule of law in Argentina, a victory for the entire nation and a foil for the Court's future Morton's Forks.

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283. For an extrapolation of Weber's Sociology of Law and its description of the types of "legitimate domination" in a system of responsive law, including that of "charismatic" domination, see Miller, *supra* note 12, at 87-99.

284. Cf. Banks & Carrio, *supra* note 3, at 71.