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Judicial Independence and the Rule of Law: Lessons from Post-Menem Argentina

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“The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.”
—Mistretta v. United States

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INTRODUCTION

“Judicial independence” has become a buzzword among the Justices at One First Street and in American politics more generally. In his 2006 end-of-the-year report, Chief Justice Roberts “discuss[ed] only one issue—in an effort to increase even more the chances that people will take notice.”2 That issue was Congress’s failure to raise judges’ salaries, which he labeled “a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary.”3 The Chief Justice concluded that “[i]nadequate compensation directly threatens the viability of life tenure, and if tenure in office is made uncertain, the strength and independence judges need to uphold the rule of law—even when it is unpopular to do so—will be seriously eroded.”4

The Chief Justice is not the Lone Ranger on the U.S. Supreme Court in calling for increased judicial independence. Supreme Court Justices seldom, if ever, appear before congressional committees—with the exception of the appropriations subcommittees—but in February 2007 the Court sent Justice Kennedy to the Senate Judiciary Committee to deliver an important message:

[J]udicial independence is a foundation for sustaining the Rule of Law . . .

A judiciary with permanent tenure, with a sufficient degree of separation from other branches of government, and with the undoubted obligation to

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3. Id.; see also JOHN ROBERTS, 2005 YEAR-END REPORT ON THE FEDERAL JUDICIARY 2-3 (2007) (“A strong and independent judiciary is not something that, once established, maintains itself. It is instead a trust that every generation is called upon to preserve, and the values it secures can be lost as readily through neglect as direct attack. . . . A more direct threat to judicial independence is the failure to raise judges’ pay.”), available at http://www.supremecourtus.gov/publicinfo/year-end/2005year-endreport.pdf.
4. ROBERTS, supra note 2, at 6.
resist improper influence is essential to the Rule of Law as we have come to understand that term.  

In other words, he reiterated the Chief Justice’s message that judicial independence is critical for maintaining the rule of law.

Justice O’Connor has also embarked on a mission to strengthen judicial independence, and not only in the United States.  Upon announcing her retirement, she began proselytizing worldwide that “[j]udicial independence doesn’t happen all by itself . . . . It’s tremendously hard to create, and easier than most people imagine to destroy.” Justice O’Connor organized the Sandra Day O’Connor Project on the State of the Judiciary at the Georgetown Law Center.  

At a conference hosted by the Project in September 2006, Justice O’Connor declared that the United States has “actively urged upon every nation that we be concerned with the rule of law and that the key component to that is a fair, impartial, and independent judiciary.”

It’s fair to say that American jurists today view judicial independence as a key ingredient to democracy and the rule of law.  But it’s unclear whether this ingredient is as important to developing the rule of law in countries that are still democratizing or that have struggled historically to maintain the democratic state.  In those countries, judges’ salaries are far from being the biggest roadblock to judicial independence, and it’s far from


9. Of course, these are just three examples of Justices on the Court who have emphasized the importance of judicial independence.  In addition, Justice Breyer has noted: “We must keep in mind that judicial independence is a means toward a strong judicial institution.  The strong judicial institution is a means toward securing the basic goals of people: human liberty and a reasonable level of prosperity.” Stephen G. Breyer, Comment, Liberty, Prosperity, and a Strong Judicial Institution, 61 LAW & CONTEMP. PROBS. 4 (1998); see also Ruth Bader Ginsburg, Judicial Independence: The Situation of the U.S. Federal Judiciary, 85 NEB. L. REV. 1, 1 (2006) (“Essential to the rule of law in any land is an independent judiciary, judges not under the thumb of other branches of Government, and therefore equipped to administer the law impartially.”).
clear that judicial independence would be a sufficient condition for establishing the rule of law.

Current developments in Argentina illustrate the dangers in advancing judicial independence as the solution to establishing the rule of law. Argentina, like much of Latin America, has historically been plagued by what some call “delegative democracy,” or a democracy without a developed rule of law. The Kirchner Administration, however, has brought a glimmer of hope to the twenty-first-century Argentine democracy. President Néstor Kirchner was elected in 2003, after what was probably the most serious institutional, financial, and economic crisis in Argentina in recent times—a crisis that led to the resignation of President Fernando de la Rúa, a revolving door of interim presidents, street demonstrations, and an unprecedented economic collapse. Argentina went “from poster child to basket case” in a matter of months: Pot-banging protestors gathered on the steps of the Supreme Court in Buenos Aires each Thursday, demanding that the Justices “que se vayan todos” (“may they all leave”); and Interim President Eduardo Duhalde unsuccessfully attempted to impeach the entire Supreme Court.

Upon being elected, Kirchner promised to address the perceived lack of independence of the Supreme Court and to restore the rule of law. And


his promise is one that, if implemented, would arguably make the U.S. Supreme Court Justices proud.

To evaluate whether these efforts will be enough to (re-)build the rule of law, we must first understand Kirchner’s reforms. President Kirchner has attempted to make broad-sweeping reforms to reestablish economic and political stability as well as strengthen the rule of law and deepen democratic institutions and practices. With respect to instituting judicial reform and restoring judicial independence, Daniel Brinks notes that Kirchner initially had dual concerns to balance:

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

To address these dual and conflicting concerns, the Kirchner Administration has tried to implement two separate strategies—one to address transparency in the judicial appointment process and another to replace some, but not all, of the Menemist Justices on the Court.

With respect to the Supreme Court appointment process, Kirchner has attempted to make the nomination process more transparent, public, and deliberative. To achieve these ends, he signed a voluntary presidential decree that limits his discretion in the judicial-nomination process. Under this decree, the President must publicly announce his candidates and post their names online and in various government publications. The nominees must then submit a statement for public scrutiny detailing their affiliations, activities, assets, and so forth from over the past eight years. The public has fifteen days to file comments and objections, and the President then has another fifteen days to either submit or withdraw the names. Under a 1994 constitutional amendment, the Senate needs a two-thirds majority to confirm the President’s choices. This self-imposed presidential decree should make the process more public and transparent, but it is too early to

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16. See Lesson No. 1, Part D for further discussion of President Carlos Menem’s court-packing plan and how he tamed the Supreme Court to allow him to advance his political agenda.


18. Id. (discussing decree).

19. Id. at 609-10.
measure its effectiveness in restoring some legitimacy to the selection process and to the Supreme Court more generally.\(^{20}\)

The second prong of Kirchner’s judicial reform strategy involved the balancing act of replacing the Menemist Justices without continuing the democratically corrosive tradition of replacing the entire Court with Justices who would blindly uphold the new administration’s policies. To achieve this balance—or at least the public perception of such balance—the Kirchner Administration purported to replace four of the Menemist Justices while leaving one Menemist on the Court in order to avoid having a Kirchner majority.\(^{21}\) While Kirchner publicly (though perhaps not privately) opposed Congress’s call for impeachment of the last Menemist Justice, Antonio Boggiano,\(^{22}\) commentators indicated that it was only a matter of time before Congress succeeded in driving Boggiano off the bench.\(^{23}\) Indeed, Boggiano was removed from office in September 2005.\(^{24}\) Again, it is probably too early to tell whether this unsuccessful effort to maintain balance will nevertheless be successful in restoring the perception of judicial independence and, thus, the Court’s ability to bolster the rule of law.\(^{25}\)

On both fronts, the jury is still out on whether Kirchner’s reform efforts will restore judicial independence.\(^{26}\) But this question leads to a more pressing one: Is judicial independence enough to (re-)build the rule of law?

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\(^{20}\) This finding raises a separate critique of the rule of law industry—namely, a lack of empirical data. As Hazel Genn explains, “both protagonists and opponents of [legal] change lack a solid empirical foundation for their respective positions.” HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW 1 (1999); see also Jensen, supra note 14, at 361 (“In many respects, it is difficult to examine the record of successes and failures in legal and judicial reform projects because we have little baseline data against which to assess progress.”).

\(^{21}\) Brinks, supra note 15, at 609.


\(^{23}\) See Brinks, supra note 15, at 609.

\(^{24}\) Another Wig Falls: The Removal of a Fifth Supreme Court Judge Threatens the Separation of Powers, ECONOMIST, Oct. 8, 2005, at 46.

\(^{25}\) Courts have often been called the primary guardian of the rule of law, but they are perhaps more accurately described as institutions that, when functioning effectively, reflect and reinforce the rule of law.

\(^{26}\) By the time this Article is published, Néstor Kirchner will no longer be President, as he did not seek reelection. Instead, Senator Cristina Fernandez de Kirchner won in a landslide victory to replace her husband as President in the October 2007 elections. See Alexei Barrionuevo, Economic Balancing Act for Argentina’s Next Leader, N.Y. TIMES, Nov. 1, 2007, at A8. For ease of reference, this Article will assume that Senator Kirchner will continue her husband’s judicial reform efforts—referring collectively to the two as “the Kirchner Administration” or simply “Kirchner”—though this assumption is far from certain.
The short answer is no. It’s safe to conclude that efforts to reestablish judicial independence, even if successful, will not be sufficient to rebuild the rule of law in Argentina, though they are arguably a step in the right direction. More importantly, the Argentine case study provides several important lessons for missionaries promoting the rule of law in developing countries. This Article focuses on three of those lessons.

LESSON NO. 1: CONTEXT MATTERS

A refrain in international development is that “context matters,” and not all Latin American countries are the same. Analyzing reform principles in the abstract can pose a major pitfall to rule-of-law reform. Avner Greif perhaps best summarizes this insight: “To study the impact of a legal system, we must therefore also examine the rules, belief, and norms that generate behavior among members of its constituting organizations and between them and others.”27 Larry Diamond also stresses that rule-of-law reformers need to understand local context and start democracy at the local level.28 Yet, many reformers have prescribed a one-size-fits-all strategy for Latin America—ignoring how each country’s unique history has shaped its particular rules, belief, and norms.29 Only recently have scholars begun to criticize such regional approaches as “monolithic and millenarian,”30 and instead have called for country-specific diagnosis. This country-specific approach dictates that before reaching a conclusion on whether judicial independence is sufficient to rebuild the rule of law in Argentina, one must examine the country’s unique history and current context. Only then can one understand what needs to be rebuilt, which materials should be used, and how much effort is required.

Applying Lesson No. 1 illustrates that, while Argentina has formally maintained a version of American constitutionalism since 1853, what is on
paper has seldom been implemented, as intended, in practice.\footnote{This finding echoes on a main rule of law lesson (albeit a classic Friedman commentary on law and society), in that the legal profession seems much more concerned with what is on the books, but laws “never work[] as they were meant to work on paper.” LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 232 (2d ed. 1985) (citations omitted) (referring to national land law programs in the United States during the nineteenth century). This insight is not novel; it can be found in just about every political science book on Latin America.} Argentina’s 1853 Constitution has endured undemocratic regime changes, human rights abuses, and ultrapresidentialism, which all dramatically departed from the written text. This trend is particularly important to the role of the judiciary in guarding and reinforcing the rule of law. Because the Argentine Supreme Court emerged as a carbon copy of the U.S. Supreme Court—not based on preexisting Argentine institutions—and because its role was, at best, that of a “rubber stamp”\footnote{This reference is borrowed from Matías Iaryczower et al., Judicial Independence in Unstable Environments, Argentina 1935-1998, 46 AM. J. POL. SCI. 699, 703 (2002).} for much of the twentieth century, the Court has never been able to firmly establish itself as an institutional support for the rule of law.

In light of this historical context, the Supreme Court’s behavior during the economic crisis at the turn of the twenty-first century—its submission to Menem’s agenda and thus contribution to the economic crisis—as well as Kirchner’s current judicial reform efforts can be better understood. For the purposes of this Article, Argentina’s constitutional history will be divided chronologically into five stages: (1) Argentina’s constitutional foundation, 1853-1930; (2) the rise of authoritarian regimes, ultrapresidentialism, and judicial dependence, 1930-1983; (3) Alfonsín’s redemocratization and empowerment of the judiciary, 1983-1989; (4) Menem’s delegative democracy, 1989-1998; and (5) Argentina’s twenty-first-century economic crisis and presidential revolving door. By briefly reviewing these stages, the importance of Lesson No. 1—i.e., that context matters—becomes fully evident.\footnote{These stages are explored in much more detail in Walker, supra note 14, at 765-804.}

A. Constitutional Foundation, 1853-1930

Argentina’s Constitution was not built on existing norms and institutions, but imported from the North. Jonathan Miller notes the absence of judicial institutions prior to Argentina’s constitutional founding in 1853:

The situation of the judiciary was particularly bleak. During the period of predominantly unitarian control of Buenos Aires immediately following independence, a court of appeals took over the judicial functions of the
audiencia, including, in some periods, the critical areas of customs disputes and other tax matters. In most provinces between 1810 and 1852, as in Buenos Aires under Rosas, what justice existed was exercised personally by the local caudillo.34

Without formal institutions in place, the Argentine Framers started from scratch and adopted a document and structure strikingly similar to that of the U.S. Constitution.35 With the American Constitution as its model, the Argentine Constitution was established in 1853 and has only been partially amended five times since its adoption.36

In fact, the U.S. system continued to be the driving influence—the “talisman” by some accounts—behind the development of democracy and the rule of law through the end of the nineteenth century, declining somewhat in the early 1900s.37 Argentine lawyers relied on U.S. law treatises,38 and the Argentine Supreme Court explicitly mimicked its American counterpart by referring to U.S. Supreme Court cases as persuasive precedent39 as well as incorporating Marbury-like judicial review and American concepts of substantive law.40

Understanding its American roots can help explain the current state of the Argentine judiciary and why it has not been particularly successful in upholding the rule of law: the institution lacks a solid historical foundation and has never fully developed into an independent guardian and support for the rule of law—due in part to its initial reliance on the U.S. model. A


35. Id. at 1522; Manuel Jose Garcia-Mansilla, Separation of Powers: The Case of Argentina, 32 GA. J. INT’L & COMP. L. 307, 309 (2004). Formally, the Argentine Framers created a federal constitutional democracy with a strong separation of powers between the three branches of government—an executive branch headed by a democratically elected president, a U.S.-style bicameral legislature, and an independent judiciary. See CONST. ARG. art. 1 (“The Argentine Nation adopts for its government the federal, republican, representative form as established by the present Constitution.”); CONST. ARG. pt. II, arts. 44-120 (describing the structure of the federal government).

36. Garcia-Mansilla, supra note 35, at 310 n.3 (noting that the Argentine Constitution was amended in 1860, 1866, 1898, 1957, and 1994).

37. Miller, supra note 34, at 1561-1562; see Garcia-Mansilla, supra note 35, at 310-315.

38. Miller, supra note 34, at 1544 (“[N]o leading lawyer here [in Argentina] is without his complete set of our U.S. Supreme Court reports.”) (quoting Letter from John Pitkin, U.S. Ambassador to Argentina, to U.S. Secretary of State (May 16, 1891)).

39. See, e.g., Corte Suprema de Justicia de la Nacion [CSJN], 21/8/1877, “Lino de la Torre / recurso de habeus corpus,” Fallos (1877-19-236-237) (Arg.) (reaching its decision based on the U.S. Supreme Court’s ruling in Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821)).

40. These similarities are explored in more detail in Walker, supra note 14, at 766-72. See generally CARLOS S. NINO, FUNDAMENTOS DE DERECHO CONSTITUCIONAL (1992) (detailing the fundamental principles of constitutional law and judicial review in Argentina).
constitution must be the product of societal values, political institutions, and cultural norms in order to succeed in the long run in its role of shaping, reflecting, and reinforcing the rule of law—a conclusion with which Greif would likely agree. During Argentina’s constitutional founding and early years, foreign legal frameworks were adopted without the ability, or perhaps even the intention, of truly making them compatible with existing institutions and experiences.41


While the Argentine judiciary might have emerged as a mirror image to the American model, its legitimacy and its role in shaping the rule of law gradually eroded in the twentieth century with the cyclical rise of authoritarianism and ultrapresidentialism. This erosion was due in large part to the emergence of a widening gap between formal and informal institutions.42 The trend can be traced back to September 30, 1930—four days after General Uruburu’s military coup—when the Supreme Court issued a resolution (acordada)43 that declared the military government to be constitutional44 and instituted the controversial De Facto Doctrine: a de facto, and in this case authoritarian, government can provisionally exercise all national power due to its successful revolution against an existing de

41. It should be noted, as Miller does, that Argentina reaped certain benefits from “copying a foreign constitution” because “the recognized success of the U.S. Constitution gave that Constitution a talismanic authority.” Miller, supra note 34, at 1487-88. To be sure, adopting a proven “best practice” undoubtedly does provide certain benefits. The ultimate success of that practice, however, depends on local context. As many social scientists tracing back to Hegel have argued (correctly, I believe), a constitution cannot be effectively copied unless the principles are founded in, and/or adapted to, existing institutions. See GEORG WILHELM FRIEDRICH HEGEL, THE PHILOSOPHY OF RIGHT 178-79 (T.M. Knox trans., Oxford Univ. Press 1967) (1821) (“The constitution of any given nation depends in general on the character and development of its self-consciousness. In its self-consciousness its subjective freedom is rooted and so, therefore, is the actuality of its constitution.”); see also Atilio A. Boron, Latin America: Constitutionalism and the Political Traditions of Liberalism and Socialism, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 339-40 (Douglas Greenberg et al. eds., 1993); Carlos F. Rosenkranz, Against Borrowings and Other Nonauthoritative Uses of Foreign Law, 1 INT’L J. CONST. L. 269, 277 (2003) (“To speculate on what other countries have done in similar circumstances is, indeed, challenging but it seems unlikely that any country will forge a constitutional identity and a constitutional culture through the wholesale adoption of another country’s constitutional doctrines and experiences.”).

42. GRETCHEN HELMKE, COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA 63 (2005).


This De Facto Doctrine worked in the short run to preserve the Court’s institutional capacity, as the Justices were not removed from office and continued to rule on the constitutionality of government action under the first military government. In the years following the first military coup, the Court claimed to be the final check on de facto government power with the scope being limited by the Constitution. In 1935, the Court limited the power of the de facto government—in that the military would have executive but not legislative or judicial powers—but even this holding was later weakened in 1943 when the Court recognized that the Executive may usurp legislative power through emergency decrees. Thus, the gap between the Court’s formal and actual independence widened, as the Court was forced to ignore the rule of law in favor of “the law of rulers,” in order to preserve the institution.

This behavioral pattern recurred several times until re-democratization in 1983, and the Court gradually became a hollow institution—lacking both public confidence and independence from the ruler. For instance, the military coup of June 3, 1943—of which General Juan Perón was a major player—produced a similar outcome. The new military regime, although suspending the Constitution, left the Court intact in exchange for the Court’s recognition of the de facto government’s authority. The Court’s independence and power withered even further under the military regime. Indeed, as Miller explains, the Supreme Court was an active opponent of the military regime during those years, and it declared many key acts of the regime unconstitutional. Although one might assume that the Court would regain power when Perón transitioned the country to democratic rule

46. HELMKE, supra note 42.
47. Garcia-Mansilla, supra note 35, at 351.
50. This phrase is borrowed from the title of Tim Dockery’s article. See Dockery, supra note 45, at 1578.
51. Id. at 1598.
in 1947, the formal-informal gap widened even further with Perón’s democratically elected government. When Perón did not like the Court’s decisions, he replaced its Justices; this en masse “court swapping” became common practice in Argentina—occurring five more times in the twentieth century.

In addition to court swapping, Argentina experienced drastic regime changes from 1955 to 1976 with five successful coups—four by the military and one by civilian revolutionaries. The first occurred in 1955 when Perón was removed, and each subsequent coup replaced a democratically elected administration with a de facto president or dictatorial ruler. Juan Perón and his Peronist Party returned to power in 1973, and the party remained in power until another military coup occurred in 1976. During this entire period, the Court was, at best, a dependent, weak institution that did little to challenge the ruler or uphold the rule of law; at worst, it was a servant and accomplice of an authoritarian regime that reinforced unconstitutional policies and practices.

The lowest point with respect to the rule of law in Argentina occurred from 1976 to 1983, when the junta (military regime) ruled Argentina and waged a “dirty war” of covert terror against the civilian population. The junta severely restricted civil and political liberties and persecuted those who resisted. In total, the Argentine government later reported that at least 9000 civilians were counted among los desaparecidos—the “disappeared ones” who the junta detained, tortured, and likely murdered—while human rights organizations estimated the number to be around 30,000. In addition to these human rights violations, the junta replaced the entire government by decree, centralizing all power to be shared equally among the branches of the military.

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53. HELMKE, supra note 42, at 63-64.
54. See Garcia-Mansilla, supra note 35, at 352. This court-swapping phenomenon occurred in 1955, 1962, 1966, 1976, and 1983. Id. Furthermore, every new administration between 1955 and 1983, inclusively, replaced the majority of the Justices with two exceptions when the military appointed a new leader. HELMKE, supra note 42, at 65 & n.4. Before Perón’s election in 1947, judicial tenure was an established norm. For instance, between 1862 and 1946, thirty-five Justices served on the Supreme Court for an average tenure of eleven years; conversely, between 1947 and 1999, fifty-seven Justices served for an average tenure of less than five years. See id. at 65-68 & tbs.4.1 & 4.2.
56. JUAN E. MENDEZ, TRUTH AND PARTIAL JUSTICE IN ARGENTINA: AN UPDATE 18-19 (1991) (stating the number of los desaparecidos was more likely 30,000); see also HUMAN RIGHTS WATCH, ARGENTINA: SUPPORT HUMAN RIGHTS TRIALS (2001), http://www.hrw.org/press/2001/12/argtrials1212.htm (last visited Oct. 28, 2007) (finding that the government kidnapped, imprisoned, tortured, and executed at least 14,000 alleged leftist rebels).
C. Alfonsín’s Liberal Democracy, 1983-1989

With democracy being interrupted by the junta during the 1970s and early 1980s, Argentina experienced authoritarian rule for seven consecutive years. In 1983, however, the tides turned: President Raúl Alfonsín was democratically elected, and the re-democratization process began. Not only did Alfonsín’s election mark the first democratic election in almost a decade; this Radical Party candidate was the first non-Peronist to win a freely competitive election since Perón’s appearance in Argentine politics in the 1940s. With respect to the rule of law, Alfonsín faced two main challenges: appointing a Supreme Court that would genuinely protect the rule of law, and restoring the political and civil liberties lost during the military regime and the dirty war.

The Alfonsín Administration rejected the legitimacy of the de facto government: it struck down the laws created by the junta and planned to remove all of the junta-appointed Supreme Court Justices through presidential decree. All five Justices resigned once Alfonsín’s intentions were made public, so he was free to select the entire Court without having to invoke a presidential decree or initiate the impeachment process. Alfonsín defied the traditional strategy of appointing a Court that unanimously shared his ideology. Instead, he appointed a variety of Justices from diverse backgrounds, which sent a strong message to the country that Alfonsín meant to establish the Court as a critical, independent guardian of the rule of law.

Alfonsín stated that his “first objective was to implement effective judicial protection of human rights.” And many scholars note that the Alfonsín Court progressively expanded political and civil liberties to an unprecedented level. For instance, the Supreme Court struck down a civil
law that prohibited divorced individuals from remarrying and a criminal law that made the mere possession of illegal drugs a crime. The Court also instituted constitutional protections with respect to search and seizures, confessions to law enforcement, the exclusionary principle, and freedom of the press. Perhaps for this reason, public confidence in the Supreme Court was relatively high during the first part of Alfonsín’s term, with between forty-five and fifty-seven percent of the public trusting the Court.

While the Court was not sufficiently powerful, entirely independent, or fully committed to the rule of law during this period of re-democratization, Alfonsín and his Court made great strides toward judicial independence and the rule of law. The Court was relatively independent in that the Justices were willing to rule against the administration, and only one Justice was replaced during Alfonsín’s rule (resigning for health reasons in 1985). The Court’s expansion of political and civil liberties and its willingness to strike down constitutionally questionable government action reinforced its efforts to develop a liberal democracy and a strong rule of law. In sum, the Alfonsín era was one in which the Supreme Court began to develop into a strong institutional support for the rule of law.


68. See Corte Suprema de la Nacion [CSJN], 13/05/1986, “Rayford / recurso extraordinario,” Fallos (1986-308-733) (Arg.) (instituting the exclusionary rule to bar evidence gathered against third parties through an illegal detention and search).
71. HELMKE, supra note 42, at 78.

Unfortunately for the Court, the Constitution only allowed Alfonsín to be President for one six-year term, and his successor, Carlos Menem, returned to traditional practices of ultrapresidentialism and delegative democracy. These undemocratic practices stripped the Supreme Court of virtually all power and independence, and set up the country for an even more debilitating economic crisis. When Menem assumed the presidency in 1989—in a Peronist sweep of the Executive and Legislature—he had a mandate to turn the economy around \(^\text{72}\) and enjoyed no real horizontal checks on authority with the exception of the judiciary. \(^\text{73}\) When questioned as to why he was not seizing this historic opportunity to build the judiciary’s capacity to protect the rule of law, Menem responded: “Why should I be the only president in fifty years who hasn’t had his own court?” \(^\text{74}\) His administration believed and publicly stated that a judiciary that was willing and able to resist Menem’s aggressive economic reforms would ruin any chance for economic recovery. \(^\text{75}\) So, Menem turned his attention to taming the Supreme Court.

Menem first attempted to replace the Court shortly before taking office, when he informally bribed and threatened the current Justices to step down so that he could replace them with those who would be more sympathetic to his agenda. \(^\text{76}\) When informal means failed, Menem took a page from U.S. President Franklin D. Roosevelt and decided to pack the Court. Unlike FDR, Menem was successful, increasing the ranks from five to nine Justices. With two resignations and four new positions, Menem was able to add six Menemist Justices to the Supreme Court. \(^\text{77}\) Not only did he expand the Court to fulfill his political agenda, but whom he chose as Justices was also highly controversial. One appointee was a former partner at Menem’s law firm, and several others were family friends. \(^\text{78}\) All were Menem’s

\(^{72}\) Ronaldo Munck, Introduction: A Thin Democracy, 24 Lat. Am. Persp. 6, 8 (1997) (“If Alfonsín had neglected the economy to his cost, with Menem it moved center-stage and became the linchpin of his political project.”).


\(^{74}\) Mariano Grandona, La justicia y los políticos, in LA JUSTICIA EN CRISIS 136 (Francisco Diez ed., 1994) (quoting President Menem on the Argentine political show Hora Clave).

\(^{75}\) See Larkins, supra note 73, at 428.

\(^{76}\) Id. at 427-28.

\(^{77}\) Horacio Verbitsky, Hacer la Corte 67 (1993) (Arg.).

\(^{78}\) One member of Menem’s inner-circle, when nominated, proclaimed, “I am and always will be a Peronist,” while another nominee that came from Menem’s cabinet remarked, “My only two bosses are Perón and Menem.” Another appointee was reportedly Menem’s favorite tennis doubles partner. Larkins, supra note 73, at 428. Yet another nominee described himself as a
conservative disciples. Anecdotal stories of their close ties with and allegiance to Menem flooded the newspaper headlines and the tabloids.

Menem took advantage of the Court’s illegitimacy and dependence. Without any real horizontal checks on his power, he reinitiated the hollowing out of democratic institutions and practices, and Argentina began to move toward delegative democracy. As Guillermo O’Donnell explains, Menem abused executive powers and assumed “delegative democratic authority” that extended well beyond the limits written in the Constitution.79 Miller notes that Menem expanded presidential power in three main ways: the emergence of emergency executive decrees of necessity and urgency; the delegation of legislature authority to the executive; and the dismissal of officials with executive oversight.80

With an understanding of these moves toward delegative democracy, one can see how Menem was able to implement radical economic reforms—i.e., there was no horizontal check on his power. Moreover, the Supreme Court played a critical role in expanding Menem’s power by neither standing in the way nor slowing down his project when it violated constitutional protections. It is in large part because of this usurpation of horizontal checks that scholars have labeled democracy under Menem as a “thin,”81 “delegative,”82 and “persistently unconsolidated”83 “democracy in turmoil,”84 as well as a case of “neopopulism.”85

E. Argentina’s Collapse, 1999-2003

In February 1999, Fernando de la Rúa of the Alliance for Jobs, Justice, and Education was elected president by defeating Peronist candidate Eduardo Duhalde with 48.5% of the vote to 38.1%; Domingo Cavallo,
Menem’s former Economics Minister, finished third with 10.1%.86 This election marked several milestones for the democratic consolidation of Argentina’s political society. First, the Alliance’s win signified that Argentina had finally passed Samuel Huntington’s “two-party turnover test.”87 Second, the Alliance’s victory, the first such victory by a multi-party coalition in Argentine history, signified a major democratic evolution, as Juan Linz claims that multi-party alliances reveal consolidation development.88 Third, the substantial success of the third party demonstrated that the system was pluralistic, and political competition was significantly developed—bringing about a “normalization of Argentine politics.”89 Finally, the Alliance victory in the 1999 elections marked the end of the “impossible game,” of which O’Donnell claimed Argentina might never conquer.90

Notwithstanding these democratic milestones, Menem had so hollowed out democratic institutions—both with respect to their actual power and the public’s trust in them—and unilaterally implemented drastic economic reforms that economic crisis was virtually inevitable. By 2001, economic chaos arrived with the devaluation of the peso, the resignation of President de la Rúa, and a revolving door of interim presidents. Public pressure removed three interim presidents from office in less than a month, and in January 2002, Congress chose Peronist Eduardo Duhalde, the 1999 runner-up, as the interim President. President Duhalde took an incremental approach to the economic dilemma, but it was nevertheless unsuccessful. In March 2002, the Argentine government defaulted on its $155 billion public debt, the largest such default in world history.91 At the current exchange rate, income per person was estimated to have decreased from $7000 to just $3500, with unemployment around twenty-five percent.92 By April 2002, the peso, once interchangeable with the U.S. dollar, had fallen

92. Id.
to almost one third (2.75:1) the value of the dollar.\textsuperscript{93} Rather than waiting out the term until December 2003, Duhalde stepped down in May 2003.\textsuperscript{94} Néstor Kirchner was then elected President and began his judicial reform efforts as outlined in the Introduction.

So, what was the Supreme Court’s role in the economic crisis? Part of the answer is nothing, in that the political crisis of the revolving presidential door was arguably resolved within constitutional bounds, so the Court had nothing to review or correct.\textsuperscript{95} The Menem Court’s failure to act, however, was also a major concern. With respect to the economic crisis, the damage was already done when the Supreme Court allowed Menem to usurp legislative power, pass hundreds of constitutionally questionable executive decrees, and remove virtually all horizontal checks from the political process. In that sense, the Court might be considered a “but for” cause of the crisis, or at least a major contributing factor.

Furthermore, Menem’s weakening of the Court—coupled with the Court’s inaction and submission to the President’s agenda—destroyed public trust in the institution, as most believed it was merely one of Menem’s many puppets.\textsuperscript{96} For that reason, protesters congregated on the steps of the Supreme Court each Thursday after the economic collapse, demanding that Menem’s Court be removed and that judicial independence and the rule of law be restored.\textsuperscript{97} Any headway Alfonsín had made in establishing judicial independence and the Court’s role in supporting the rule of law was swiftly reversed by Menem’s delegative democracy; three additional years of economic and political crisis only solidified public opinion concerning the illegitimacy of the Supreme Court.


\textsuperscript{94} Levitsky & Murillo, \textit{supra} note 12, at 155-56.

\textsuperscript{95} Hector E. Schamis, \textit{Argentina: Crisis and Democratic Consolidation}, 13 J. DEM. 81, 90 (2002).

\textsuperscript{96} See, e.g., Mariano Obarrio, \textit{Para el Duhaldismo, el Fallo de la Corte Suprema Fue Impulsado por Menem}, \textit{LA NACIÓN} (Arg.), Mar. 6, 2003 (arguing that the Argentine Supreme Court’s problem under Duhalde was that the Court was chosen, owned, and manipulated by Menem), http://www.lanacion.com.ar/478757 (last visited Dec. 17, 2007).

\textsuperscript{97} See Ventura, \textit{supra} note 13, (explaining that the Court had its days numbered); see also Irina Houser, \textit{Cómo Hacer que la Corte Tenga un Peso Propio}, \textit{PÁGINA DOCE} (Arg.), Oct. 17, 2004, at 7 (discussing how the Court could regain its power and legitimacy—the only way being with new Justices), available at http://www.pagina12.com.ar/diario/elpais/1-42449-2004-10-17.html.
LESSON NO. 2: A MORE DIVERSIFIED AND COMPREHENSIVE STRATEGY IS NEEDED

One need not wait to see how history will judge the current reform efforts to know they will be insufficient. Based on the above historical overview, it is easy to see why Kirchner’s efforts, without more, will not overcome a history of judicial dependence and public distrust. And most rule-of-law reformers and academics would agree. For instance, the authors of the 2005 World Bank report, Judicial Systems in Transition Economies, would likely assert that Kirchner’s efforts are a decade outdated—echoing the ineffective “primacy given in the 1990s to establishing judicial independence over ensuring efficiency and accountability.”

Under Erik Jensen’s framework, this reform effort falls under the “Third Wave” of rule-of-law reforms of the 1980s, during which “more attention was paid to the question of judicial independence” in a “limited systemic approach to the development of legal systems.” Indeed, an earlier 2001 World Bank report on rule-of-law reform in Argentina outlined three major, albeit overly simplistic and general, areas that needed to be addressed: “(a) predictability in the outcomes of cases, (b) accessibility to the courts by the population regardless of income level, and (c) efficient resolution of cases through a transparent process.”

In contrast to the World Bank’s recommendations for Argentina, the Kirchner Administration’s proposed reforms seem to only target part of area (c)—that of creating a transparent process—though a more transparent process arguably will help with predictability (area (a)) and efficiency (area (c)) more generally. Taken alone, Kirchner’s modest approach will not overcome a history plagued with judicial dependence and suppression; a lack of preexisting institutions on which to build the rule of law; drastic human rights and civil liberties violations in the 1970s and 1980s; and a general rule by law (or law of the rulers) under the authoritarian regimes. A diversified approach to rule-of-law reform needs to be undertaken, the state must be built up, and corruption must be addressed more systematically.


Indeed, it is questionable whether these particular reforms will even be enough to reestablish judicial independence.

These four points will be developed further in the following subsections.

A. Develop a Diversified Portfolio of Judicial Reform Measures

To understand why judicial independence is not enough to restore the rule of law requires examining why the rule of law is critical for effective governance. Gerhard Casper provides the simplest yet perhaps most accurate response: the power to rule must be separated among different actors.101 Furthermore, O’Donnell asserts that horizontal accountability, which an independent judiciary can provide, is paramount to reinforcing the rule of law: “In institutionalized democracies, accountability runs not only vertically, making elected officials answerable to the ballot box, but also horizontally, across a network of relatively autonomous powers (i.e., other institutions) that can call into question, and eventually punish, improper ways of discharging the responsibility of a given official.”102 Horizontal checks and balances within a democratic system ensure that the rule of law constrains the more powerful actors. Without these checks on government power, countries get trapped in an “asymmetric equilibrium,” where the dominant government actors—in Argentina, the Executive—have incentives to act beyond or outside their formal limits.103

An independent horizontal check on the dominant government actor is of particular importance in Argentina, where ultrapresidentialism has been a common feature of governance. Knowledge of Argentina’s history is important for understanding why a more diversified reform portfolio is needed. As detailed in Lesson No. 1, rationales for the emergence of ultrapresidentialism and delegative democracy in Argentina range from the emergence of caudillismo104 to the country’s strong historical precedent of

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104. CHAVEZ, supra note 59, at 12-14 (explaining that ultrapresidentialism is a result, in part, of the colonial era tradition when the culture and political climate were heavily authoritarian and instilled a sense of caudillismo or executive supremacy); see also Keith S. Rosenn, The Protection of Judicial Independence in Latin America, 19 INTER-AM. L. REV. 1 (1987) (examining the historical and cultural explanations of ultrapresidentialism and the dependent judiciary).
military authoritarian rule. The country’s long tradition of civil law also contributes to the power asymmetry. Regardless of its origin, the Argentine state has historically provided less-than-adequate horizontal checks on ultrapresidentialism, which has left the country vulnerable to delegative democracy and authoritarian reversals. Consequently, understanding how to strengthen the judiciary’s ability to serve as a horizontal check on the executive power is particularly important for democratic consolidation in Argentina and in Latin America more generally.

To restore the judiciary as an effective horizontal check, Kirchner must complement these judicial reform efforts with other rule-of-law reforms. For instance, the World Bank has presented some helpful “lessons for future reform”: reformers must (1) complement structural independence with operational independence; (2) link independence with accountability; (3) improve court access and efficiency; (4) execute laws, not just write them; (5) reform the whole legal profession, not just the judiciary; and (6) recognize the “donor effect” on judicial reform. A helpful addition to this list is made in another World Bank report, which recommends that reform efforts should look to “empower[] poor people to participate in development.”

While not a comprehensive reform package, the World Bank’s recommendations underscore several of the further reforms that the Kirchner Administration should pursue—or at least consider. It should seek to increase the judiciary’s accountability, perhaps by strengthening and

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105. See CHAVEZ, supra note 59 at 28-52 (discussing the role of the Argentine military coup tradition in eroding horizontal checks on power and in creating ultrapresidentialism and delegative democracy).


107. While this Article focuses on the judiciary as a horizontal check to strengthen the rule of law, the Legislature should not be overlooked. President Menem usurped legislative powers during the 1990s, and that usurpation significantly contributed to the turn-of-the-century economic and political crisis—perhaps to the same or greater degree than his taming of the Supreme Court. Indeed, the more diversified rule-of-law reform should look beyond judicial reform to political reform more generally.

108. WORLD BANK 2005 REPORT, supra note 98, at 57-60. These findings are not unique at the theoretical level, but the evidence they present adds credibility to the lessons learned from the case studies the authors present. However, it should be noted that the evidence is not beyond reproach. See Adam Lerrick, Are World Bank Claims of Success Credible? It Is Time for an External Performance Audit, in Q. INT’L ECON. REP. 1 (Carnegie Mellon ed., 2002) (challenging the World Bank’s findings generally), available at http://www.house.gov/jec/imf/audit.pdf.

expanding the national judiciary council in order to help train, monitor, and certify judges. The Administration should look to increase access to justice by, for instance, guaranteeing legal services to those without financial means, exploring alternative dispute resolution mechanisms, building new courthouses, hiring more judges, and so forth. With respect to executing the laws on the books, Kirchner should attempt to bridge the large gap that has historically plagued democracy in Argentina and still exists between formal and informal institutions. Furthermore, Kirchner should strive to reform the entire legal profession, not just the courts. In summary, Casper’s “task of separating powers” must necessarily involve more than efforts to create judicial independence; a diversified approach to reform is especially necessary in a country like Argentina where the judiciary has historically been a weak and distrusted institution.

B. Focus on State-Building

If restoring the rule of law (and order) is one of the Kirchner Administration’s main objectives, focusing on judicial independence alone fails to meet this goal; the state must also be rebuilt. Or as the World Bank frames the issue, “institutions matter.” This task of state-building is particularly important in Argentina because of its inconsistent and unstable experience with democracy. As Huntington posits, the “most important political distinction among countries concerns not their form of government but their degree of government.” 110 In other words, just as electoral democracy is insufficient without liberal democracy, 111 judicial independence is insufficient without a state-building agenda that strengthens four institutions of stateness: (1) organizational design and management, (2) political system design, (3) basis of legitimization, and (4) cultural and structural factors. 112 Even if the judiciary is independent, that independence will do little good in an environment where weak institutions unsuccessfully attempt to sustain the courts’ decisions and uphold the rule of law and order.

110. SAMUEL HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 1 (1968).
111. See generally LARRY DIAMOND, DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION (1999).
112. FRANCIS FUKUYAMA, STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY 23-30 (2004). Fukuyama’s four institutions are strikingly similar to what Juan Linz and Alfred Stepan offer in their five arenas of democratic consolidation. See JUAN LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE 5-11 (1996) (outlining the five arenas of democratic consolidation as (1) economic society, (2) civil society, (3) political society, (4) rule of law, and (5) state apparatus).
A closer look at Argentina reveals that the Washington Consensus—the free market economic model implemented throughout Latin America in the second half of the twentieth century—aimed at both narrowing the scope and strengthening the capacity of state power. For instance, Daniel Yergin and Joseph Stanislaw explain that the traditional statist approach in mid-twentieth-century Latin America was based on dependency theory, but by the 1970s, the Latin American state had fallen from its "commanding heights." States—the state's capacity to manage the economy—drastically declined, even though statism—the state's involvement in the economy—remained extremely high. In practice, the Washington Consensus failed for a variety of reasons—in addition to Francis Fukuyama's claim that it failed to build institutions—which Dani Rodrik aptly summarizes as an attempt to "make openness work." Kirchner must now rebuild these institutions after Menem's failed reforms, as an independent judiciary will do little good in a failed state.

Other scholars have defined stateness in a different light, arguably requiring a different set of reforms. For instance, Charles Tilly broadly defines stateness or state-building as "state controlled violence," while Robert Jackson and Carl Rosberg reference two definitions of statehood—the empirical state as defined by Max Weber's "monopoly of force," and the juridical state that encompasses both "territory" and "independence." These references to force or violence could potentially be difficult concepts for Argentina to embrace. Not only was Argentina attempting to recover from its fall from commanding heights economically; the wounds of military authoritarian rule were still raw—and still are—because the courts have just begun to address these rights abuses. The disappeared ones and the dirty war of the 1970s arguably prompted democratically elected leaders to foster a freer, less government-regulated regime—not only in the economic society, but also in the political and civil societies and the state.

114. Id.
115. FUKUYAMA, supra note 112, at 23-30.
apparatus generally. Kirchner now faces the challenge of rebuilding state power in a climate where the wounds of state-initiated violence are still raw. Perhaps Kirchner should rebuild these institutions of stateness with an eye toward Amartya Sen’s call for a Kantian approach to development that focuses on human capacity, quality of life, and basic needs.\(^\text{119}\)

In any event, what is clear, given Argentina’s unique history of juntas and dirty wars, is that reforms aimed solely at judicial independence, without more, will not restore the rule of law—or the political order necessary for the rule of law to take effect. The state must also be rebuilt.

C. Eliminate Corruption

Argentina’s history of struggling with corrupt and oppressive regimes underscores Kirchner’s need to combat corruption and restore transparency to the political process. As John McMillan and Pablo Zoido explain, eliminating corruption is important to maintaining democracy and the rule of law.\(^\text{120}\) In fact, this argument is somewhat tautological. Corruption is, by definition, the opposite of the rule of law: corruption is “the misuse of public office for private gain,”\(^\text{121}\) whereas the rule of law requires government actors to play within the rules of the game. Accordingly, any effective rule-of-law agenda must focus on measuring and reducing corruption.\(^\text{122}\) Kirchner’s reforms attempt to reduce corruption (or at least the perception of corruption) by bringing more transparency to the judicial appointment process. But this increased transparency only addresses the tip of the corruption iceberg in Argentina. There is much more work to be done. And the Kirchner Administration cannot do it alone.

Transparency is arguably only achieved if an independent body can examine and expose corruption. McMillan and Zoido point to the media in Peru as an excellent example of such an independent body; they call the media the “chief watchdog.”\(^\text{123}\) A free, independent, and effective press can be a powerful tool for ensuring the rule of law. Indeed, McMillan and


\(^{122}\) Svensson explains that the three main types of corruption measures should be used cautiously, as there are difficulties in measurement and each type measures a different side of corruption. The results can be misleading. Acting on them could actually lead to more corruption. Id. at 20-21.

\(^{123}\) McMillan & Zoido, supra note 120, at 20.
Zoido proclaim that “[t]he news media are the most potent of the democratic checks and balances.” However, rule-of-law observations about the “objectivity” and “freedom” of the press should give one pause; perhaps the authors have overlooked another animal metaphor that may more accurately capture the potential role of the media. If the press is not truly independent and free—but is an arm of the state—the danger exists that the press is not a watchdog but a wolf in sheep’s clothing. The press could be an accomplice or coconspirator in the corruption, only further skewing the misperception of transparency.

So, what is the solution for Argentina? Is there another watchdog out there that can rise above the corruption? Perhaps this watchdog could be the international community. International organizations can remain free and independent enough to make honest evaluations of transparency and corruption. Or perhaps the courts could eventually play that role. The Kirchner Administration would likely assert that an independent judiciary will be an effective watchdog for corruption and that these reforms aim to do that. However, to be the independent watchdog, the judiciary would have to overcome a century of domination and incompetence. The courts are not the short-term solution, but perhaps they could develop into a long-term one. Admittedly, this discussion has produced more questions than answers, but these are questions that must be addressed to effectively restore the rule of law in Argentina.

D. Post-Script: Judicial Independence Revisited

This discussion of the need for a more diversified portfolio has sidestepped a preliminary question: Will Kirchner’s purported reform efforts, if successful, even adequately reestablish judicial independence? Brinks emphasizes that “formal independence is a singularly unhelpful construct, especially in the Latin American context,” where the formal structures are routinely not applied in practice. With respect to judicial independence in Argentina, Chavez notes that “[t]he gap between rules and practices highlights the need to focus on informal patterns of power.” Chavez further explains: “Many scholars mistakenly limit their analysis to formal guarantees of judicial autonomy. Actual practices may illustrate that

124. Id.
126. CHAVEZ, supra note 59, at 23.
the formal institutions are mere façades that hide subordination of the courts.” Accordingly, an analysis of formal institutions—such as the text of the national constitution or the law on the books, or Kirchner’s formal appointment process—might suggest independence, but how political actors apply and work around those formal institutions appears to be a much more important indicator of judicial independence.

Similarly, empirical research suggests that analyzing actual court decisions to look for signs of pressure from, or dependence on, other political institutions might be misleading. For instance, scholars have found that the Argentine Supreme Court has often engaged in strategic defection to maintain institutional capacity. Consequently, individual decisions must be viewed within the broader political and social context in which they are decided to better understand the courts’ level of independence from other governmental institutions. Likewise, judicial independence cannot be measured by judicial reversal alone: the Argentine Supreme Court has often engaged in strategic decision-making to preserve institutional independence. In fact, some scholars suggest that the state of the government (i.e., whether politically divided among parties) and electoral incentives must also be taken into account when evaluating judicial independence or autonomy.

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Lesson No. 2 is not meant to serve as a comprehensive review of judicial independence and the rule of law but, instead, to illustrate the

127. Id. at 23-24 (internal citations omitted). Chavez notes that “informal institutions and practices that allow Latin American presidents to control the courts are often stronger than the formal constitutional guarantees of judicial independence.” Id. at 23. She outlines five indicators of executive subordination of the judiciary in Latin America: (1) the executive uses an opaque process to appoint pliant judges; (2) the executive violates judges’ tenure protection; (3) the executive violates judges’ salary protection; (4) the executive packs the Supreme Court; and (5) judges are unwilling to endure the costs of ruling against executive interests. Id. at 26 tbl.1.1. Consequently, to ensure judicial independence, Kirchner must look beyond the appointment process to other factors, such as the five Chavez suggests.

128. Gretchen Helmke, Checks and Balances by Other Means: Strategic Defection and Argentina’s Supreme Court in the 1990s, 35 COMP. POL. 213, 213-214 (2003). Helmke argues that judges appear to engage in “strategic defection” by ruling against the sitting government more often as the administration grows weaker near the end of its tenure in order to garner favor with the incoming administration. See Gretchen Helmke, The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy, 96 AM. POL. SCI. REV. 291, 291-293 (2002).

129. Iaryczower et al., supra note 32, at 713.

130. CHAVEZ, supra note 59, at 23-26 (arguing that divided government between two or more parties is essential for the development of judicial autonomy).

131. See Finkel, supra note 63, at 56 (demonstrating how electoral incentives shape judicial reforms and influence judicial autonomy in Argentina).
various components involved in evaluating judicial independence. It also underscores the importance of looking beyond formal institutions and placing the court’s action within the larger societal and political context. To analyze the state of the rule of law within a particular country, one must examine other qualitative and quantitative indicators, including the level of government corruption, evidence of human-rights violations, the status of civil and political liberties, the degree of adherence to constitutional and statutory provisions, access to justice, and the protection of property rights—just to name a few.

Unfortunately, Kirchner does not seem to have the whole answer, at least not yet. Various indicators exist to gauge the strength of the rule of law within a particular country, yet Kirchner has focused on only one obvious measure: judicial independence. Current efforts, even if they successfully implemented, are clearly not enough. Much more needs to be done to overcome a history of the law of the rulers. Indeed, judicial independence is not enough. Restoring the rule of law requires more than merely making the appointment process transparent and public, and ensuring that the Court is not monopolized by one party or ideology. Especially because Argentina’s history has been plagued with judicial dependence, human rights violations, and authoritarian juntas, judicial reform efforts must involve multiple strategies in order to restore the rule of law. Lesson No. 2 underscores three of the moves Kirchner should make: (1) pursue a more diversified judicial reform effort; (2) engage in the state-building necessary to create and strengthen institutions that can help shape and support the rule of law; and (3) combat the corruption that has plagued the Argentine state.

134. See, e.g., Website of Freedom House, http://www.freedomhouse.org (last visited Oct. 27, 2007)) (rating each country worldwide on a seven-point scale for both political rights and civil liberties).
LESSON NO. 3: RESTORING PUBLIC TRUST AND THE RULE OF LAW TAKES TIME

Lesson No. 3 emphasizes public trust and patience. President Kirchner does not have the whole answer, but the proposed reforms are a step in the right direction and should produce modest results (if fully implemented). Increasing transparency in the appointment process arguably not only helps make the judiciary more independent; it improves public trust in the institution—something which the World Bank claims is an important ingredient in any judicial-reform recipe. As former President Alfonsin aptly notes, “[p]reserving the public trust is thus the most important duty of public officials.” Argentina has learned the hard way that public trust in democratic institutions is essential for the institutions to be able to carry out their governmental function. The lack of public confidence in the Argentine Supreme Court—a distrust that is grounded in the fact that the Court has historically been a hollow institution at the mercy of the Executive—has plagued the institution’s ability to uphold the rule of law. Although Kirchner is now pursuing judicial reforms to restore the Supreme Court’s independence, the President appears to realize that such reforms must also aim at regaining public trust in the institution. Both real and perceived independence matter. Because once public trust is lost, it is difficult, if not impossible, to regain. In that way, Kirchner’s efforts constitute a necessary step in the right direction.

That said, any gains will be modest. As Alfonsin remarked during his re-democratization efforts in the 1990s, neither “a single grand gesture nor . . . [the work] of a single administration” is sufficient to establish the long-term viability of the rule of law or an independent judiciary. Even though Alfonsin made great strides to restore democracy, reestablish an independent judiciary, and reinstate the rule of law, democratic

135. WORLD BANK 2005 REPORT, supra note 98, at 18-21.
136. Alfonsin, supra note 57, at 52.
137. Distrust in government is not new in Argentina; the country has struggled with corruption and distrust throughout its history. This trend raises the question: What alternative institutions may be filling the role of public trust and constraining the state? Historically, the military has arguably held democratic regimes in check—in fear of a military intervention. More recently, the international community might have played that role in ensuring that the state conforms to international norms in order to receive financial assistance and sustain international trade and relations. Furthermore, public acceptance might have replaced public trust: while the public distrusts the government, citizens might still accept the democratic state as legitimate and take out its frustration, not against the form of government, but against the party in power. This arguably may have been the case during the recent economic crisis.
138. Alfonsin, supra note 57, at 49.
consolidation requires considerable time and patience to develop. Unfortunately, it takes much less time to destroy, as Menem proved by setting democracy back fifty years during one presidential term. Alfonsin’s hard-learned lesson is one of which Kirchner should take note: “Democratic consolidation requires serious and continuous effort over a long period.” Any judicial reform effort in Argentina will be slow and tedious, and will produce only modest gains in restoring the rule of law. But at least the Kirchner Administration is making incremental moves toward that goal.

CONCLUSION

While the literature on democracy and state-building in Latin America has explored various practices and institutions that contribute to deepening democracy and building the state, little attention has been paid to the role of the judiciary in strengthening democracy and the rule of law. Perhaps this is due to the fact that the courts have historically played neither a major nor a positive role in democratic consolidation in most Latin American countries, Argentina included. Similarly, it is by no happenstance that Latin American countries have been plagued by delegative democracy and an absence of the rule of law. Institutions, such as courts, are needed to shape, reflect, and reinforce the rule of law and serve as horizontal checks on power.

Like many Justices on the U.S. Supreme Court, Kirchner appears to have placed great faith in the notion that an independent judiciary can play a critical role in guarding the rule of law and providing a horizontal check on ultrapresidentialism and delegative democracy. The President is probably right, but as detailed in this Article, judicial independence alone will produce only modest results. Judicial independence is not a quick or sufficient fix to Argentina’s rule-of-law crisis. Kirchner needs to diversify the reform portfolio to include, among other things, a comprehensive judicial reform strategy, a focus on state-building, and an attempt to reduce corruption.

And, as former President Alfosín remarks, it will take a long time and a lot of effort:

Democratic consolidation requires serious and continuous effort over a long period. It does not result from a single grand gesture, nor is it the task of a single administration. It is a particularly long process given the difficult conditions under which Latin American democracies operate . . . . General awareness that judges—particularly Supreme Court Justices—do not fulfill their duties of guaranteeing rights or protecting the division of
power among the branches is a grave symptom; a loss of confidence in institutions ultimately leads to social dissolution. Preserving the public trust is thus the most important duty of public officials.\textsuperscript{140}

When the Kirchner Administration’s reform efforts are placed within Argentina’s unique historical context, one can safely conclude that these efforts to reestablish judicial independence will not be sufficient to rebuild the rule of law in Argentina, but they arguably are a necessary step in the right direction.

These three lessons are several of many that advocates of “judicial independence” should keep in mind when attempting to promote the development of the rule of law and democracy worldwide.

\textsuperscript{140} Alfonsín, \textit{supra} note 57, at 49, 52.