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The Rule of Law Over the Law of Rulers: The Treatment of De Facto Laws in Argentina

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Tim Dockery

Abstract

This Note argues that Argentina's acceptance of de facto laws, regardless of their nature, hinders the transition to democracy, a factor that outweighs considerations for the public's expectations of rights vested by de facto laws. Part I analyzes Argentina's political history, particularly the nation's experiences with constitutional and de facto governments. Part I also offers a synopsis on how the Argentine Supreme Court has treated de facto laws throughout the Republic's history. Part II presents arguments supporting the legitimacy of de facto laws and the need to protect expectations based upon them. Part II also examines arguments positing that de facto laws are illegitimate because of their source and that acceptance of them would create a dangerous precedent. Part III argues that the legitimization of de facto laws by express or tacit congressional ratification as set forth in *Aramayo* offers the best solution as it both protects the rule of law and legitimate expectations based upon de facto laws while helping to create foundations for democratic institutions in Argentina. This Note concludes that Argentina's existing treatment of de facto laws as legitimate endangers Argentina's transition to democracy, especially, the creation of strong democratic institutions.

NOTES

THE RULE OF LAW OVER THE LAW OF RULERS: THE TREATMENT OF *DE FACTO* LAWS IN ARGENTINA

*Tim Dockery**

INTRODUCTION

In 1983, constitutional¹ and democratic government² returned to Argentina.³ During the seven year absence of constitutional and democratic government from 1976 to 1983, a *de facto* government,⁴ a government that rules by force rather than by constitutional right,⁵ ruled the country.⁶ This *de facto* government seized power in a *coup d'état*,⁷ a manner of succession not enumerated in the Argentine Constitution.⁸ The *de facto* regime

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1. K.C. WHEARE, MODERN CONSTITUTIONS 1-2 (2d prtg. 1966). A constitutional government is a government that rules according to a selection of rules. *Id.* A constitutional government need not be democratic. *Id.* at 4. A country that has a constitution does not have a constitutional government if the government of that country circumvents the constitution in its exercise of power. *Id.*

2. Raúl R. Alfonsín, *The Function of the Judicial Power During the Transition, in THE TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* 39, 41 (Irwin P. Stotzky ed., 1993) [hereinafter *TRANSITION TO DEMOCRACY*]. A democracy is a representative and participatory government that "encompasses a rule of law bound by the central requisites of liberalism—a set of traditional civil and political rights that serve to deter state action as well as permit economic, social, and cultural choices—commonly referred to as 'human rights,' and which complements free and popular elections." *Id.*

3. *Id.* at 42.

4. J. Irizarry y Puente, *The Nature and Powers of a "De Facto" Government in Latin America*, 30 TUL. L. REV. 15, 25 (1955). A *de facto* government is a government that "usurps power by force, in violation of established constitutional and legal forms of secession, by deposing the lawful authorities and arrogating provincially all or some of the functions of government." *Id.*

5. *Id.*

6. Alfonsín, *supra* note 2, at 42.

7. BLACK'S LAW DICTIONARY 351 (6th ed. 1990) [hereinafter *BLACK*]. A *coup d'état* is the overthrow of government by force. *Id.*

8. CONST. ARG. Unless otherwise noted, all references to the Argentine Constitution will be to the Argentine Constitution of 1853 as updated by the Constituent Assembly of 1994. All quotations to the Argentine Constitution are from translations found in CONSTITUTIONS OF THE WORLD. CONSTITUTIONS OF THE WORLD: ARGENTINA 29 (Gisbert H. Flanz ed., 1995) [hereinafter *CONSTITUTIONS*].

exercised the functions of government, enacted laws,⁹ issued decrees,¹⁰ regulated legislation,¹¹ and gave judicial sentences¹² in an authoritarian manner.¹³ Argentina has lived under five such *de facto* governments this century.¹⁴

The transition in 1983 from an authoritarian government to a democracy¹⁵ sparked numerous questions in Argentina.¹⁶ One question asks how a constitutional and democratic government should treat *de facto* laws,¹⁷ the laws, decrees, and regulations of a

9. *Godoy v. Universidad Nacional de La Plata*, [1991-II] J.A. 455, 459 (1990). A law is that which "must be obeyed and followed by its citizens subject to sanctions and legal consequences." BLACK, *supra* note 7, at 884. According to the Argentine Constitution, the legislature is the primary enactor of laws. CONST. ARG. arts. 44-86. The *de facto* government from 1976 to 1983 legislated itself into government with a *de facto* law. *Acta para el Proceso de Reorganización Nacional*, 36-B ANALES DE LEGISLACIÓN ARGENTINA [hereinafter A.D.L.A.] 1019 (1976). *De facto* governments in Argentina have issued laws in an array of areas, including taxation, judicial reform, penal law, and the Civil Code. Irizarry y Puente, *supra* note 4, at 47-53.

10. *Godoy*, [1991-II] J.A. at 459. A decree is a "an authoritative order having the force of law." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 344 (William Morris ed., 10th prtg. 1981). In Argentina, the executive may rule by decree in situations of necessity and urgency. CONST. ARG. art. 99, cl. 3. Examples of areas in which Argentine *de facto* governments have issued decrees include the declaration of war, labor regulation, rent control, and the prohibition of registering children's names that are not in Spanish or are deemed ridiculous. Irizarry y Puente, *supra* note 4, at 46-53.

11. *Godoy*, [1991-II] J.A. at 459. A regulation is a "rule or order having the force of law issued by executive authority of government" that further defines a preexisting law. BLACK, *supra* note 7, at 1286.

12. *Godoy*, [1991-II] J.A. at 459.

13. Julie M. Taylor, *Technocracy and National Identity: Attitudes Toward Economic Policy, in FROM MILITARY RULE TO LIBERAL DEMOCRACY IN ARGENTINA* 131, 133-34 (Monica Peralta-Ramos & Carlos H. Waisman eds., 1987) [hereinafter LIBERAL DEMOCRACY]. An authoritarian government is one that rules in a totalitarian fashion and does not permit input in decisions from those who do not hold power. *Id.*

14. DONALD B. HODGES, ARGENTINA'S "DIRTY WAR": AN INTELLECTUAL BIOGRAPHY 9 (1991).

15. Alejandro M. Garro, *Nine Years of Transition to Democracy in Argentina: Partial Failure or Qualified Success?*, 31 COLUM. J. TRANSNAT'L L. 1, 4 (1993). A transition to democracy is not just a "mere return to government by consent, which is just one step in a long-term movement towards the consolidation of a truly democratic regime," but it is also an "on-going process involving gradual changes of social mentality or ethos, a process that brings into question the relationship between actual operation of legal institutions and the consolidation of democracy." *Id.*

16. Irwin P. Stotzky & Carlos S. Nino, *The Difficulties of the Transition Process, in TRANSITION TO DEMOCRACY*, *supra* note 2, at 3, 3. Among the larger questions are how to create strong democratic institutions, whether and how to prosecute for human rights violations of *de facto* governments, how to achieve political and economic stability, and how to ensure respect for the rule of law. *Id.*

17. Carlos S. Nino, *On the Exercise of Judicial Review in Argentina, in TRANSITION TO*

de facto government.¹⁸ If Argentina treats *de facto* laws as equal to the laws of a *de jure*¹⁹ government, a government that rules by constitutional right,²⁰ Argentina might hamper its transition to democracy.²¹ By contrast, if the constitutional Government voids *de facto* laws, the Argentine Government may jeopardize the public's faith in the law and its expectations of rights vested by *de facto* laws.²²

This Note argues that Argentina's acceptance of *de facto* laws, regardless of their nature, hinders the transition to democracy, a factor that outweighs considerations for the public's expectations of rights vested by *de facto* laws. Part I analyzes Argentina's political history, particularly the nation's experiences with constitutional and *de facto* governments. Part I also offers a synopsis on how the Argentine Supreme Court has treated *de facto* laws throughout the Republic's history. Part II presents arguments supporting the legitimacy of *de facto* laws and the need to protect expectations based upon them. Part II also examines arguments positing that *de facto* laws are illegitimate because of their source and that acceptance of them would create a dangerous precedent. Part III argues that the legitimization of *de facto* laws by express or tacit congressional ratification as set forth in *Aramayo*²³ offers the best solution as it both protects the rule of law and legitimate expectations based upon *de facto* laws while helping to create foundations for democratic institutions in Ar-

DEMOCRACY, *supra* note 2, at 309, 318. *De facto* laws are the laws, rules, and decrees of *de facto* governments. *Id.*

18. Jorge A. Sandro, *¿Leyes penales tácitas ó implícitas?*, [1992-D] L.L. 82, 82-88 (1992); Nino, *supra* note 17, at 317-20; Enrique Vera Villalobos, *Un "Obiter Dictum" inoportuno*, [1991-II] J.A. 462, 462-67 (1991); Aristides H.M. Corti, *Algunas reflexiones sobre leyes defacto [sic] y derechos adquiridos*, [1984-B] L.L. 970, 970-73 (1983). This problem was evident before the military government transferred power. Carlos S. Nino, *Una nueva estrategia para el tratamiento de las normas "de facto"*, [1983-D] L.L. 935, 935-46 (1983) (suggesting new approach to treatment of *de facto* laws and written prior to restoration of democracy).

19. Godoy, [1991-II] at 458. A *de jure* government is a constitutional government. *Id.* A *de jure* government "assumes political power through an election or appointment, in accordance with existing constitutional and legal requirements of form and substance, and discharges its public functions in conformity with the law. It is, in a word, a government of laws rather than of force." Puente, *supra* note 4, at 24.

20. Puente, *supra* note 4, at 24.

21. *Gaggiomo c. Provincia de Santa Fe*, [1992-D] L.L. 481, 488 (Petracchi, J., dissenting); Nino, *supra* note 17, at 317.

22. *Gaggiomo*, [1992-D] L.L. at 483-84.

23. *Aramayo*, 306 Fallos 72, 73-74 (1984).

gentina. This Note concludes that Argentina's existing treatment of *de facto* laws as legitimate endangers Argentina's transition to democracy, especially, the creation of strong democratic institutions.

I. AUTHORITARIANISM AND CONSTITUTIONALISM IN ARGENTINA

Argentina's authoritarian tendencies began with its founding as a Spanish colony²⁴ and survived both independence from Spain²⁵ and the creation of a Constitution.²⁶ Argentina's authoritarianism has displayed itself frequently in the past seventy years through *coup d'états* that have led to military governments in 1930,²⁷ 1943,²⁸ 1955,²⁹ 1967,³⁰ and 1976.³¹ During these past seventy years, Argentina has alternated between constitutional and authoritarian governments.³² Throughout this cycle of authoritarian and constitutional governments, Argentina's Supreme Court developed several standards for the treatment of *de facto* laws.³³

24. SUSAN CALVERT & PETER CALVERT, ARGENTINA: POLITICAL CULTURE AND STABILITY 14 (1989) [hereinafter CALVERT]; 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, 22-23 (1990). Spanish explorers first arrived in what is now Argentina in 1516. DAVID ROCK, ARGENTINA: 1516-1987, at 8 (1987). It took nearly 70 years before the Spanish colonies in Argentina were advanced enough to engage in significant internal and external trade. *Id.* at 6.

25. CALVERT, *supra* note 24, at 17.

26. ROCK, *supra* note 24, at 160.

27. ROBERT A. POTASH, THE ARMY & POLITICS IN ARGENTINA, 1928-1945, at 283 (1969) [hereinafter POTASH (1928-1945)].

28. *Id.* at 202.

29. ROCK, *supra* note 24, at 318.

30. DEPARTMENT OF THE ARMY, ARGENTINA: A COUNTRY STUDY 60 (13th ed. 1st prtg. 1986) [hereinafter ARMY STUDY]

31. Robert D. Kartheiser, Jr., *De Facto Governments, State of Siege Powers, and Freedom of the Press in Argentina*, 18 U. MIAMI INTER-AM. L. REV. 243, 248 (1986).

32. Irwin P. Stotzky, *The Fragile Bloom of Democracy*, 44 U. MIAMI L. REV. 105, 113 (1989) (describing history of Argentina as "that of a nation caught in a never ending cycle between hope for democracy and fear of authoritarian rule").

33. See Nino, *supra* note 17, at 317-19 (offering analysis of treatment of *de facto* laws from 1860's to present); Vera Villalobos, *supra* note 18, at 462-67 (highlighting standards for treatment of *de facto* laws from 1930 to present); Corti, *supra* note 18, at 970-73 (discussing treatment of *de facto* laws from 1930 to 1983).

A. *Early Political History and Judicial Treatment of Authoritarian Regimes and Constitutional Government: 1516 - 1930.*

Spain initially governed Argentina as a colony and in an authoritarian manner.³⁴ Although Argentina gained its independence from Spain,³⁵ this independence did not translate initially into a drastic change in the form of government.³⁶ In 1860, Argentina united under a constitution³⁷ that established the form of government that has continued until the present.³⁸ As the nation centralized government³⁹ and increased its economic growth,⁴⁰ the Government slowly became more democratic and constitutional.⁴¹ By the early 1900's, Argentina enjoyed a democratic and constitutional government.⁴²

1. The Authoritarian Origins of Argentina: 1513 - 1810

The Spanish ruled Argentina and the rest of the Spanish empire⁴³ in the Americas in a paternalistic manner,⁴⁴ ceding lit-

34. CALVERT, *supra* note 24, at 14; Rosenn, *supra* note 24, at 22-23 (describing Spanish rule as "paternalistic and absolutist"). Almost all government officials in the Spanish colonies were from Spain. Rosenn, *supra* note 24, at 23. The only forms of local representation were city and town councils that had little power or autonomy. *Id.*

35. ARMY STUDY, *supra* note 30, at 17. The people of Argentina established their autonomy in 1810 and declared their independence in 1816. *Id.*

36. CALVERT, *supra* note 24, at 17; Rosenn, *supra* note 24, at 21.

37. CONST. ARG.

38. Gisbert H. Flanz, *Comparative Notes on the New Constitution of Argentina*, in CONSTITUTIONS, *supra* note 8, at xi

39. ROCK, *supra* note 24, at 129-31. By 1870, the disputes among the provinces that had marred the years following Argentina's independence from Spain, ceased to create national fragmentation. *Id.*

40. *Id.* at 131-52 (detailing economic growth between 1852 and 1890); *id.* at 163-69 (detailing economic growth between 1890 and 1913). Between 1861 and 1889, the combined value of imports and exports rose from 47 million gold pesos to 250 million gold pesos. *Id.* at 132. Cultivated land in Argentina expanded from 600,000 hectares in 1872 to 2,500,000 hectares in 1888. *Id.* at 136. While Argentina only exported 77 metric tons of wheat between 1870 and 1874, that number increased to 782,000 between 1890 and 1894. *Id.* The value of exports increased fivefold between 1893 and 1913. *Id.* at 167. The tonnage of goods that passed through Argentine ports tripled in the two decades from 1893 to 1913. *Id.* at 168-69.

41. *Id.* at 184-90 (discussing expansion of electorate, greater role of political parties, and strengthening of constitutional institutions).

42. ARTHUR P. WHITAKER, ARGENTINA 65 (1965). In 1912, the Argentine Congress enacted legislation requiring universal male suffrage. ROCK, *supra* note 24, at 189-90. The most blatant types of electoral fraud had disappeared by the 1920's. *Id.* at 190.

43. P.E.H. Hair, *Introduction* to TO DEFEND YOUR EMPIRE AND THE FAITH: ADVICE OFFERED TO PHILIP, KING OF SPAIN AND PORTUGAL 1 (P.E.H. Hair ed. & trans., 1990).

the control to the colonists.⁴⁵ Spanish born officials stationed in Latin America made most of the managerial and policy decisions in the colonies.⁴⁶ Spain discouraged dialogue over policy with the colonists and the incorporation of local interests into government decisions.⁴⁷

During this period of authoritarian rule, Spain applied its laws uniformly in its colonies regardless of regional considerations.⁴⁸ Rather than establishing colonies with stable legal systems, Spain's foremost concern in its American colonies, including Argentina, was increasing its own wealth.⁴⁹ Because of Argentina's distance from Spain,⁵⁰ dearth of easily exploitable mineral resources,⁵¹ and lack of native populations to force into labor,⁵² Argentina received comparatively little attention from its

The Spanish empire in the Americas stretched from Florida to the River Plate region to tip of the South American continent. *Id.*

44. CALVERT, *supra* note 24, at 14. The Spanish Crown reviewed all appeals originating in its American colonies and controlled the distribution of wealth within those colonies. *Id.* The imperial government did not permit its colonies to make many legal or economic decisions on their own. *Id.* The Spanish Government controlled the entrance of foreigners into Argentina, how long they could stay, what property they could own, and the practice of their religion. H.S. FERNS, *THE ARGENTINE REPUBLIC* 23 (1973).

45. CALVERT, *supra* note 24, at 16.

46. Rosenn, *supra* note 24, at 23; *see generally* CALVERT, *supra* note 24, at 14-20 (illustrating how colonial administrative structures helped entrench authoritarianism).

47. CALVERT, *supra* note 24, at 14-15.

48. *Id.* The Spanish Government was:

[U]niversalistic in its application [of laws] to the whole Empire disregarding the needs or unique conditions of particular areas. Jurists and theologians in Spain framed laws for colonies they had never visited. [Francisco J.] Moreno wrote of this "The geographic isolation of the new territories helped, if anything, to preserve the unreality of Spanish law."

Id. (quoting FRANCISCO J. MORENO, *LEGITIMACY AND STABILITY IN LATIN AMERICA: A STUDY OF CHILEAN POLITICAL CULTURE* 12 (1969)).

49. CALVERT, *supra* note 24, at 12; FERNS, *supra* note 44, at 12. Spain's interest in its American colonies:

[W]ere controlled with the objective of providing an income for the leading institution of Spain, The Crown of Castile. For five-sixths of Spanish imperial history the interest of the Crown was conceived of narrowly in terms of the royal share in the mining of silver and of the taxes on trade goods bought and sold within the framework of an economy devoted principally to the production of one commodity-silver.

Id.

50. CALVERT, *supra* note 24, at 15 (noting "isolation of the colonies, especially the River Plate area, added to the problem of formalism (i.e., law being enacted but not imposed)").

51. ROCK, *supra* note 24, at 39.

52. *Id.* at 39-40.

colonial master.⁵³ Consequently, Spain provided Argentina with insufficient resources to enforce Spain's universal laws.⁵⁴ Because Spain could only partially enforce its own laws⁵⁵ and these laws hampered Argentine trade,⁵⁶ Argentine merchants resorted to smuggling to support themselves.⁵⁷ As a result, the colonists evaded the law, demonstrating a disrespect for the legal system in Argentina.⁵⁸

2. Independence and the Creation of the Argentine Constitution: 1810 - 1860

The form and stability of Argentina's government did not develop immediately following Argentine independence from Spain.⁵⁹ Only after internal disorder⁶⁰ and provincial rule fragmented from the rest of the nation⁶¹ did Argentina found a Constitution⁶² that has served as the framework of its government

53. *Id.* at 39 (noting that Spanish interest in Americas was limited to "the twin quests for precious metals and Indians. Because the River Plate had neither in any abundance, throughout [the colonial] period, it commanded little significance."). It was only in 1776 that Spain created the viceroyalty of the River Plate of which Buenos Aires was the capital. *Id.* at 40. Prior to 1776, the viceroyalty of Peru governed Argentina. *Id.*

54. CALVERT, *supra* note 24, at 15.

55. *Id.*

56. *Id.*; FERNS, *supra* note 44, at 16. Until 1778, the Spanish Crown strictly regulated what cities Argentina could trade with. *Id.* It was only in 1778 that the imperial government first permitted Argentina to trade directly with any city within the Spanish empire. *Id.* After 1778, the imperial government still forbid Argentina to trade with any port outside of the Spanish Empire. *Id.* at 17.

57. CALVERT, *supra* note 24, at 15. Smuggling resulted from Spain's inability to enforce its laws. *Id.* In Argentina, "[v]iolation [of Spanish laws] was to be expected if Spain did not apply coercion to enforce the law, and Spain did not have enough coercive power to apply in such a massive empire." *Id.* See ROCK, *supra* note 24, at 30-32, 40-43 (discussing growth and importance of contraband trade in River Plate towns); see also FERNS, *supra* note 44, at 17 (discussing impact of trade liberalization laws as eliminating impetus to smuggle).

58. CALVERT, *supra* note 24, at 15-17. "[T]he most obvious and direct consequence of the colonial administrative structure and functioning was the development of unworkable laws and formalistic attitudes which encouraged evasion and corruption." *Id.* at 16-17.

59. *Id.* at 17.

60. RICARDO LEVENE, *A HISTORY OF ARGENTINA* 463 (James A. Robertson trans. & ed., 1963).

61. PETER H. SMITH, *POLITICS AND BEEF IN ARGENTINA: PATTERNS OF CHANGE AND CONFLICT* 11 (1969); ROCK, *supra* note 24, at 101-04. After Argentina's independence, regional loyalties took precedent over national interests. SMITH, *supra*, at 11.

62. CONST. ARG.

until the present day.⁶³ The Constitution defines a federal framework of government⁶⁴ between the provinces⁶⁵ of Argentina and the Federal Government.⁶⁶ The Federal Government includes an Executive Branch headed by a president,⁶⁷ a Legislative Branch⁶⁸ composed of a Chamber of Deputies of the Nation⁶⁹ and a Senate,⁷⁰ and a Judicial Branch⁷¹ with its highest court the Supreme Court of Justice of the Nation ("Supreme Court" or "Court").⁷² In addition to the framework of government, the Argentine Constitution establishes constitutional guarantees for individuals.⁷³

a. Independence

Argentina began its independence movement from Spain in 1810⁷⁴ and declared its independence in 1816.⁷⁵ The overthrow of the colonial power did not destroy the authoritarian framework of government in Argentina.⁷⁶ Most of the Argentine

63. Kartheiser, *supra* note 31, at 244.

64. CONST. ARG. The Constitution states that the "Argentine Nation adopts for its government the federal, republican, representative form as established by the present Constitution." *Id.* art. 1.

65. Cristina Bonasegna, *Buenos Aires Law puts Falklands in Argentine State*, DAILY TELEGRAPH, Apr. 27, 1990, at 13. The Argentine nation is divided into provinces. *Id.*

66. CONST. ARG. art. 1.

67. *Id.* arts. 87-107. Articles 87 to 107 of the Argentine Constitution enumerate the powers of the Executive Branch. *Id.*

68. *Id.* arts. 44-86. Articles 44 to 86 of the Argentine Constitution describe the powers of the Legislative Branch. *Id.*

69. *Id.* art. 44. Article 44 of the Constitution declares, "[a] Congress consisting of two Chambers, one of Deputies of the nation and the other of Senators of the Provinces and the City of Buenos Aires, is vested with the Legislative Power of the Nation." *Id.*

70. *Id.*

71. *Id.* arts. 108-19. Articles 108 to 119 detail the nature and competence of the Judicial Branch. *Id.*

72. *Id.* art. 108. Article 108 of the Constitution states, "[t]he Judicial Power of the Nation shall be vested in a Supreme Court of Justice." *Id.*

73. *Id.* arts. 1-43. The Constitution guarantees, amongst other liberties, the right to work, free speech, free religion, and the right to learn. *Id.* art. 14.

74. ARMY STUDY, *supra* note 30, at 16-17. Napoleon's removal of the Spanish King in 1808 catalyzed the independence movement. *Id.* The Argentines who overthrew the colonial powers in Buenos Aires initially intended to rule until the King returned to the Spanish throne. CALVERT, *supra* note 24, at 17.

75. ARMY STUDY, *supra* note 30, at 17.

76. CALVERT, *supra* note 24, at 17-18. Independence changed neither the class structure nor the position of the church in government. *Id.* at 18. Among the traits carried over into post-independence Argentina were the reliance on individuals, rather than parties, for leadership, the extraction of forced loans from political opponents, and provincial allegiances that discouraged compromise with opposition. *Id.* at 38-40.

elite⁷⁷ responsible for independence were not concerned with implementing social changes,⁷⁸ but wanted to seize control of government for their own benefit.⁷⁹ Two early attempts to agree upon the structure of government in written constitutions failed in the face of internal struggles between the Federalists,⁸⁰ provincial forces that wanted to create a federation,⁸¹ and Unitarist⁸² forces centered in Buenos Aires that wanted a republic.⁸³ These failures resulted in a decentralized government⁸⁴ characterized by the regional authoritarian rule of *caudillos*.⁸⁵

All the Argentine provinces, excluding Buenos Aires,⁸⁶ at-

77. FERNS, *supra* note 44, at 14. The elites in colonial Argentina were first merchants and then the owners of vast tracts of land. *Id.* The Argentine elites sought to consolidate the monopoly of power. ROCK, *supra* note 24, at 38. The monopolies of the Argentine elites existed in land ownership, trade, smuggling, and mule breeding. *Id.* at 117. The Argentine elites tended to be urban. *Id.*

78. CALVERT, *supra* note 24, at 17.

79. *Id.* at 17. One of the benefits that the elite sought was the power, prestige, and profit that came with the filling of governmental posts previously reserved for those born in Spain. *Id.* This concept applies to Latin America as a whole. Rosenn, *supra* note 24, at 21-22. Land based elites initiated the independence movements not as a means to overturn the traditional economic and social orders, but rather as a means to increase their betterment from those structures. *Id.*

80. ARMY STUDY, *supra* note 30, at 21. The Federalists were a political force aligned with provincial leaders who sought greater autonomy for the individual provinces and wanted to create a loose federation that would unite them. *Id.*

81. *Id.*

82. *Id.* at 22. The Unitarists base of support was in Buenos Aires. *Id.* The Unitarists sought greater and less restrictive trade. ROCK, *supra* note 24, at 36. The Unitarists advocated "administrative and political centralism." *Id.*

83. Carlos S. Nino, *The Debate Over Constitutional Reform in Latin America*, 16 *FORDHAM INT'L L.J.* 635, 639 (1993) [hereinafter *Constitutional Reform*]. The exclusion of Federalist concerns from both the Constitution of 1819 and the Constitution of 1824 created deep divisions in Argentina. *Id.*; ROCK, *supra* note 24, at 93-94. The Constitution of 1819 fell victim to disagreements between the provinces. *Id.*; Forces representing the Province of Buenos Aires mounted a failed invasion of the Province of Santa Fe in an attempt to force the Constitution of 1819 upon the local government of Santa Fe. *Id.* The Constitution of 1826 collapsed in the face of disputes between the provinces. *Id.* at 101-04. In 1828, Juan Manuel de Rosas emerged from the provincial disputes as a national dictator based in Buenos Aires, a position that he would effectively hold until 1852. *Id.* at 103-04.

84. SMITH, *supra* note 61, at 121. During this period, the Argentine population's resources and "primary loyalties were devoted to the provinces rather than the Republic." *Id.* There was no unified government that could exert control over the entire nation. *Id.*

85. ROCK, *supra* note 24, at 101-04. A *caudillo* is the term used for any local strongman who has a private military and rules by force. *Id.* at 93. *Caudillos* are "[p]rovincial warlords." *Id.*

86. *Id.* at 121-22 The Unitarists in Buenos Aires felt excluded from the Constitution of 1853. *Id.* Among other things, they were concerned over the status of the city of

tempted to create a national government by ratifying the Constitution of 1853.⁸⁷ Problems immediately followed the founding of the Constitution of 1853 ("Argentine Constitution" or "Constitution").⁸⁸ Buenos Aires resisted incorporation with the rest of the provinces and did not adopt the Constitution until 1860, shortly before the battle of Pavón.⁸⁹ At the Battle of Pavón in 1861,⁹⁰ the province of Buenos Aires, under General Mitre⁹¹ defeated the Federalist forces.⁹² Following the battle of Pavón, General Mitre set up a *de facto* government that lasted from 1861 until his election as president in 1862.⁹³

b. The Constitution

The founders⁹⁴ of the Argentine Constitution⁹⁵ structured it

Buenos Aires and the revenue generated from its port. ARMY STUDY, *supra* note 30, at 31.

87. ROCK, *supra* note 24, at 121. The Government of Buenos Aires refused to participate in the planning of the new Constitution. ARMY STUDY, *supra* note 30, at 30.

88. ROCK, *supra* note 24, at 121.

89. ARMY STUDY, *supra* note 30, at 31. To entice Buenos Aires to ratify the Constitution of 1853, the other provinces made concessions such as granting a special status to the city of Buenos Aires and delaying the date customs' revenue collected at the port in Buenos Aires became domain of the national government. *Id.*

90. LEVENE, *supra* note 60, at 463. The Battle of Pavón was the ultimate conflict between Unitarist and Federalist forces in Argentina. *Id.*

91. *Id.* at 459. General Bartolomé Mitre was the Minister of War of the Province of Buenos Aires during the period when it resisted adoption of the Constitution of 1853. *Id.* In the late 1850's, Mitre also became the Governor of the Province of Buenos Aires. *Id.* at 460-61

92. ARMY STUDY, *supra* note 30, at 33.

93. *Id.*; ROCK, *supra* note 24, at 125; *see* LEVENE, *supra* note 60, at 464-67 (discussing Mitre Government between 1861 and 1862).

94. ARMY STUDY, *supra* note 30, at 30. In 1852, the Federalist forces that defeated the *caudillo* Juan Manuel de Rosas organized a Constitutional Constituent Assembly. *Id.* The most influential delegate was Juan Bautista Alberdi. *Id.*; Segundo V. Linares Quintana, *Comparison of the Constitutional Basis of the United States and Argentine Political Systems*, 97 U. PA. L. REV. 641, 642 (1949).

95. CONST. ARG. The Constitutional Constituent Assembly began in 1852. ARMY STUDY, *supra* note 30, at 30. The delegates from all the provinces but Buenos Aires ratified the Constitution at the Constitutional Constituent Assembly of 1853. Linares Quintana, *supra* note 94, at 642. It was not until the other provinces agreed to some constitutional modifications in 1860, that Buenos Aires adopted the Constitution of 1853. ARMY STUDY, *supra* note 30, at 31; 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, 162 n.2 (1991). To avoid confusion about the different dates involved, many scholars refer to the Argentine Constitution as the 1853-60 Constitution. *Id.*

after the U.S. Constitution.⁹⁶ Like the U.S. Constitution,⁹⁷ the Argentine Constitution establishes the National Government within a federal framework.⁹⁸ A central principle of both the U.S. and Argentine frameworks is the separation of powers⁹⁹ between the different federal branches of government.¹⁰⁰ While the basic frameworks of the U.S. and Argentine constitutions are the same, the details differ.¹⁰¹ Argentina's Federal Government is composed of three primary branches,¹⁰² an Executive Branch¹⁰³ led by the president,¹⁰⁴ a Legislative Branch¹⁰⁵ composed of a Senate¹⁰⁶ and a Chamber of Deputies of the Na-

96. Rosenn, *supra* note 24, at 24; Linares Quintana, *supra* note 94, at 643, 645; Garay, *supra* note 95, at 161.

97. Linares Quintana, *supra* note 94, at 645.

98. CONST. ARG. art. 1; *see* Linares Quintana, *supra* note 94, at 649-54 (describing relation between Federal Government and provinces). Argentina presently has 23 provinces. Bonasegna, *supra* note 65, at 13. Like the states in the United States, the provinces have surrendered some of their sovereignty to the federal government. Linares Quintana, *supra* note 94, at 650; *see* CONST. ARG. arts. 77, 99 (listing powers granted to Federal Government). The Constitution states that the "Provinces retain all powers not delegated by the Constitution to the Federal Government and those expressly reserved by special covenants at the time of their incorporation." CONST. ARG. art. 121.

99. GERMÁN BIDART CAMPOS, *TRATADO ELEMENTAL DE DERECHO CONSTITUCIONAL ARGENTINO* 17 (1993) [hereinafter *DERECHO CONSTITUCIONAL*]. The separation of powers principle calls for different branches of government to have different governmental functions as a means of ensuring that no one branch can assume control over the other branches and, thus, all state functions. *Id.*

100. *Id.*; GABRIEL NEGRETTO, *EL PROBLEMA DE LA EMERGENCIA EN EL SISTEMA CONSTITUCIONAL* 54 (1994); Linares Quintana, *supra* note 94, at 654 (calling principle of separation of powers "backbone" of U.S. and Argentine Constitutions).

101. Linares Quintana, *supra* note 94, at 643, 645; Garay, *supra* note 95, at 161.

102. CONST. ARG. art. 120. The Constituent Assembly of 1994 added a fourth independent branch by separating the office of the Public Ministry from the other branches. *CONSTITUTIONS, supra* note 8, at xii.

103. CONST. ARG. arts. 87-107 (establishing Executive Power). The Executive Branch traditionally has had preeminence over the other two branches. Linares Quintana, *supra* note 94, at 654; *see Constitutional Reform, supra* note 83, at 640-41 (discussing "hyper-presidentialism" in Argentine political structure).

104. CONST. ARG. art. 87; *see id.* art. 99 (outlining presidential powers). The president is elected by the direct vote of the eligible Argentine population. *Id.* art. 94. The President serves a four-year term and may be consecutively re-elected to office once. *Id.* art. 90. Until 1994, the president served a six-year term, but was not eligible for consecutive re-election. *CONSTITUTIONS, supra* note 8, at xii.

105. CONST. ARG. arts. 44-86 (detailing powers of Legislative Branch). Traditionally, the Legislative Branch has not been a powerful branch of government. Linares Quintana, *supra* note 94, at 655-56. The strength of the Executive Branch came at the expense of the Legislative Branch. *Id.*

106. CONST. ARG. art. 44. The Senate is composed of three senators from each province, one of whom must be from the political party receiving the second highest percentage of the vote. *Id.* art. 54. Senators sit for a term of six years. *Id.* art. 55.

tion,¹⁰⁷ and a Judicial¹⁰⁸ Branch with the Supreme Court of Justice as its highest court.¹⁰⁹ The Argentine Constitution also restricts the power of the Argentine Government by enumerating guarantees against governmental abuse of individuals.¹¹⁰

i. The Executive Branch

The Argentine Constitution vests the executive¹¹¹ with an array of powers.¹¹² The president is the commander-in-chief of the nation's armed forces.¹¹³ The president nominates Supreme Court Justices¹¹⁴ for the Senate's confirmation.¹¹⁵ The president may approve¹¹⁶ or veto a congressional bill.¹¹⁷ The president executes legislation.¹¹⁸ During exceptional circumstances,¹¹⁹ the president is able to enact legislation through decrees of "urgency and necessity."¹²⁰ The president may also declare Federal intervention in a province, allowing the Federal Government to de-

107. *Id.* art. 44. The number of deputies that each province sends is contingent upon that province's population. *Id.* art. 45. The term of the deputies is for four years. *Id.* art. 50.

108. *Id.* arts. 108-19 (enumerating Judicial Power).

109. *Id.* The Supreme Court is the "guardian and final and definitive interpreter of the Constitution." Linares Quintana, *supra* note 94, at 656. The members of the Supreme Court are Supreme Court Justices. CONST. ARG. art. 110.

110. CONST. ARG. arts. 1-43 (listing constitutional guarantees). Among the guarantees in the Constitution are freedom of speech, the right to unionize and strike, freedom of religion, and the right to own property. *Id.*

111. *Id.* arts. 87-107. Articles 87 to 107 establishes the Executive Branch and enumerate its authority to execute the law and create government policy. *Id.* The president holds the powers vested to the Executive Branch. *Id.* art. 87.

112. Linares Quintana, *supra* note 94, at 665.

113. CONST. ARG. art. 99, cl. 12.

114. *Id.* art. 99, cl. 4.

115. *Id.* The president's nominees for the Supreme Court are contingent upon a two-thirds majority vote of the Senate. *Id.*

116. *Id.* art. 78.

117. *Id.* art. 80. A bill that the executive rejects returns to Congress. *Id.* art. 83. The legislature may override the executive by a two-thirds majority. *Id.*

118. *Id.* art. 99, cl. 2.

119. *Id.* art. 99, cl. 3. Presidents have declared the existence of exceptional circumstances in an array of situations including internal security problems, economic crises, the need for new national identification documents, and Bolivia's shortage of cement. HORACIO VERBITSKY, *HACER LA CORTE* 164-65 (1993).

120. CONST. ARG. art. 99, cl. 3. The Constitution states:

Under penalty of the same being absolutely and irredeemably void, the Executive Power may in no case make dispositions of a legislative character.

Only when exceptional circumstances make it impossible to follow the regular arrangements which this Constitution provides for passing laws and when it is not a matter of rules regulating penal, tax, or electoral matters or

pose provincial governments and assumes their responsibilities and powers.¹²¹ The president may declare a state of emergency in the entire nation or certain provinces,¹²² during which time the government may suspend constitutional guarantees.¹²³

ii. The Legislative Branch

The Argentine legislature¹²⁴ is composed of a Senate¹²⁵ and a Chamber of Deputies.¹²⁶ While in certain exceptional circumstances the executive enacts legislation by decree,¹²⁷ the legislature enacts most laws.¹²⁸ By a two-thirds majority, Congress may call a Constituent Assembly to reform all or part of the Constitution.¹²⁹ Also by a two-thirds majority, the Senate may approve of the president's nomination of a Supreme Court Justice,¹³⁰ and

the system of political parties, may he dictate decrees for reasons of necessity and urgency.

Id. The Constitutional Constituent Assembly of 1994 added the power to legislate by decree in situations of urgency and necessity to the Constitution. CONSTITUTIONS, *supra* note 8, at 49. Presidents since the founding of the Constitution, however, have used executive decrees to legislate. VERBITSKY, *supra* note 119, at 164. As recently as 1990, the Supreme Court upheld the use of such decrees. *Peralta c. Estado Nacional*, [1991-C] L.L. 173, 186 (1990).

121. CONST. ARG. art. 99, cl. 20; Garro, *supra* note 15, at 88 (discussing president intervening in provinces).

122. *Id.* art. 99, cl. 16. Article 99, clause 16, sets forth the conditions under which the president may declare a state of siege. *Id.* Article 99, clause 16, states that, with the consent of the Senate, the president may declare "one or more districts of the Nation in a state of siege for a limited period in the event of a foreign attack. In the event of internal disorder, he has this power only when Congress is in recess, since this is a power belonging to that body." *Id.*

123. *Id.* art. 23. Article 23 states, "[i]n the event of internal disorder or foreign attack endangering the operation of this Constitution and of the authorities created thereby, the Province or territory in which the disturbance of order exists shall be declared in a state of siege and the constitutional guarantees shall be suspended therein." *Id.*

124. *Id.* arts. 44-86.

125. *Id.* art. 44; *see supra* note 106 (describing nature of Senate).

126. CONST. ARG. art. 44; *see supra* note 107 (describing nature of deputies).

127. CONST. ARG. art. 99, cl. 3; *see supra* notes 119-20 and accompanying text (describing executive legislation by decree).

128. CONST. ARG. arts. 77-83. Article 77 enumerates the areas in which Congress may legislate. *Id.* art. 77. A bill originates in either the Senate or the Chamber of Deputies. *Id.* After being approved by a simple majority of both Chambers of Congress, Congress sends the bill for presidential approval. *Id.* art. 78. If the president approves the bill, it becomes law. *Id.* If the president rejects the bill, it returns to Congress where both the Senate and the Chamber of Deputies may override the president by a two-thirds majority in each Chamber. *Id.* art. 83.

129. *Id.* art. 30.

130. *Id.* art. 99, cl. 4.

the Senate may remove from office the president¹³¹ or Supreme Court Justices¹³² who the Chamber of Deputies have impeached for malfeasance or a common crime.¹³³

iii. The Judicial Branch

Argentina's constitutional founders based the Argentine judicial system upon the Anglo-American judicial tradition.¹³⁴ The head of the judiciary is the Supreme Court,¹³⁵ which has inferior courts beneath it.¹³⁶ The Supreme Court possesses the power of judicial review,¹³⁷ but only in judicial cases, controversies, and suits between parties.¹³⁸ The precedent of these rulings influences later cases before the Supreme Court¹³⁹ and the lower courts.¹⁴⁰ A case of a political nature¹⁴¹ is non-justiciable.¹⁴²

131. *Id.* arts. 59-60.

132. *Id.*

133. *Id.* art. 53. The Chamber of Deputies may only impeach the president or a Supreme Court Justice by a two-thirds majority. *Id.*

134. Linares Quintana, *supra* note 94, at 643. In the 1860's and 1870's, as a recognition of the influence of the U.S. legal system in Argentina, Congress ordered the translation into Spanish of books on U.S. constitutional law. Garay, *supra* note 95, at 176 n.100.

135. See CONST. ARG. art. 108 (establishing Supreme Court possessing Argentina's judicial power); *Id.* arts. 108-19 (describing nature and competence of judicial branch).

136. See *id.* art. 108 (allowing Congress to create federal courts inferior to Supreme Court).

137. Nino, *supra* note 17, at 316. The Supreme Court has the power of judicial review, the authority to determine whether a piece of legislation exceeds the constitutional powers of Congress or the president. *Id.* While the power of judicial review is not enumerated in the Constitution, it has grown out of Supreme Court case law. *Id.*; Rios, 1 Fallos 36, 36 (1863) (finding president may not ascribe judicial functions to administrators); Calavete, 1 Fallos 345, 349 (1864) (asserting Supreme Court is final interpreter of Constitution); Sojo, 32 Fallos 125, 141 (1887) (holding congressional legislation to be unconstitutional); La Municipalidad de la Capital c. Elortondo, 33 Fallos 162, 184 (1888) (establishing Supreme Court's duty to find legislation unconstitutional if outside of Constitution's mandate).

138. Irizarry y Puente, *supra* note 4, at 33-34. The Supreme Court releases *Acordadas*, declarations and comments that have no binding legal effect. *Id.*

139. Garay, *supra* note 95, at 187-201; Alejandro M. Garro, *Eficacia y autoridad del precedente constitucional en america latina: las lecciones del derecho comparado*, 20 U. MIAMI INTER-AM. L. REV. 480, 486 (1989) [hereinafter *Precedente constitucional*].

140. Garay, *supra* note 95, at 187-201; *Precedente constitucional*, *supra* note 139, at 486.

141. Alejandro M. Garro, *The Role of the Argentine Judiciary in the Transition to Democracy*, 4 HUM. RTS. L. J. 311, 327 (1983) [hereinafter *Argentine Judiciary*]. A political question is one that would bring two branches of government into conflict. *Id.* Political questions are questions "which courts will refuse to take cognizance, or to decide, on account of their purely political character or because their determination would involve an encroachment upon the executive or legislative powers." BLACK, *supra* note 7, at

While the Constitution does not establish the number of Justices, it does guarantee Justices life tenure which is revocable by the Senate only for malfeasance or criminal conduct.¹⁴³

iv. Constitutional Guarantees

The Federal Government may not intrude upon liberties guaranteed by the Argentine Constitution.¹⁴⁴ Amongst these liberties are freedom of the press,¹⁴⁵ the right to unionize and strike,¹⁴⁶ the inviolability of the home,¹⁴⁷ the right to trial in front of a judge,¹⁴⁸ and the right to property,¹⁴⁹ including vested rights.¹⁵⁰ The State, however, may temporarily suspended some

1158. See Julio Oyharante, *Cuestiones no justiciables*, in TEMAS DE CASACIÓN Y RECURSOS EXTRAORDINARIOS 143, 143-54 (1982).

142. Arlandini, 208 Fallos 184, 186 (1947); Acordada sobre reconocimiento del Gobierno surgido de la Revolución del 4 de Junio de 1943, 196 Fallos at 6-7 (1943); Acordada sobre reconocimiento del Gobierno Provincial de la Nación, 158 Fallos at 290, 291 (1930); GERMÁN J. BIDART CAMPOS, *THE ARGENTINE SUPREME COURT: THE COURT OF CONSTITUTIONAL GUARANTEES* 10 (1982).

143. CONST. ARG. art. 110.

144. *Id.* arts. 1-43. Articles 1 through 43 enumerate constitutionally guaranteed liberties. *Id.*; see Linares Quintana, *supra* note 94, at 645-49 (summarizing constitutional guarantees).

145. CONST. ARG. art. 14. Article 14 enumerates several rights, including rights: [Of] working in and practicing any lawful industry; of navigating and trading; of petitioning the authorities; of entering, remaining in, travelling through and leaving Argentine territory; of publishing their ideas through the press without previous censorship; of using and disposing of their property; of associating for useful purposes; of freely professing their religion; of teaching and learning.

Id.

146. *Id.* art. 14 bis.

147. *Id.* art. 18.

148. *Id.* (stating that "defense, by trial, of the person and of rights is inviolable").

149. *Id.* art. 17. Article 17 establishes that property is "inviolable, and no inhabitant of the nation can be deprived thereof except by virtue of a sentence founded on law. Expropriation for reasons of public utility must be authorized by law and previously compensated." *Id.*

150. BIDART CAMPOS, *supra* note 142, at 52. Vested rights are rights to property arising from judgements, laws, contracts, or administrative rights. *Id.* A vested right is a right granted in law and "of which an individual could not be deprived without injustice, or of which he could not be justly deprived otherwise than by the established methods of procedure and for the public welfare." BLACK, *supra* note 7, at 1564.

The Supreme Court has interpreted Article 17 as a guarantee to retain a vested right when Congress repeals the law granting it. *Gaggiamo*, [1992-D] L.L. at 483 (finding that right vested by law is protected under Article 17 of Constitution); *Horta c. Harguindeguy*, 137 Fallos 47, 61 (1922) (stating "ni el legislador ni el juez pueden, en virtud de una ley nueva o de su interpretación arrebatar o alterar un derecho patrimonial adquirido al amparo de la legislación anterior." ["neither legislator nor judge can,

of these constitutional guarantees¹⁵¹ during a state of siege.¹⁵²

3. *Constitutional Rule: 1861 - 1930*

By 1860, every province had ratified the Argentine Constitution.¹⁵³ National adoption of the Constitution, however, did not immediately create national unity.¹⁵⁴ Rather, the fragmentation of the provinces from the National Government¹⁵⁵ did not end until the 1880's, when Argentina was firmly under the control of a stable centralized government.¹⁵⁶

by a new law or decision, divest one of a property right once it has been acquired under previous legislation."]) (translation in BIDART CAMPOS, *supra* note 142, at 520).

151. CONST. ARG. art. 23. All guarantees can be suspended save those that lead to the unconstitutional arrest or forced internal transport of citizens, unless the Government first gives them the opportunity to leave the nation. *Id.*

152. *Id.* art. 23; see *supra* notes 122-23 and accompanying text (describing how Executive or Congress declares state of siege). A state of siege is an emergency provision that reduces the liberties that the state must respect. Kartheiser, *supra* note 31, at 245, 251-52. Between 1930 and 1983 there were 15 states of siege, the longest of which lasted from 1974 to 1983. *Id.* at 252 n.37.

The Argentine Supreme Court defined the scope, object, and length of states of siege in *Granada*. *Granada*, [1986-B] L.L. 221, 245-49 (1985). The Court's interpretation of the scope, object and length of a state of siege in *Granada* was narrow. Kartheiser, *supra* note 31, at 252. The U.S. Supreme Court has approved suspension of constitutional guarantees, most notably President Lincoln's suspension of *habeas corpus* during the U.S. Civil War. *Ex parte Milligan*, 4 Wall. 2, 125 (1866).

153. ARMY STUDY, *supra* note 30, at 31. All the provinces except Buenos Aires ratified the Constitution in 1853. *Id.*; ROCK, *supra* note 24, at 121. The Province of Buenos Aires was the last province to adopt the Constitution. *Id.* at 120.

154. YSABEL F. RENNIE, *THE ARGENTINE REPUBLIC* 110-20 (1945). The battle of Pavón occurred after every province ratified the Constitution. ARMY STUDY, *supra* note 30, at 31. For several years after the battle of Pavón, there was a rebellion in the northern provinces of Argentina. RENNIE, *supra*, at 110. Caudillos still controlled many provinces, including a caudillo from the province of La Rioja who attacked other provinces. *Id.* President Mitre wrote that bandits had taken over Province of La Rioja and that the government there no longer existed. *Id.* at 112. In 1874, the national army invaded the province of Entre Rios and fought against the militia of Entre Rios in order to wrest control of the province from a regional *caudillo*. *Id.* at 118.

155. SMITH, *supra* note 61, at 11. The provincial powers often ignored the national laws. *Id.* The national government often resorted to force to implement its control over provinces. ROCK, *supra* note 24, at 129. The Federal Government used force to quell rebellions in northern provinces. RENNIE, *supra* note 154, at 110. In 1874, a federal army from Buenos Aires invaded the province of Entre Rios to quash the rule of a provincial leader. *Id.* at 118. Federal soldiers assassinated a *caudillo* from the province La Rioja who attacked neighboring provinces and refused to cooperate with the Federal Government. *Id.* at 111-14.

156. ROCK, *supra* note 24, at 129. By the 1880's, *caudillos* ceased to be able to disregard national law. *Id.* By 1880, the presence of the *caudillos* had diminished to such a degree that their strength now lay in controlling regional elections rather than the regions outright. *Id.*

While the four decades following the founding of the Constitution witnessed the crystallization of the Argentine state,¹⁵⁷ economic expansion,¹⁵⁸ and social change,¹⁵⁹ little change occurred in terms of participatory democracy.¹⁶⁰ This gradually changed as the ruling Conservative party¹⁶¹ replaced the fraudulent elections in the 1890's¹⁶² with universal laws requiring male suffrage for citizens by 1912,¹⁶³ in an attempt to consolidate political divisions within the Conservative party and to coopt and preempt opposition.¹⁶⁴ The result changed not only how the elections were held¹⁶⁵ but also who won them.¹⁶⁶ In the years between 1916 and 1930, non-fraudulently elected Radical Party¹⁶⁷ presidents governed Argentina.¹⁶⁸

157. *Id.* By 1870, the political struggle between Federalists and Unitarists was over. *Id.* The Unitarist's goal of creating a strong centralized government prevailed over the Federalists goal of a loose coalition with greater autonomy for the provinces. *Id.*

158. *Id.* at 131-52 (detailing economic growth between 1852 and 1890); FERNS, *supra* note 44, at 54. In the 20 years from 1870 to 1890, the total length of Argentine railway track in kilometers increased from 836 to 3300. *Id.* at 55. During this same period exports of wheat increased from 9 tons a year to 327,894 tons, wool from 6.8 million pesos to 35.5 million, and animal hide from 10.3 million pesos to 20 million. *Id.* at 67. The value of Argentine exports increased from under 100 million gold pesos in 1893 to over 500 million gold pesos in 1913. ROCK, *supra* note 24, at 167.

159. ROCK, *supra* note 24, at 131. During this period, Argentina became a more educated, urban, and wealthy nation. *Id.* at 118, 143. In 1850, Argentina had an estimated population of a little under one million. FERNS, *supra* note 44, at 38. By 1890, Argentina's population had risen to 3.4 million. ROCK, *supra* note 24, at 153. During this period, Argentina experienced its first major wave of immigration with a net immigration of over 1.1 million people between 1870 and 1890. *Id.*

160. ROCK, *supra* note 24, at 160.

161. ARMY STUDY, *supra* note 30, at 216. The Conservative Party governed Argentina from the founding of the Constitution until 1916. *Id.* The Conservatives stressed "free trade, export led growth, openness to foreign investment, and a further integration into the global trade and monetary system" while opposing "government intervention in the economy." *Id.* at 216-17. The Conservative Party was the party of the upper-class with strong ties to Argentina's agrarian interests. Carlos H. Waisman, *The Legitimation of Democracy Under Adverse Conditions: The Case of Argentina*, in LIBERAL DEMOCRACY, *supra* note 13, at 97, 98.

162. ROCK, *supra* note 24, at 184. Among the problems hampering open elections were that only a portion of the population was enfranchised and that local bosses intimidated opposition and bribed voters. *Id.*

163. *Id.* at 189-90.

164. *Id.* at 188-90.

165. *Id.* at 190. In addition to the new election laws doubling voter turnout, "the worst kinds of political skulduggery were banished." *Id.*

166. WHITAKER, *supra* note 42, at 65.

167. ARMY STUDY, *supra* note 30, at 218. The Radical Party began in the 1890's as a political party devoted to breaking up the oligarchical rule of the Conservatives. *Id.* The Radical Party has traditionally been the party of the middle-class. WHITAKER, *supra*

4. *First Judicial Treatment of De Facto laws*

The Argentine Supreme Court first addressed the issue of *de facto* laws in *Martinez y Otero*.¹⁶⁹ Baldomero Martinez sued for damages on a law that Mitre's *de facto* Government¹⁷⁰ enacted claiming that Mitre's Government was not constitutionally competent to enact binding laws.¹⁷¹ The Court recognized the validity of the laws of Mitre's Government, emphasizing the nation's grave and unstable political situation and noting that Mitre exercised national power and had the consent of the people in his victory at Pavón.¹⁷² The Court's decision to ascribe validity to laws that had their origin outside of the Constitution became known as the *de facto* doctrine.¹⁷³

B. *Historical Cycle of De Facto Regimes and Constitutional Government.*

Since 1930, Argentina has been caught in a cycle of military juntas followed by civilian governments.¹⁷⁴ Between 1930 and 1983, both military and civilian governments constrained the participation of political parties.¹⁷⁵ The military governments, however, also infringed upon constitutional and democratic in-

note 42, at 9. See generally ARMY STUDY, *supra* note 30, at 217-20 (discussing Radical Party from its inception to 1985).

168. WHITAKER, *supra* note 42, at 48-49.

169. *Martinez y Otero*, 2 Fallos 127, 142-43 (1865).

170. See *supra* note 93 and accompanying text (describing Mitre's *de facto* government).

171. *Martinez y Otero*, 2 Fallos at 142.

172. *Id.*; see *supra* note 90-92 and accompanying text (presenting General Mitre's victory at Pavón). The Court stated that Mitre was a:

[A]utoridad competente para conocer y decidir en esa clase de asuntos, por ser quien ejercia provisoriamente todos los poderes nacionales, despues de la Batalla de Pavon, con el derecho de la revolucion triunfante y asentida por los pueblos, y en virtud de los graves deberes que la victoria le imponia.

Martinez y Otero, 2 Fallos at 142-43 [[C]ompetent authority to understand and decide this type of matter, because he was the person who provisionally exercised all of the national powers after the Battle of Pavón, with the right of the triumphant revolution, assented to by the people, and in virtue of the grave duties that the victory imposed upon him.] (translation by Note author).

173. Nino, *supra* note 17, at 317-18.

174. Stotzky, *supra* note 32, at 109-14. The longest military government lasted from 1976 to 1983. *Id.* at 111-12. The last shift in government was from the military to a democracy in 1983. *Id.* at 113-14.

175. Edward C. Epstein, *Democracy in Argentina*, in THE NEW ARGENTINE DEMOCRACY 3, 4-13 (Edward C. Epstein ed., 1992) [hereinafter NEW DEMOCRACY].

stitutions¹⁷⁶ as well as human rights.¹⁷⁷ The constraints on political power¹⁷⁸ and the weakness of constitutional and political institutions¹⁷⁹ created a political instability¹⁸⁰ in Argentina that is only now recuperating.¹⁸¹

1. Uriburu's Coup: 1930 - 1932

In 1930, General Uriburu¹⁸² staged a coup that interrupted the existing constitutional rule.¹⁸³ The military supported the coup because of the nation's economic crisis resulting from the global depression¹⁸⁴ and because of growing dissatisfaction with the democratically elected President.¹⁸⁵ The Argentine Supreme Court, which the military allowed to continue operating with its pre-coup Justices,¹⁸⁶ approved of the Uriburu Government and declared it constitutional.¹⁸⁷ The Supreme Court

176. Monica Peralta-Ramos, *Toward an Analysis of the Structural Basis of Coercion in Argentina: The Behavior of the Major Fractions of the Bourgeoisie, 1976-1983*, in LIBERAL DEMOCRACY, *supra* note 13, at 39, 46-47; Carlos S. Nino, *Transition to Democracy, Corporatism and Constitutional Reform in Latin America*, 44 U. MIAMI L. REV. 129, 130 (1989) [hereinafter *Corporatism*].

177. ROCK, *supra* note 24, at 334-37 (describing murder, torture, and detainment of political opponents of *de facto* Government of 1955 to 1958); COMISIÓN NACIONAL SOBRE LA DESPERACIÓN DE PERSONAS, NUNCA MÁS 1-6 (1986) [hereinafter NUNCA MÁS] (summarizing military's use of violence during 1976-83 *de facto* Government).

178. Peralta-Ramos, *supra* 176, at 46-47. As a general rule, from 1930 to 1983, political groups in Argentina that have exercised control have been unable to build political parties with enough popular support to obtain control of government democratically. *Id.* These groups resorted to military coups, fraudulent elections, and political pressure to achieve and maintain power. *Id.*

179. *Id.*

180. *Id.* at 47. With the lack of strong political and constitutional institutions, "the accumulation of economic and political demands did not find proper expression within the existing institutional channels. The result was the progressive crisis of institutional legitimacy that shook the country." *Id.*

181. Alfonsín, *supra* note 2, at 41-42; Garro, *supra* note 15, at 7-8.

182. RENNIE, *supra* note 154, at 222-23. General José Félix Uriburu was a military officer who, in his youth, associated himself with the Radical party, but by the time of the coup had developed Conservative connections. *Id.*

183. POTASH (1928-1945), *supra* note 27, at 283. The *de facto* Government of 1930 left all the Supreme Court justices in their posts. Vera Villalobos, *supra* note 18, at 462. The *de facto* Government also appointed mostly civilians to cabinet posts, kept some provincial governments intact, and remained in power for less than a year and a half. POTASH (1928-1945), *supra* note 27, at 55-56.

184. Stotzky, *supra* note 32, at 110.

185. ARMY STUDY, *supra* note 30, at 37-38.

186. JONATHAN M. MILLER ET AL., CONSTITUCIÓN Y PODER POLÍTICO 828 (1987). Although the Supreme Court Justices remained in their posts, the *de facto* Government removed lower court judges. *Id.*

187. 1930 *Acordada*, 158 Fallos at 290-91.

declared that the new military Government was constitutional because it vowed to uphold the Constitution and it had the will and power to secure national peace.¹⁸⁸ A decline in Uriburu's health, as well as in military and public support for his government, led to elections in 1931 and the transfer of power to a civilian government in 1932.¹⁸⁹

2. Civilian Government: 1932 - 1943

The following decade of civilian rule appeased neither the Conservative nor Radical Parties.¹⁹⁰ The fraudulent electoral victories of Conservative presidential candidates frustrated the opposition.¹⁹¹ Conservatives, on the other hand, believed that their control was diminishing over the selection of presidential candidates and that the Radicals and other opposition parties were disproportionately influential in Congress.¹⁹² The precedent of General Uriburu's *de facto* Government and the subsequent electoral fraud, created an atmosphere in which both Radicals and Conservatives sought military force to achieve goals that they could not attain through the democratic system.¹⁹³ The military was becoming accustomed to its role in national politics.¹⁹⁴ These factors combined to produce a *coup d'état* in 1943 by Nationalist forces.¹⁹⁵

3. Nationalist *De Facto* Regime: 1943 - 1946

In 1943, the military viewed its coup as part of its duty to

188. *Id.*

189. ARMY STUDY, *supra* note 30, at 48; POTASH (1928-1945), *supra* note 27, at 60.

190. ROCK, *supra* 24, at 216-17.

191. ARMY STUDY, *supra* note 30, at 47-50; POTASH (1928-1945), *supra* note 27, at 74, 94. The Radical Party was not represented in the 1931 elections, and there was fraud in the 1937 presidential election and all congressional elections between 1930 and 1943. ARMY STUDY, *supra* note 30, at 47-50; POTASH (1928-1945), *supra* note 27, at 74, 94.

192. ARMY STUDY, *supra* note 30, at 50-51.

193. POTASH (1928-1945), *supra* note 27, at 283. Conservatives relied on the military to maintain their hold on government while Radicals and nationalist elements sought military intervention as a means of obtaining control of the State. *Id.*

194. *Id.* at 284.

195. *Id.* at 283-85. The Nationalists tended to favor a "diversification of trade patterns as a supplement to agricultural exports, the expansion of state control over vital sectors of the economy, close supervision of foreign investment, and local industrialization based on the protection of domestic industry from foreign competition." ARMY STUDY, *supra* note 30, at 221.

save the nation from political discord.¹⁹⁶ Although the military immediately suspended the Constitution¹⁹⁷ it left the judiciary intact.¹⁹⁸ As it did in the *Acordada* of 1930,¹⁹⁹ the Supreme Court once again recognized the validity of the *de facto* Government.²⁰⁰ The military Government did not take into account, however, the internal discord among its officers.²⁰¹ During the ensuing internal struggle between the army's Liberal²⁰² and Nationalist factions, neither faction stemmed the growth of Colonel Juan Perón's²⁰³ populist movement.²⁰⁴ Unable to solve the internal friction, the military called for new elections in 1946.²⁰⁵ Juan Perón won decisively.²⁰⁶

4. Perón's First Era: 1946 - 1955

The Peronists recognized constitutional principles in limited areas²⁰⁷ while ignoring such ideas in others.²⁰⁸ Ignoring the rule of law, President Juan Perón purged the Supreme Court by

196. POTASH (1928-1945), *supra* note 27, at 202, 204.

197. ARMY STUDY, *supra* note 30, at 51.

198. Vera Villalobos, *supra* note 18, at 462.

199. 1930 *Acordada*, 158 Fallos at 290-91.

200. 1943 *Acordada*, 196 Fallos at 6-7.

201. DAVID ROCK, *AUTHORITARIAN ARGENTINA* 135-36 (1993) [hereinafter *AUTHORITARIAN*]; see generally POTASH (1928-1945), *supra* note 27, at 201-37 (detailing internal divisions in Argentine army from 1943 to 1945).

202. POTASH (1928-1945), *supra* note 27, at 286. The liberal faction of the armed forces was the faction that wished to maintain the traditional constitutional framework. *Id.*

203. WHITAKER, *supra* note 42, at 104. Juan Perón belonged to the group of military officers responsible for the 1943 coup. *Id.* at 114. For much of the *de facto* Government between 1943 and 1946, Juan Perón ran the Department of Labor and Social Security as well as being the Ministry of War's secretariat. *Id.* From 1944 to 1945, Juan Perón was the *de facto* Government's Vice-President. *Id.* at 115-19.

204. POTASH (1928-1945), *supra* note 27, at 285-86. Juan Perón used his position as head of the Department of Labor and Social Security to mobilize the unions behind his drive for industrialization and to obtain greater benefits for workers. WHITAKER, *supra* note 42, at 115-17.

205. ROCK, *supra* note 24, at 261.

206. *Id.* at 261. In the 1946 presidential election, Juan Perón won 56% of the vote. WHITAKER, *supra*, note 42, at 120. The Peronist party won two-thirds of the seats in both Chambers of Congress. *Id.*

207. CALVERT, *supra* note 24, at 53. The Peronists reformed the Constitution in 1949, allowing for the consecutive re-election of the president. *Id.* Although the Peronists probably had enough popular and military support to force their constitutional changes upon the opposition, they chose to initiate them through the procedure set out in the Constitution of 1853. *Id.*

208. JOSEPH PAGE, *PERÓN: A BIOGRAPHY* 164-67 (1983) (discussing Peronist interference with Supreme Court); *id.* at 207-18 (discussing Peronist repression of opposi-

impeaching three of the four Justices on dubious charges.²⁰⁹ The Peronist Congress also called a Constituent Assembly that passed a new constitution²¹⁰ that permitted the president to run for re-election.²¹¹ President Juan Perón hindered political opposition²¹² and the media²¹³ as his Government became more authoritarian.²¹⁴ President Juan Perón sought re-election in 1952 and won two-thirds of the vote in a marred election.²¹⁵ President Juan Perón declared a state of siege that lasted from shortly before his second re-election in 1952 until 1955, allowing for greater executive power.²¹⁶ Despite these acts, Perón was unable to contain the expansion of opposition resulting from the economic troubles of the early 1950's²¹⁷ and the political frustration of his opponents.²¹⁸ These factors led to Argentina's third *coup d'état* of the twentieth century.²¹⁹

5. Anti-Peronist Liberals: 1955 - 1958

United in their dislike of Juan Perón, the Liberal military regime that emerged after the coup²²⁰ replaced the Constitution

tion); Kartheiser, *supra* note 31, at 245 (discussing Peronist interference with freedom of press).

209. PAGE, *supra* note 208, at 164-67. In order to place all the branches of government in Peronist hands, Congress impeached three of the four Justices of the Supreme Court on the contradictory charges of failing to condemn the military governments of 1930 and 1943 and of illegally hindering their work. *Id.* While the Peronists altered the trial procedure to the detriment of the Justices, Congress impeached the Justices in a constitutional manner. *Id.* Although Congress followed the constitutional procedure, the charges did not amount to malfeasance. *Id.* One of the replacement Justices was the brother-in-law of Eva Perón, Juan Perón's second wife. *Id.*

210. CONST. ARG. (1949).

211. PAGE, *supra*, note 208, at 200-06.

212. ROBERT A. POTASH, *THE ARMY & POLITICS IN ARGENTINA, 1945-1962*, at 104-05 (1980) [hereinafter POTASH (1945-1962)]; see generally PAGE, *supra* note 208, at 207-18 (discussing Peronist interference with political opposition).

213. Kartheiser, *supra* note 31, at 245.

214. WHITAKER, *supra* note 42, at 139-43 (describing emerging totalitarian appearance of Peronist Government).

215. *Id.* at 140-41. The Peronists denied the Radicals use of the radio or press. *Id.* at 140. Peronist supporters harassed Radicals at Radical Party rallies. *Id.* at 141.

216. ARMY STUDY, *supra* note 30, at 56; ROCK, *supra* note 24, at 306.

217. WHITAKER, *supra* note 42, at 136-39. Between 1948 and 1952, as the national population rose from 15.4 million to 18 million, gross national product dropped from 62.3 billion Argentine pesos to 49.3 billion pesos. *Id.* at 137.

218. POTASH (1945-1962), *supra* note 212, at 170. Among Juan Perón's opponents were the Radicals, the Conservatives, and the Catholic Church. *Id.* at 173.

219. ROCK, *supra* note 24, at 306-18.

220. *Id.* at 334. The Liberals in the military sought the eradication of Peronism

of 1949²²¹ with that of 1853,²²² disbanded the Peronist Supreme Court Justices,²²³ and replaced them with their own appointees.²²⁴ The Liberal regime's dismantling of Peronism was not just directed at the Peronist structure of government,²²⁵ but at the party itself.²²⁶ The military banned Peronist party members who had held office from participating in any form of government.²²⁷ The military outlawed the existence of the Peronist party and any use of its name or symbols.²²⁸ Finally, the military attempted to exterminate the Peronist party through the arrest, murder, and torture of key Peronist leaders.²²⁹ The regime's cohesive element of anti-Peronism, however, evaporated with their failure to define themselves in a positive political light or to achieve economic stability.²³⁰ While this dwindling unity within the Liberal regime resulted in the elections of 1958, the liberals maintained a focused determination to bar the Peronist party

from Argentine government. *Id.* Economically, they advocated a plan of deregulation, limited privatization of state industry, and a reduction in government spending. *Id.* at 335.

221. CONST. ARG. (1949).

222. CONST. ARG.; ROCK, *supra* note 24, at 335. The military wanted to extract all vestiges of Peronism from government, including the Constitution of 1949 that the Peronist dominated Constituent Assembly passed. *Id.*

223. Vera Villalobos, *supra* note 18, at 462.

224. *Id.*

225. ROCK, *supra* note 24, at 334-37; POTASH (1945-1962), *supra* note 212, at 228-30. The military replaced the Constitution enacted by the Peronists with the Constitution of 1853. ROCK, *supra* note 24, at 335. The military Government also replaced the Justices on the Supreme Court appointed by the Peronists with their own appointees. Vera Villalobos, *supra* note 18, at 462.

226. ROCK, *supra* note 24, at 334-37; POTASH (1945-1962), *supra* note 212, at 228-30; ARMY STUDY, *supra* note 30, at 58. The military sought "to discredit all those who had held leadership positions with the Peronist movement and to destroy any possibility for the recreation of a mass movement with its characteristics." POTASH (1945-1962), *supra* note 212, at 228. The military Government seized all the assets of the Peronist party. *Id.* In addition to outlawing the Peronist party, the military intervened in the organization of labor unions aligned with the Peronists. *Id.* at 228.

227. ROCK, *supra* note 24, at 334-37; POTASH (1945-1962), *supra* note 212, at 228-30. The ban on Peronist Government officials from holding a government post only applied to elected officials or those who had been in high appointive posts. *Id.*

228. ROCK, *supra* note 24, at 334-37; POTASH (1945-1962), *supra* note 212, at 228-30. Because the military banned Juan Perón's name, the Argentine populace now referred to him by a slew of euphemisms, of which the one most acceptable to the military was the "fugitive tyrant." ROCK, *supra* note 24, at 334-37.

229. ROCK, *supra* note 24, at 334-37; POTASH (1945-1962), *supra* note 212, at 228-30; ARMY STUDY, *supra* note 30, at 58.

230. ROCK, *supra* note 24, at 306-07.

from the elections.²³¹

6. Semi-Democracy: 1958 - 1966

The first President of this period won an election in which the military forbid Peronist candidates to participate.²³² When the civilian Government once again allowed the Peronists to participate in elections in 1961,²³³ the Peronists won ten of the fourteen contested provinces.²³⁴ The military demanded that the elections be annulled.²³⁵ When the President refused to comply,²³⁶ the military overthrew him.²³⁷ Instead of assuming control of the Government, the military appointed a provisional president²³⁸ and held new presidential and congressional elections.²³⁹ The new elections involved even greater limitations of political participation²⁴⁰ and delivered a president with little public or military support.²⁴¹ The lack of widespread support for the new President²⁴² and his failure to stimulate the economy undermined his administration.²⁴³

7. Military Rule: 1966 - 1973

In 1966, the military overthrew the constitutional Government.²⁴⁴ In the tradition of its military predecessors, the military

231. *Id.*

232. KENNETH L. KARST & KEITH S. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA* 199 (1975) [hereinafter *LAW AND DEVELOPMENT*]. Because the military barred the Peronist party, the Peronists could not field a candidate in the 1958 elections. *Id.* Arturo Frondizi, the winner of the 1958 presidential elections, received two-thirds of the vote. WHITAKER, *supra* note 42, at 158. The Radicals, President Frondizi's party, won two-thirds of the seats in both Chambers of Congress. *Id.*

233. PAGE, *supra* note 208, at 376.

234. ROCK, *supra* note 24, at 342.

235. *LAW AND DEVELOPMENT*, *supra* note 232, at 199.

236. *Id.*

237. *Id.*

238. PAGE, *supra* note 208, at 379. Because the Vice-President of deposed President Frondizi refused to assume the executive office, the President of the Senate became the next president of Argentina. *Id.*

239. ROCK, *supra* note 24, at 342.

240. *Id.* at 344. The military did not permit the Peronists, parties with substantial ties to the Peronists, or the last elected President to participate in the new elections. *Id.*

241. *Id.* The winning candidate received only 25% of the vote. *Id.*

242. *Id.* The military appointed Dr. José María Guido, previously the President of the Senate, as the provisional President of Argentina. *LAW AND DEVELOPMENT*, *supra* note 232, at 200.

243. ROCK, *supra* note 24, at 344.

244. ARMY STUDY, *supra* note 30, at 60. The constitutional Government that the

regime oppressed opposition²⁴⁵ and tinkered with the judiciary.²⁴⁶ The military once again viewed itself as the nation's savior.²⁴⁷ The military's desire to save the nation, however, lacked popular or political support.²⁴⁸ Denied political participation, groups on the left²⁴⁹ turned to terrorism²⁵⁰ as a means of implementing change.²⁵¹ As a counter to these groups, right-wing terrorists²⁵² took the law into their own hands.²⁵³ The emerging

military overthrew in 1966 had little popular or political support. *Id.* Among the factors leading to the decision to stage a *coup d'état* was a slew of Peronist labor action "designed to force the government to allow for Perón's return. Elements in the military felt that stability could be achieved only through the repression of some of those groups." *Id.*

245. ROCK, *supra* note 24, at 348.

246. Vera Villalobos, *supra* note 18, at 462. In 1966, the military replaced all of the Justices of the Supreme Court. *Id.*

247. ROCK, *supra* note 24, at 347. Unlike the previous *de facto* governments, this regime did not label its government as provisional. *Id.* The military saw no need to prepare for the return of civilian government. *Id.*

248. *Id.* at 346-47. The military Government that emerged after the coup "sought to create a modernizing autocracy that would change society from above, with or without popular backing." *Id.* at 436-47. This *de facto* Government was a "hard-line regime prepared to make immediate resort to force to quell all competing institutions and any real or imaginary adversaries." *Id.* at 347.

249. AUTHORITARIAN, *supra* note 201, at 223. Among these groups on the left were organizations associated with Peronist Youth organizations. HODGES, *supra* note 14, at 97-99. The *Montenaros*, an urban guerilla movement, had the strongest ties to the leftist elements of the Peronist party. *Id.* They sought a return to Peronism, a stronger state, and less foreign influence in Argentina. *Id.* A similar group was the Peronist Armed Force ("FAP"). *Id.* The People's Revolutionary Army ("ERP") was independent from the Peronist party and had connections with Trotskyist and Pan-American Revolutionary organizations. *Id.* at 99-100.

250. HODGES, *supra* note 14, at 96; ROCK, *supra* note 24, at 353; *see generally* Roberto P. Guimarães, *Understanding Support for Terrorism Through Survey Data: The Case of Argentina, 1973*, in JUAN PERÓN AND THE RESHAPING OF ARGENTINA 189, 189-202 (Frederick C. Turner & José E. Miguens eds., 1983) (discussing acceptance among Argentines in 1973 of terrorism as means of implementing democratic reform). The most notable example of left-wing terrorism during this period was the kidnapping and execution of the former *de facto* President Pedro Aramburu. HODGES, *supra* note 14, at 96. After killing Pedro Aramburu, the terrorists absconded with his body to accentuate their political statement. Arthur M. Shapiro, *Political Necrophilia: Holding (Perón's) Hands in Argentina*, NEW LEADER, Aug. 10-24, 1987, at 5-8. The terrorists also involved themselves in "kidnaps, bank robberies, occasional assassinations of senior Army or police personnel, and Robin Hood escapades in which multinationals were forced to make charity handouts in the shanty towns in return for abducted executives." ROCK, *supra* note 24, at 353.

251. AUTHORITARIAN, *supra* note 201, at 213-22; ROCK, *supra* note 24, at 352-55.

252. HODGES, *supra* note 14, at 172-75. These terrorists were mostly police and military officers who were acting unofficially. *Id.*

253. ROCK, *supra* note 24, at 355; AUTHORITARIAN, *supra* note 201, at 223; HODGES, *supra* note 14, at 172-75. Terrorist acts included destruction of homes, bombings, assassinations, and disappearances. HODGES, *supra* note 14, at 172-75.

political radicalism and extremism of this period alerted the military regime of a need for national reconciliation.²⁵⁴ The attempted reconciliation included open elections in which the Peronists could participate.²⁵⁵

8. The Return of Perón: 1973 - 1976

The Peronists decisively won the open presidential and congressional elections of 1973.²⁵⁶ While the Peronists were united in their support for Juan Perón and their opposition to the military government,²⁵⁷ they were sharply divided as to what to do once in power.²⁵⁸ Whatever cohesion existed within the Peronist party dissipated with the death of Juan Perón.²⁵⁹ After Juan Perón's death, political violence on both the right and the left increased dramatically²⁶⁰ and inflation was severe.²⁶¹ The new Argentine President²⁶² was politically impotent.²⁶³ The military

254. ROCK, *supra* note 24, at 356-57.

255. *Id.*; PAGE, *supra* note 208, at 420.

256. PAGE, *supra* note 208, at 449. The Peronist presidential candidate won nearly 50% of the vote, with the closest candidate receiving about 22%. *Id.* The Peronists won over half of the seats in both chambers of Congress. *Id.* The Peronists won all but one of the provincial governorships. *Id.* As a show of allegiance to Juan Perón and in response to the demands of the Peronists, the Peronist presidential candidate who won the elections of 1973 resigned so that new elections could be held in which Juan Perón would participate. *Id.* at 470. Juan Perón won the new election in 1973 with 60% of the vote. *Id.* at 474. His third wife, Isabel Perón, was his Vice-President. *Id.* at 472.

257. ROCK, *supra* note 24, at 362.

258. *Id.*

259. *Id.* The division within the Peronist party ranged from those on the extreme left, including many who supported both the ERP and FAP, to those on the extreme right, including those involved in right-wing death squads and terrorist organizations. *Id.* at 360-62. The two extremes openly clashed at a public display of support of over half a million people at Buenos Aires' international airport on the day of Juan Perón' return to Argentina for the first time since the military coup that overthrew him in 1955. *Id.* at 360. Over 200 people, the vast majority of whom was on the left, died in this armed clash between the two extremes. HODGES, *supra* note 14, at 172.

260. PAGE, *supra* note 208, at 496-97; ROCK, *supra* note 24, at 363-64; AUTHORITARIAN, *supra* note 201, at 223-24. The most notorious right-wing terrorist organization was Lopez Rega's Argentine Anti-Communist Alliance ("Triple A"). HODGES, *supra* note 14, at 173-76. In the first seven months of 1975, the Triple A assassinated 450 people and caused the disappearance of another 2000. *Id.* at 175. The left-wing ERP terrorists attacked army barracks, kidnapped people for ransom money, and occupied a "liberated territory" in the Province of Tucumán. *Id.* at 101-02. Leftist terrorists caused over 600 deaths between 1973 and 1976. *Id.* at 107.

261. ARMY STUDY, *supra* note 30, at 66.

262. PAGE, *supra* note 208, at 495. Isabel Perón succeeded Juan Perón as President of Argentina. *Id.*

263. *See id.* at 495-99 (accounting President Isabel Perón's ineptitude, lack of polit-

waited until these factors eliminated any remaining popular support for the civilian government before overthrowing it in 1976.²⁶⁴

9. *El Proceso*: 1976 - 1983

The military began its new rule, known as *el proceso*,²⁶⁵ after it deposed the constitutional Government.²⁶⁶ Once again, the military suspended operation of the Constitution²⁶⁷ and tampered with the judiciary and the Supreme Court.²⁶⁸ The junta silenced opposition in the media, judiciary, and political arena.²⁶⁹ This time, however, the military's repression involved indiscriminate violations of human rights against anyone perceived as a mild threat.²⁷⁰ The Junta supervised this repression,

ical experience and leadership, and dependence on bizarre advisor and founder of Triple A).

264. *Id.* at 499; ROCK, *supra* note 24, at 366.

265. Kartheiser, *supra* note 31, at 248. The name *el proceso* derives from the *de facto* statute that replaced the legislature, executive, and judiciary with a military junta. *Id.* The statute is the *Acta para el Proceso de Reorganización Nacional* [Act for the Process of National Reorganization], 36-B A.D.L.A. 1019 (1976). During *el proceso*, there was more than one military junta that controlled the Government. Stotzky & Nino, *supra* note 16, at 3.

266. PAGE, *supra* note 208, at 499; ROCK, *supra* note 24, at 366.

267. *Acta para el Proceso de Reorganización Nacional*, 36-B A.D.L.A. 1019 (1976). The military Junta granted itself a variety of powers, including the power to stop all federal and provincial orders, politically intervene in all of the provinces, dissolve Congress and all provincial legislatures, suspend all political parties and activities, and remove Supreme Court Justices and lower court judges. *Id.*

268. *Id.* art. 5, 36-B A.D.L.A. at 1019. Article 5 of the *Acta para el Proceso de Reorganización Nacional* states that the military junta has the power to dissolve the Supreme Court Justices and all judges in lower courts. *Id.* Not only did the military junta replace the Justices of the constitutionally appointed Supreme Court with ones who would approve of the junta's actions, but they replaced nearly a third of all the judges in Buenos Aires and over 40% of those elsewhere in the country. VERBITSKY, *supra* note 119, at 19.

269. NUNCA MÁS, *supra* note 177, 391-92. A committee of the constitutional government of 1984 reported that during *el proceso* "the right to life, security of person and individual liberty had little to do with the decisions of the judges; the sole arbiters of these decisions were the members of the State's repressive apparatus." *Id.* at 392. The military had removed all of the sitting Supreme Court Justices and 24 federal judges within a couple of weeks of the coup. *Argentine Judiciary*, *supra* note 141, at 315. By 1978, "a total of twenty-three members of the [Argentine] bar had been murdered, one hundred nine detained, and forty-one disappeared." *Id.* at 316. Judges who were lenient to those detainee who actually received a trial received death threats. *Id.* The only judge during *el proceso* to declare the military government as illegal fled the country days after issuing his opinion. Frederick E. Snyder, *State of Siege and Rule of Law in Argentina: The Politics and Rhetoric of Vindication*, 15 U. MIAMI INTER-AM. L. REV. 503, 517 (1984).

270. NUNCA MÁS, *supra* note 177, at 10. The official estimate of those who are still disappeared, kidnapped by the military and never seen again, is around 9000 although

believing that it was necessary and proper to achieve its objectives.²⁷¹

A faltering economy,²⁷² military rivalries,²⁷³ and the political aftermath of the Falkland/Malvinas Islands war²⁷⁴ led the military to call for a return to a constitutional democracy in 1983.²⁷⁵ While the Junta tried to establish a more institutional role for itself within the new constitutional Government,²⁷⁶ the military

many more were detained and tortured. *Id.*; see generally *id.* at 9-282 (documenting and reporting on methods and extent of human rights violations).

271. AUTHORITARIAN, *supra* note 201, at 225. The military junta held that "[i]n the war on subversion, it would be no longer possible to apply 'judicial norms and standards.'" *Id.* at 225. In an attempt to validate their actions, the junta described the human rights violations as inevitable occurrences in putting an end to terrorist violence. NUNCA MÁS, *supra* note 177, at 8. The junta tried to justify their refusal to release information about those detained or disappeared by declaring, "[i]n this type of struggle the secrecy with which our special operations must be conducted means that we cannot divulge whom we have captured and whom we want to capture; everything must be enveloped in a cloud of secrecy." *Id.*

272. MARTIN E. ANDERSEN, DOSSIER SECRETO: THE MYTH OF ARGENTINA'S "DIRTY WAR" 298-99 (1993); see generally Waisman, *supra* note 161, at 97 (listing worsening economic indicators during *el proceso*). During *el proceso*, Argentina's foreign debt rose from eight billion in 1976 to 40 billion in 1983. HODGES, *supra* note 14, at 7. Increasing unemployment, decreasing consumer purchasing power, corruption, and capital flight ailed the Argentine economy in the early 1980's. ANDERSEN, *supra*, at 298-99. By the end of *el proceso*, inflation was at an annual rate of 600%. William C. Smith, *Hyperinflation, Macroeconomic Instability, and Neoliberal Restructuring in Democratic Argentina*, in NEW DEMOCRACY, *supra* note 175, at 20, 26. The military Government's deficit in the public sector was more than 20% of gross national product. Peralta-Ramos, *supra* note 176, at 46-47.

273. ANDERSEN, *supra* note 272, at 223-24. Each of Argentina's three armed forces, the Army, the Navy, and the Air Force, wanted to play a larger role in the junta. *Id.* In addition to division by armed forces, ideological gulfs also separated those in the military, ranging from one faction that advocated greater opposition participation to another that sought renewed political repression. ARMY STUDY, *supra* note 30, at 69.

274. ANDERSEN, *supra* note 272, at 299-301. The Falkland/Malvinas Islands are a chain of islands in the South Atlantic. *Id.* While Argentina and the United Kingdom have disputed ownership of the islands for over a century and a half, the United Kingdom possessed them during this entire dispute, except for a few weeks during the armed conflict. *Id.* at 299. In April 1982, Argentina invaded the islands and took control of them. *Id.* The United Kingdom fought to get them back, and the ensuing war lasted a little over two months, resulting in the loss of 1000 Argentine and 250 British lives and ending with the the British forces' victory over the Argentine forces. *Id.* The Argentine military's false reports of early victories and lack of preparation for an armed conflict that they initiated created deeper public resentment for the military junta. *Id.*

275. Epstein, *supra* note 175, at 13; David Pion-Berlin & Ernesto Lopez, *A House Divided: Crisis, Cleavage, and Conflict in the Argentine Army*, in NEW DEMOCRACY, *supra* note 175, at 63, 69-73; Nino, *supra* note 176, at 130.

276. ROCK, *supra* note 24, at 384-85. The military sought to establish itself as an independent power within the Constitution. *Id.* Furthermore, it sought constitutional guarantees not to be prosecuted for human rights violations. *Id.*

did not have sufficient bargaining power to obtain it.²⁷⁷ The military allowed for democratic elections in 1983.²⁷⁸ Although the Peronists won the Senate in the 1983 elections, the public essentially rejected both the military and the Peronists²⁷⁹ by electing Radical party candidate Raúl Alfonsín²⁸⁰ to the presidency and a Radical party majority to the Chamber of Deputies.²⁸¹

10. Restoration of Democracy: 1983 - Present

President Alfonsín's administration set about to create strong democratic institutions and government by consensus.²⁸² Alfonsín viewed the new Government not as the continuation of a democracy that authoritarian rule had temporarily suspended, but rather as the creation of a new democracy whose institutional and historical ancestors had ceased to exist.²⁸³ The Government sought and obtained convictions against members of the military on the grounds of human rights violations.²⁸⁴ The Government argued against the constitutionality of the military's

277. *Id.*

278. *Id.* at 389.

279. *Corporatism*, *supra* note 176, at 130-131. The Peronist presidential candidate declared that the military junta's law providing a self-amnesty for all human rights abuses committed during their reign, was a valid law. *Id.* The Radicals claimed that there was a secret pact between the military and the Peronists in which the military would back the Peronists in return for leniency toward the military's human rights abuses. ROCK, *supra*, note 24, at 388-89.

280. ANDERSEN, *supra* note 272, at 305-06. Raúl Alfonsín was the first non-Peronist elected President in open elections in over fifty years. *Id.* He received 52% of the vote as opposed to the nearly 40% by the Peronist candidate. *Id.*

281. ARMY STUDY, *supra* note 30, at 251; ROCK, *supra* note 24, at 388-89.

282. Alfonsín, *supra* note 2, at 41-43.

283. *Id.* at 43; Marcelo Cavarozzi & María Grossi, *Argentine Parties under Alfonsín: From Democratic Reinvention to Political Decline and Hyperinflation*, in *NEW DEMOCRACY*, *supra* note 175, at 173, 174. Referring to his government, Alfonsín wrote:

We begin with the conviction that only through institutionalization of democratic procedures, dialogue, and participation would it be possible to lay the groundwork to establish the sovereignty of law. The task of reinstating the rule of law in Argentina demanded a profound transformation. We repeatedly emphasized that Argentina's transition to democracy should not be regarded as a restorative process, but rather as a process of creation—of new institutions, new procedures, new habits, and new ways to cohabit peacefully. We were faced not with reconstructing an already functioning system, temporarily disbanded by authoritarianism, but with the need to establish new foundations so that an authentic democratic institution could emerge.

Alfonsín, *supra* note 2, at 43.

284. Henry Dahl & Alejandro M. Garro, *Introductory Note to Argentina: National Appeals Court (Criminal Division) Judgment on Human Rights Violations by Former Military Leaders*, 26 *I.L.M.* 317, 319, 327 (1987).

self amnesty for human rights violations during *el proceso*.²⁸⁵ The judiciary gained independence from any one party because appointments of federal judges and Supreme Court Justices only occurred after President Alfonsín's compromises over candidates with the Peronist dominated Senate.²⁸⁶

Increasing concern for economic stability rather than the creation of a stable democracy brought about Peronist victory, at the expense the Radicals, in the May 1989 elections.²⁸⁷ During the Alfonsín administration, Argentina experienced hyper-inflation.²⁸⁸ The hyper-inflation that occurred during the Alfonsín administration led to the victory of the Peronist candidate, Carlos Menem,²⁸⁹ in the 1989 presidential elections.²⁹⁰ To appease a growing public restlessness, Alfonsín transferred the presidency to Menem five months before the constitutionally registered date.²⁹¹

While President Menem has revitalized the economy,²⁹² there is concern that this has come at the health of democratic institutions.²⁹³ President Menem and the Peronist Congress that

285. *Id.*

286. Stotzky & Nino, *supra* note 16, at 12; Alfonsín, *supra* note 2, at 46.

287. Smith, *supra* note 272, at 39-41. The Peronist presidential candidate beat the Radical candidate by a margin of 51.7% to 39.2%. *Id.* The February before the May election, the Argentine Central Bank's reserves were so low that it could no longer afford to support the Argentine currency. *Id.* The economy collapsed as the Argentine currency became devalued. *Id.* Monthly inflation increased from 12.3% in February, to 24.9% in March, to 54.3% in April, and to 98.2% in May. *Id.* at 38.

288. *Id.* at 41. Inflation rose from a monthly rate of 13.2% in February of 1989 to a monthly rate of 98.2% in May of the same year. *Id.* Inflation in the months of June and July in 1989 was respectively 114% and 196%. George de Lama, *Hyperinflation Costing Argentines Their Dreams, Their Futures*, CHI. TRIB., Sep. 3, 1989, at C1. Inflation for the year neared one million percent. *Id.* See Smith, *supra* note 272, at 39-41 (describing hyperinflation during Alfonsín administration).

289. Eugene Robinson, *Argentina's Menem Sees Hard Times: Peronist Takes Office with Call for Work*, WASH. POST, July 9, 1989, at A19. Carlos Saul Menem, a Peronist, became President of Argentina in 1989. *Id.* He was the first elected president in 61 years to succeed another elected president. *Id.*

290. Smith, *supra* note 272, at 39-41.

291. *Id.* at 41.

292. William D. Rogers & Paolo Wright-Carozza, LA CORTE SUPREMA DE JUSTICIA Y LA SEGURIDAD JURÍDICA 141 (1995) (calling Menem Administration's achievements "nothing short of an economic miracle"). In 1995, inflation in Argentina was 2% for the year. *Latin Realities*, ECONOMIST, Mar. 30, 1996, at 19. Per anum growth of gross national product reached as high as 7% under President Menem. *Id.* Between 1991 and 1993, Argentina's economy grew by 25.5%. Stephen Fidler & John Barham, *Argentine Miracle Needs More Foreign Capital*, FIN. TIMES, June 22, 1994, at 8.

293. John Barham, *Menem Gets His Way on Route to a Second Term: John Barham on a*

simultaneously won election in 1989 increased the number of Supreme Court Justices from five to nine.²⁹⁴ The new Justices were all politically allied with the President, raising about the Supreme Court's independence.²⁹⁵ Menem's government also removed the Public Minister and other criminal and economic investigators, despite their traditional status as occupying tenured posts, subject only to congressional dismissal.²⁹⁶ The president's use of legislative decrees increased dramatically without establishing boundaries as to when the executive can issue such decrees.²⁹⁷ President Menem politically intervened in four provinces, giving him the power to remove the elected governors of those provinces and replace them with new ones.²⁹⁸ The Peronists pushed for the passage of laws aimed at having a chilling effect on the media.²⁹⁹ Additionally, widespread reports of cor-

Step Forward for Argentina's President and Misgivings About its Democracy, FIN. TIMES, Dec. 14, 1993, at 7 (stating "although Mr. Alfonsín restored democracy and Mr. Menem brought economic stability, the latter is not the man to rebuild Argentina's institutions"); Stotzky & Nino, *supra* note 16, at 8-9; Garro, *supra* note 15, at 8 (commenting, "the promising economic take-off led by [President Menem] has been clouded by increasing . . . mistrust of the administration's genuine commitment to the rule of law").

294. Stotzky & Nino, *supra* note 16, at 8; *see generally* VERBITSKY, *supra* note 119, at 47-52 (detailing expansion of Supreme Court).

295. *Constitutional Reform*, *supra* note 83, at 639 (1993) (mentioning "doubts over the impartiality of the Supreme Court" resulting from "Menem government's court-packing"); Alfonsín, *supra* note 2, at 49; John Barham, *Carlos Menem Wins Second Shot: But New Constitution Could Backfire Against the President*, FIN. TIMES, Sep. 8, 1994, at 5; Peter Ford, *Menem Uses Court to Sell State Airline*, INDEPENDENT, July 18, 1990, at 13; *see generally* VERBITSKY, *supra* note 119, at 52-69 (outlining relationship between President Menem and new Justices).

296. Stotzky & Nino, *supra* note 16, at 9; Alfonsín, *supra* note 2, at 51-52; *Constitutional Reform*, *supra* note 83, at 641; VERBITSKY, *supra* note 119, at 79. *See generally* VERBITSKY, *supra* note 119, at 79-135 (detailing President Menem's tightening of control over state's investigative powers).

297. VERBITSKY, *supra* note 119, at 164-71; *see supra* notes 119-20 and accompanying text (describing use of executive decree to legislate in exceptional circumstances). Prior to President Menem, constitutional Argentina presidents had only used executive decrees 30 times to legislate. VERBITSKY, *supra* note 119, at 164. President Menem issued 244 legislative decrees in less than two and a half years from his date of inauguration. NEGRETTO, *supra* note 100, at 107. President Menem has issued decrees of urgency and necessity to provide Bolivia with cement, to secure a contract with a foreign company to produce new identification documents, and, later, to void that same contract. VERBITSKY, *supra* note 119, at 165.

298. Garro, *supra* note 15, at 88; *see supra* note 121 and accompanying text (discussing presidential power to intervene in provinces). One of these provinces, Corrientes, was the only province never to have had a Peronist government. *Id.* The previous administration never intervened in a province. *Id.*

299. Editorial, *Argentina's Pressured Press*, N.Y. TIMES, Feb. 22, 1995, at § 1, at 18. Among the proposed laws were ones that would require all newspapers to carry

ruption at all levels of government circulated.³⁰⁰

C. Modern Judicial Treatment of De Facto Laws

A *de facto* government rules by force, rather than in accordance with a constitutional system.³⁰¹ *De facto* governments use force to usurp governmental functions from *de jure* governments, the constitutionally appointed authorities.³⁰² A *de facto* government's rules, decrees, and regulations are *de facto* laws.³⁰³ Argentina's treatment of *de facto* laws this century has included treating all *de facto* laws as valid, recognizing *de facto* laws only in particular situations, and requiring express or tacit congressional treatment of *de facto* laws before treating them as valid.³⁰⁴

1. Limited Power of *De Facto* Governments: 1930 - 1947

The question of the legitimacy of *de facto* governments was dormant from *Martinez y Otero*³⁰⁵ in the 1860's until the 1930's, when the Court reaffirmed that *de facto* governments could be legitimate³⁰⁶ and that their laws were valid until the return of constitutional government.³⁰⁷ Shortly after General Uriburu's coup in 1930,³⁰⁸ the Supreme Court issued an *acordada*,³⁰⁹ a res-

US\$500,000 of libel insurance and that could impose a six-year prison term and US\$200,000 fine for libel. Calvin Sims, *Press Protests 'Gag' Bills In Argentina*, N.Y. TIMES, Feb. 19, 1995, § 1, at 15. See VERBITSKY, *supra* note 119, at 439-44 (describing Menem Administration's strained relationship with press).

300. Garro, *supra* note 15, at 8; Katherine Ellison, *Argentine President Battles Family Scandals: Analysts Say Menem Weakened by Disclosures*, DALLAS MORNING NEWS, Dec. 24, 1995, at A15; Matthew Doman, *Cavallo Lashes 'Corrupt' Allies*, FIN. TIMES, Aug. 25, 1995, at 4; Calvin Sims, *Menem Complains, But Press Has Turned President to 'Star'*, N.Y. TIMES, May 24, 1995, § 1, at 5; see generally VERBITSKY, *supra* note 119, at 325-91 (documenting recent scandals concerning Menem Administration).

301. Irizarry y Puente, *supra* note 4, at 25.

302. *Id.*

303. Alfonsín, *supra* note 2, at 50.

304. Nino, *supra* note 17, at 317-20 (discussing Court's treatment of *de facto* laws from mid-nineteenth century to present); Vera Villalobos, *supra* note 18, at 462-67 (detailing Court's standards for treating *de facto* laws from 1930 to present).

305. *Martinez y Otero*, 2 Fallos at 142-43.

306. *1930 Acordada*, 158 Fallos at 291.

307. *Administración de Impuestos Internos c. Malmonge Nebreda*, 169 Fallos 309, 319-20 (1933).

308. See *supra* notes 182-89 and accompanying text (describing General Uriburu's coup).

309. *1930 Acordada*, 158 Fallos at 291. While the Argentine Supreme Court is free to issue *acordadas*, resolutions and statements on points of the law not under litigation before the Court, the *acordadas* have no binding legal effect. Irizarry y Puente, *supra*

olution, stating that the military regime legitimately ran the country because it had the power and will to secure national peace and order,³¹⁰ vowed to maintain the supremacy of the Constitution and national law,³¹¹ and was able to protect life, liberty, and property.³¹² The resolution, however, recognized the legitimacy of the military Government and not the long term validity of its legislation.³¹³

From 1933³¹⁴ to 1947,³¹⁵ the Court adopted the theory of *caducidad*.³¹⁶ This theory posits that while a *de facto* law may have some legitimacy arising from urgency and necessity, the return of democratic institutions strips it of that legitimacy.³¹⁷ In *Malmonge Nebraska*,³¹⁸ the Court found that Uriburu's *de facto* government temporarily replaced only the executive and, therefore, had neither judicial nor legislative power.³¹⁹ Only under situa-

note 4, at 33-34. Article 100 of the Argentine Constitution limits the jurisdiction of the Supreme Court to judicial cases, controversies and suits between parties. CONST. ARG. art. 100. Because an *acordada* is a statement on a topic without adversarial parties, the only effect is to put a non-binding, albeit respected, "constitutional seal" of approval upon [the *de facto* government] through a declaration outside of the scope of a judicial proceeding." Irizarry y Puente, *supra* note 4, at 33-34.

310. *1930 Acordada*, 158 Fallos at 290. The Court affirmed the legitimacy of the *de facto* Government because it had the necessary force to "aségurar la paz y el orden de la Nación, y por consiguiente para proteger la libertad, la vida y la propiedad de las personas, y ha declarado, además, en actos públicos, que mantendrá la supremacía de la Constitución y de las leyes del país, en el ejercicio del poder." *Id.* ["assure the peace and order of the Nation, and, consequently, to protect the life, liberty, and property of the people, and, furthermore, the *de facto* government has declared in public acts that they will maintain the supremacy of the Constitution and of the laws of the country in the exercise of power."] (translation by Note author).

311. *Id.*

312. *Id.*

313. *Id.*

314. *Nebreda*, 169 Fallos at 320 (establishing theory of *caducidad*).

315. *Arlandini*, 208 Fallos at 186 (overruling theory of *caducidad*).

316. Corti, *supra* note 18, at 971. The theory of *caducidad* posits that *de facto* legislation is legitimate during the exceptional circumstances of a *de facto* government, but, with the return of constitutional rule, this legitimacy ceases. *Id.*

317. *Nebreda*, 169 Fallos at 320.

318. *Id.*

319. *Id.* at 319-20. The Court stated:

[H]ay que convenir en que el Presidente de la Nación que asumió la dirección del país por la fuerza de las armas y que se llamó provisional, tuvo los mismos poderes que el Presidente legal, consiguados y enumerados en . . . la Constitución Nacional.

Su misión fue gobernar el país, poniendo en acción sus instituciones de acuerdo con las leyes existentes, durante el tiempo necesario para volver a la normalidad.

....

tions of vital urgency could the regime enact laws,³²⁰ and, even then, these laws ceased to have effect immediately upon the return of democracy, unless Congress ratified them.³²¹

From 1945 to 1947, the Court modified its approach to the legislative powers of *de facto* regimes without overruling the theory of *caducidad*.³²² It recognized that a *de facto* government needs certain powers to fulfill properly its responsibilities³²³ and it can exercise legitimately these powers so long as it does so with respect for constitutional rights and guarantees.³²⁴ These legislative powers, however, were not without limitations.³²⁵ Under the theory of *caducidad*, the Court held that a *de facto* government could not pass laws on criminal matters,³²⁶ interfere with the judiciary,³²⁷ or amend, suspend, or repeal laws enacted within a constitutional framework.³²⁸

2. Full Plenary Powers: 1947 - 1973

In 1947, the Argentine Supreme Court gave full plenary

De ahí se desprende que ese gobierno tuvo las facultades ejecutivas, mas no las legislativas y judiciales.

Id.

[[I]t must be granted that the President of the Nation who assumed control of the country by force of arms and labeled himself provisional, had all of the same powers as the legal President, consigned and enumerated in . . . the National Constitution.

His mission was to govern the country, putting into action its institutions in agreement with existing laws, during the time necessary to return to normality.

. . . .

It follows from this that this Government had executive abilities, but not legislative or judicial.] (translation by Note author).

320. *Id.*

321. *Municipalidad de la Ciudad de Buenos Aires v. Mayer*, 201 Fallos 249, 270 (1945).

322. *Irizarry y Puente*, *supra* note 4, at 41-43.

323. *Mayer*, 201 Fallos at 272.

324. *Ciarrapico v. Marino*, [1946-I] J.A. 615, 617 (1946).

325. *Anders*, [1946-I] J.A. 740, 741-42 (1945) (holding *de facto* Government could not legislate in criminal and penal matters); *Acordada*, [1945-III] J.A. 806, 807 (1945) (stating that *de facto* Government could not interfere with judiciary); *Parada Lopez*, [1945-III] J.A. 44, 45 (1945) (holding *de facto* laws could not repeal existing laws).

326. *Anders*, [1946-I] J.A. at 741.

327. *Acordada*, [1945] J.A. at 807.

328. *Parada Lopez*, [1945-III] J.A. at 44 (1945); *Compania de Dock Sud de Buenos Aires*, [1946-I] J.A. 89, 90 (1946) (holding *de facto* Government could not repeal existing law).

power³²⁹ to *de facto* governments.³³⁰ The Court lifted all of the earlier limitations on a *de facto* government's legislative powers, save that *de facto* governments could not pass unconstitutional laws.³³¹ *De facto* laws became equal to those enacted by Congress.³³² *De facto* laws had the same legislative scope as Congress' laws, they could only be repealed by future legislation, and rights granted under them vested in the grantees.³³³ Both the constitutionally appointed 1958 Supreme Court and the Supreme Court appointed by the military junta of 1966 reaffirmed this doctrine.³³⁴

3. 'In Extremis' and 'Real Effect': 1973 - 1976

With the return of democracy in 1973, the Court abandoned the *de facto* doctrine.³³⁵ While in *Banco Central*³³⁶ the Court denied that *de facto* legislation had a legitimate origin, the Court conceded that it would treat *de facto* laws that had had a real effect³³⁷ as if they were legitimate.³³⁸ The Court added that

329. Irizarry y Puente, *supra* note 4, at 44-45. Full plenary powers entail all the powers that the Constitution vests in the legislature. *Id.*

330. *Arlandini*, 208 Fallos at 184. The Peronist majority in Congress purged the Court prior to this decision. Vera Villalobos, *supra* note 18, at 463. The Peronist replacements significantly altered the ideology of the Court. PAGE, *supra* note 208, at 164-67.

331. Vera Villalobos, *supra* note 18, at 463.

332. Corti, *supra* note 18, at 971-72. In a one page opinion in *Ziella*, the Court held that *de facto* laws "son válidos por razón de su origen y, puesto que tienen el valor de leyes, subsisten aunque no hayan sido ratificados por el Congreso mientras no sean derogados de la única manera que éstas pueden serlo, es decir, por otras leyes." *Ziella v. Smiriglio Hnos.*, 209 Fallos 25, 27 (1947) ["are valid by reason of their origin and, given that they have the status of laws, exist, although they have not been ratified by Congress, as long as they are not repealed by the only method that they can be, that is, by other laws."] (translation by Note author).

333. *Id.*

334. *Amoroso Copello v. Amoroso Copello*, 243 Fallos 265, 270-71 (1959); *Casino*, 270 Fallos 484, 485 (1968).

335. Vera Villalobos, *supra* note 18, at 463.

336. *Banco Central de la República Argentina v. S.C.A. International Electric*, 291 Fallos 55, 61-62 (1975).

337. Corti, *supra* note 18, at 971-72. A law that had a "real effect" is a law that was in practice during a *de facto* government and, consequently, had the effect of a *de jure* law for a period of time. *Id.* In *Banco Central*, the Court assumed that the public depended upon any law that was already in practice. *Banco Central*, 291 Fallos at 62.

338. *Banco Central*, 291 Fallos at 62. In *Banco Central*, the Court stated:

[L]as normas de substancia legislativa que un gobierno de facto dicta a título de leyes carecen en su origen de legalidad, pero pueden legitimarse en tanto que, dictadas en ejercicio del poder legislativo, hayan tenido real efectividad,

Congress could repeal such laws, but it could not nullify them.³³⁹ The Court treated laws that were *in extremis*³⁴⁰ differently than those that had a real effect.³⁴¹ In *Pedro Lopez*,³⁴² the Court held that *in extremis* laws were based in illegitimacy and did not have the benefit of public dependence to validate their treatment as *de jure* laws.³⁴³

4. Express or Implicit Ratification: 1984 - 1990

In *Aramayo*,³⁴⁴ the Court reversed its treatment of *de facto* laws by making their validity dependent upon Congress.³⁴⁵ The Court held that only a constitutional legislature's ratification could legitimize *de facto* laws.³⁴⁶ Likewise, Congress could expressly nullify any such law *ab initio*³⁴⁷ if they had not previously ratified it.³⁴⁸ To find a balance between democratic principles and the security of public expectations,³⁴⁹ the Court allowed rati-

en cuyo caso continúan en vigor mientras no sean derogadas por el Congreso en funciones constitucionales.

Id. [[T]he rules of a legislative nature that a *de facto* government gives the title of laws, are lacking in their legal origin, but they can become legitimate as long as, decreed in the exercise of legislative power, they have obtained a real effect, in which case they continue to be enforced as long as they are not constitutionally repealed by Congress.] (translation by Note author).

339. S.R.L. Editora Popular Americana v. Gobierno Nacional, 289 Fallos 177, 179-80 (1974).

340. Vera Villalobos, *supra* note 18, at 463. Laws that are *in extremis* are laws that *de facto* governments enacted, but were to come into effect during the constitutional government. *Id.*

341. *Id.*

342. *Pedro Lopez*, 293 Fallos 417, 419 (1975).

343. *Id.* The Court states that to accept laws that are *in extremis* would be akin to "aceptar que un gobierno de facto puede sustituir al Poder Legislativo que la Constitución Nacional establece, . . . lo que resulta desde todo punto de vista inadmisibile." *Id.* ["accepting that a *de facto* government could take the place of the Legislative Branch that the national Constitution establishes, . . . which is, from all points of view, illegitimate."] (translation by Note author).

344. *Aramayo*, 306 Fallos at 73-74.

345. *Aramayo*, 306 Fallos at 74; see *Soria contra Dir. Nac. de Vialidad*, 307 Fallos 338, 343 (1985); *Dufourq*, 306 Fallos 175, 177 (1984).

346. *Aramayo*, 306 Fallos at 74; see *Soria*, 307 Fallos at 343; *Dufourq*, 306 Fallos at 177.

347. BLACK, *supra* note 7, at 6. *Ab initio* means "[f]rom the beginning; from the first act; from the inception." *Id.* A law that is void *ab initio* is law that never had any validity. *Id.*

348. *Aramayo*, 306 Fallos at 74; see *Soria*, 307 Fallos at 343; *Dufourq*, 306 Fallos at 177.

349. Vera Villalobos, *supra* note 18, at 463.

fication to be either express or implicit.³⁵⁰

5. *De Facto* Doctrine Restored

After the expansion of the Argentine Supreme Court in 1990,³⁵¹ the Court in *Godoy*³⁵² advocated the restoration of the *de facto* doctrine, the treatment of *de facto* laws as if they were legislation that Congress itself had passed.³⁵³ The Court restored the *de facto* doctrine in *Gaggiomo*.³⁵⁴ Consequently, Congress could only repeal these laws, regardless of their dubious origin, and could not strip anyone of a right that had already vested under it.³⁵⁵ A minority on the Court still espoused maintaining the previous standard, as expressed in *Aramayo*,³⁵⁶ of validity by congressional ratification only.³⁵⁷

350. *Soria*, 307 Fallos at 343; *Dufourq*, 306 Fallos at 177; *Aramayo*, 306 Fallos at 74.

351. See *supra* notes 294-95 and accompanying text (explaining expansion of Supreme Court).

352. *Godoy*, [1991-II] J.A. at 458.

353. *Id.*; *Gaggiomo*, [1992-D] L.L. at 483.

354. *Gaggiomo*, [1992-D] L.L. at 484. The Court held that:

[C]omo fue especialmente destacado en el caso "Godoy", los actos de los gobernantes de facto son válidos desde su origen, o bien deben considerarse legitimados por su efectividad, de forma que la ley dictada por un gobierno "de facto", "respecto con su validez", debe ser juzgada como si hubiese emanado del propio Congreso o de la respectiva Legislatura.

Id. [[A]s was especially outlined in the case of *Godoy*, the acts of *de facto* governors are valid from their origin, or, better yet, should be considered legitimate for their effect, in such a form that a law dictated by a *de facto* government, "with respect to its validity," should be judged as if it had come from Congress itself or the respective legislature.] (translation by Note author). In *Pignatoro*, the Court stated that, in *Godoy*, "la validez o legitimidad de los actos de los gobernantes de facto ha sido expresamente reconocida por esta Corte." ["the validity, or legitimacy, of the acts of *de facto* governments have been expressly recognized by this Court."] (translation by Note author). *Pignatoro*, [1992-D] L.L. 82, 88 (1991).

355. *Id.* at 485. The Court held that a provincial Attorney General, who the military government granted a privileged pension twelve days before the restoration of democracy and whose pension the constitutional provincial legislature expressly rejected within two months of returning to office, had a right to that pension because within those two months his right to the pension had vested. *Id.*

356. *Aramayo*, 306 Fallos at 73-74; see *supra* notes 344-50 and accompanying text (outlining *Aramayo* standard requiring express or tacit congressional ratification of *de facto* laws).

357. *Godoy*, [1991-II] J.A. at 458 (Fayt, J., dissenting); *Gaggiomo*, [1992-D] L.L. at 485, (Belluscio, J., dissenting); *Gaggiomo*, [1992-D] L.L. at 486 (Fayt, J., dissenting); *Gaggiomo*, [1992-D] L.L. at 488 (Petracchi, J. dissenting); see *supra* notes 344-50 and accompanying text (describing Court's adoption of *Aramayo* standard).

D. *Constitutional Reform of 1994*

The divergent interests of the Peronists and the Radical party combined to generate constitutional reform in 1994.³⁵⁸ One of the reforms expressly prohibits the use of force to suspend the Constitution and instantly nullifies the validity of all acts towards that end.³⁵⁹ The Radical party wanted the reforms to provide a larger voice for opposition parties so that the majority party would have difficulty in controlling all branches of government.³⁶⁰ The Constitution now ensures that the party receiving the second largest amount of votes in a province will send a Senator to Congress.³⁶¹ The constitutional reform made the Public Ministry a fourth independent branch of government.³⁶² The Peronists were concerned with changing election laws and allowing the President to serve two consecutive terms.³⁶³ As a consequence of this change,³⁶⁴ Carlos Menem, a Peronist, won re-election to a second presidency.³⁶⁵

II *DE FACTO LAWS: ARE THEY LEGITIMATE?*

In 1991, the Argentine Supreme Court reversed its position on *de facto* laws and returned to the standard that treats *de facto* laws as legitimate equals of *de jure* laws.³⁶⁶ Throughout Argen-

358. Gisbert H. Flanz, *Introductory Notes to CONSTITUTIONS*, *supra* note 8, at iii, v. In April 1994, the Constitutional Constituent Assembly met to draft constitutional changes and ultimately enacted those changes in August 1994. *Id.*

359. CONST. ARG. art. 36. Article 36 states that the Constitution "remains in power even when its observance is interrupted by acts of force against the institutional order and the democratic system. These acts are irredeemably null." *Id.*

360. Barham, *supra* note 294, at 5. Among those measures added to give more power to opposition parties are the establishment of the Attorney General as an independent branch of government, the addition of one senator from each province who must be from an opposition party, and the assignment of more control to the legislature on matters of judiciary and investigative matters. *Id.*

361. CONST. ARG. art. 54. Each province sends three senators to Congress, two of whom belong to "the political party obtaining the greatest number of votes and the rest, to the political party receiving the next largest number of votes." *Id.*

362. *Id.* art. 120.

363. Barham, *supra* note 295, at 5; Stephen Fidler, *Survey of Argentina*, FIN. TIMES, July 13, 1994, at 11; Paula L. Green, *Argentine Politicians Bend to Popular Will*, CHRISTIAN SCI. MONITOR, June 1, 1994, at 4. Until 1994, the president could not seek consecutive re-election. CONSTITUTIONS, *supra* note 8, at xii.

364. CONST. ARG. art. 90.

365. Ellison, *supra* note 300, at A15. President Menem started his second term in 1995. *Id.* President Menem's term is set to expire in December 1999. CONST. ARG. Transitional Provision 10.

366. *Gaggiamo*, [1992-D] L.L. at 484 (stating that *de facto* laws "debe ser juzgada

tine history, the Supreme Court Justices and scholars who advocated the validity of *de facto* laws have argued for the acceptance of *de facto* laws on the grounds that *de facto* governments are legitimate,³⁶⁷ other nations and international practice recognize the legitimacy of *de facto* laws,³⁶⁸ and public expectations based on *de facto* laws warrant fulfillment.³⁶⁹ The Supreme Court Justices³⁷⁰ and scholars³⁷¹ who support requiring congressional ratification of *de facto* laws argue that treating *de facto* laws as equal to *de jure* laws ignores the illegitimacy of *de facto* governments.³⁷²

A. Arguments Supporting Validity of De Facto Laws

Several scholars and Supreme Court Justices have defended *de facto* laws on the grounds that *de facto* governments are legitimate and that this legitimacy extends to their laws.³⁷³ Others find *de facto* laws valid because of foreign and international doctrines.³⁷⁴ A different approach legitimizes *de facto* laws because of the public's expectations that these laws are valid and because of the potential consequences of what would happen if these expectations were not met.³⁷⁵

como si hubiese emanado del propio Congreso." ["ought to be judged as if they had come from Congress itself."] (translation by Note author)); see *supra* notes 351-55 and accompanying text (discussing Supreme Court's restoration of *de facto* doctrine); see *supra* notes 344-50 and accompanying text (describing previous standard for treatment of *de facto* laws that required express or tacit congressional ratification).

367. *Cassino*, 270 Fallos at 485; *Ferrocarril Oeste*, 209 Fallos 274, 288-89 (1946); *Arlandini*, 208 Fallos at 186; *Ziella*, 209 Fallos at 27; *1930 Acordada* 158 Fallos at 290; *Martinez y Otero*, 2 Fallos at 142-43; Irizarry y Puente, *supra* note 4, at 71.

368. *1943 Acordada*, 196 Fallos at 6; *1930 Acordada*, 158 Fallos at 290 (citing unnamed international practices as authority for supporting use of *de facto* doctrine); ALBERT CONSTANTINEAU, A TREATISE ON THE DE FACTO DOCTRINE 3-6, 409 (1910).

369. *Gaggiamo*, [1992-D] L.L. at 483-84; *Godoy*, [1991-II] J.A. at 458-59.

370. *Aramayo*, 306 Fallos at 73-74 (describing democracy as return to constitutional order); *Gaggiamo*, [1992-D] L.L. at 489 (Petracchi, J., dissenting)

371. Alfonsín, *supra* note 2, at 42-43; VERBITSKY, *supra* note 119, at 154-58; Snyder, *supra* note 268, at 512.

372. *Aramayo*, 306 Fallos at 73-74 (describing democracy as return to constitutional order); *Gaggiamo*, [1992-D] L.L. at 489 (Petracchi, J., dissenting); Alfonsín, *supra* note 2, at 42-43; VERBITSKY, *supra* note 119, at 154-58; Snyder, *supra* note 269, at 512.

373. *Arlandini*, 208 Fallos at 186; *Ziella*, 209 Fallos at 27; *Ferrocarril Oeste*, 209 Fallos at 288-89; *Cassino*, 270 Fallos at 485; *1930 Acordada* 158 Fallos at 290; *Martinez y Otero*, 2 Fallos at 142-43; Irizarry y Puente, *supra* note 4, at 71.

374. *1943 Acordada*, 196 Fallos at 6; *1930 Acordada*, 158 Fallos at 290; CONSTANTINEAU, *supra* note 368, at 3-6, 409.

375. *Gaggiamo*, [1992-D] L.L. at 483-84; *Godoy*, [1991-II] J.A. at 458-59.

1. The Government That Made Them Was Legitimate

Supreme Court Justices and scholars have argued that if a *de facto* government exercises power in a legitimate manner, then its laws are on par with other legitimate governments.³⁷⁶ Some Justices have held that *de facto* governments are constitutionally legitimate governments.³⁷⁷ Some scholars have argued that, regardless of whether *de facto* governments are constitutional, they are legitimate because they exercise control over the nation.³⁷⁸

a. Constitutionally Legitimate

On several occasions, the Argentine Supreme Court found that *de facto* governments that pledged to uphold constitutional guarantees had constitutionally legitimate powers.³⁷⁹ In the *Acordada* of 1930,³⁸⁰ the Court stated that the combination of exercising national power and affirming protection of constitutional rights is a sufficient criterion for the Court to grant *de facto* governments constitutional legitimacy.³⁸¹ Further, in the *Acordada* of 1930,³⁸² the Court found for the first time that the legitimacy of *de facto* governments was a non-justiciable political question.³⁸³ Between 1947 and 1973, the Court expanded its definition of a *de facto* government's legitimate powers by finding

376. *Cassino*, 270 Fallos at 485; *Ziella*, 209 Fallos at 27; *Ferrocarril Oeste*, 209 Fallos at 288-89; *Arlandini*, 208 Fallos at 186; *1930 Acordada*, 158 Fallos at 290; *Martinez y Otero*, 2 Fallos at 142-43; CONSTANTINEAU, *supra* note 368, at 3-6, 409; Irizarry y Puente, *supra* note 4, at 71.

377. *Cassino*, 270 Fallos at 485; *Ziella*, 209 Fallos at 27; *Ferrocarril Oeste*, 209 Fallos at 288-89; *Arlandini*, 208 Fallos at 186; *1930 Acordada*, 158 Fallos at 290; *Martinez y Otero*, 2 Fallos at 142-43.

378. CONSTANTINEAU, *supra* note 368, at 3-6, 409; Irizarry y Puente, *supra* note 4, at 71.

379. *Cassino*, 270 Fallos at 485; *Ziella*, 209 Fallos at 27; *Ferrocarril Oeste*, 209 Fallos at 288; *Arlandini*, 208 Fallos at 186; *1930 Acordada*, 158 Fallos at 290; *Martinez y Otero*, 2 Fallos at 143.

380. *Martinez y Otero*, 2 Fallos at 142.

381. *1930 Acordada*, 158 Fallos at 290; see *supra* note 310 (quoting Court's reasoning in *1930 Acordada*).

382. *1930 Acordada*, 158 Fallos at 290.

383. *Id.* The Court found that:

[E]l gobierno provisional que acaba de constituirse en el país, es, pues, un gobierno de facto cuyo título no puede ser judicialmente discutido con éxito por las personas en cuanto ejercita la función administrativa y política derivada de su posesión de la fuerza como resorte de orden y de seguridad social.

Id. [the provisional government that has just finished establishing itself in the country is, therefore, a *de facto* government that derived its possession of force as a means of order and social security whose title cannot be judicially questioned by those for whom

that the Constitution grants *de facto* governments legislative, as well as executive, powers.³⁸⁴ Consequently, the Court held that questioning the legitimacy of a constitutional legislature was also a non-justiciable political question beyond its jurisdiction.³⁸⁵

To strengthen the argument favoring the legitimacy of *de facto* laws, several scholars pointed to the maintenance of constitutional guarantees during *de facto* governments as evidence that *de facto* governments have protected such guarantees in deeds as well as words.³⁸⁶ The Court appointed by the military in 1955 created the right to *amparo*.³⁸⁷ During the *de facto* Government of the late 1960's, the Court issued opinions that offered greater protection for freedom of the press.³⁸⁸ In *Timerman*³⁸⁹ in 1979, the Court limited the *de facto* Government's use of arbitrary detention.³⁹⁰ Each of these decisions, made during *de facto* governments, limited the action of the *de facto* Government for the protection of an individual's rights.³⁹¹

the government exercises policy and administrative functions.] (translation by Note author); 1943 *Acordada*, 196 Fallos at 6-7 (repeating verbatim previous holding).

At least one scholar argues that challenging the legitimacy of a *de facto* government is not a non-justiciable political question. Puente, *supra* note 4, at 34-35. The argument continues, however, that once the Court determines that the *de facto* government is legitimate, any further questioning of the validity of its powers becomes a political question. *Id.*

384. *Cassino*, 270 Fallos at 485; *Ziella*, 209 Fallos at 27; *Ferrocarril Oeste*, 209 Fallos at 288-89; *Arlandini*, 208 Fallos at 186.

385. *Arlandini*, 208 Fallos at 186. The Court in *Arlandini* stated, "en la medida en que sea necesario legislar para gobernar un gobierno de hecho tiene facultades legislativas, sin que la determinación de esa necesidad . . . pueda ser judicialmente revisada." *Id.* [to the extent that it is necessary to govern, a *de facto* government has legislative abilities, without the determination of the necessity being . . . subject to judicial review.] (translation by Note author). The Court repeated this holding several times. *Cassino*, 270 Fallos at 485; *Ziella*, 209 Fallos at 27; *Ferrocarril Oeste*, 209 Fallos at 288-89.

386. BIDART CAMPOS, *supra* note 142, at 118; Kartheiser, *supra* note 31, at 251.

387. BIDART CAMPOS, *supra* note 142, at 118. *Amaparo* is the Argentine equivalent of *habeas corpus* in the United States. See *id.* at 91-95 (describing *amparo*); see generally LAW AND DEVELOPMENT, *supra* note 232, at 160-83 (detailing expansion of *amparo* in Argentina).

388. *Primera Plana*, 138 L.L. 464, 479-81 (1970) (finding state of siege did not deny newspaper right to *amparo*); *Prensa Confidencial*, 130 L.L. 456, 460-61 (1968) (recognizing criticism of public officials as pillar of republican government); *Sánchez Sorondo* ("Azul y Blanco"), 130 L.L. 450, 453-56 (1968) (recognizing criticism of public officials as pillar of republican government).

389. *Timerman*, 301 Fallos 771, 779-83 (1979).

390. *Id.*

391. BIDART CAMPOS, *supra* note 142, at 118.

b. Legitimate Regardless of Constitution

At least one scholar argues that the goal of Argentina's government should not be the maintenance of an alien constitutional system, but, rather, the betterment of the state and its individuals.³⁹² The argument continues that this is particularly true in Argentina, where Argentina's constitutional framework, based upon foreign theories,³⁹³ does not take into account the regional realities.³⁹⁴ The argument concludes that the best way to achieve the betterment of the state in Latin America is through the efficiency of *de facto* governments and that this ability is the source of the legitimacy of *de facto* governments.³⁹⁵

2. Legitimacy of *De Facto* Laws in Other Countries

One line of argument posits that *de facto* laws are legitimate because nations³⁹⁶ historically have recognized them as legitimate.³⁹⁷ In England, when the House of York³⁹⁸ regained con-

392. Irizarry y Puente, *supra* note 4, at 72.

393. See *supra* notes 94-101 and accompanying text, (describing foreign influence on Argentine Constitution).

394. Irizarry y Puente, *supra* note 4, at 71-72; see Rosenn, *supra* note 24, at 24-25 (describing foreign influence on Argentine Constitution as detrimental to its success).

395. Irizarry y Puente, *supra* note 4, at 72. One scholar warns that it "bodes ill for the Judiciary in any country to interfere unduly with [*de facto* governments] and to attempt to find in the letter of an outmoded Constitution an effectual barrier against political, economic or social progress." *Id.* The same scholar declares that *de facto* governments are the best "instruments of progress and social amelioration, of renovation and liberalism." *Id.*

396. CONSTANTINEAU, *supra* note 368, at 7-20 (describing *de facto* doctrines in England, United States, and Canada). The *Acordada's* of 1930 and 1943 cite Constantineau and also rely on unnamed international practices to support their legal recognition of the *de facto* government. 1943 *Acordada*, 196 Fallos at 6-7; 1930 *Acordada*, 158 Fallos at 290.

397. CONSTANTINEAU, *supra* note 368, at 7. The U.S. Circuit Court of the District of Virginia in *Griffin's Case* stated, in dictum, that unless *de facto* laws were recognized:

[T]here would be no security for life, or liberty, or property. It took form and shape in a statute in the time of Edward as to the rights of a king *de facto*, but its foundation was beyond that. Without the rights of *de facto* governments, who would recognize the Norman titles against the Saxon barons? Who the varying rights of York and Lancaster, or Tudor and Plantagenet, of king and commonwealth, and kings again, of Stuart and Orange, or Stuart and Brunswick? Where would you find your resting place in the history of civilization? In the Roman Empire? In its Gothic conquerors? In the house of Charlemagne? . . . When, where, and how would you base your rights *de jure*? . . . The history of the world is the history of kingdoms and empires, and civilizations *de facto*, becoming *de jure*, because they are *de facto*."

Griffin's Case, 11 F. Cas. 7, 18-19 (C.C.D.Va. 1869) (No. 5815).

trol of the monarchy from the House of Lancaster,³⁹⁹ the English legislature passed a statute⁴⁰⁰ guaranteeing all rights granted by the House of York as vested.⁴⁰¹ Likewise, French and Sicilian governments held themselves liable for the acts of predecessor *de facto* governments.⁴⁰² Furthermore, under customary international law,⁴⁰³ when there is a change of government within a state, the new government assumes the previous government's treaties, contracts, and obligations regardless of the characteristics of the previous government.⁴⁰⁴

3. Their Existence Established Expectations: The Rule of Law

The Court based its restoration of *de facto* laws on the prem-

398. TERENCE WISE, *THE WAR OF THE ROSES* 6 (1983). The House of York was one of the two principle parties in the War of the Roses, an English civil war that lasted from 1455 to 1485 and that brought about several changes of government. *Id.* at 5-6.

399. *Id.* The House of Lancaster opposed the House of York in the War of the Roses. *Id.*

400. Edw. IV., c. 1, 3 Stat. 336 (1461) (U.K.). Even though the English legislature expressly labeled the rule of the House of Lancaster as illegitimate, the legislature reasoned that they would recognize the judicial and legislative acts of the House of Lancaster as valid in order to eschew any "ambiguities, doubts, and diversities of opinions, which may rise, ensue and be taken of and upon judicial acts, and exemplifications of the same made or had in the time [of the kings of the House of Lancaster], late kings of England successively in deed, and not of right." *Id.*

401. *Id.*

402. JOHN B. MOORE, *DIGEST OF INTERNATIONAL LAW* 249 (1906). Both countries, however, limited their liability for the actions of the predecessor *de facto* governments to U.S. claims. *Id.*

403. RESTATEMENT OF THE LAW (THIRD) § 102 cmts.(b), (d) (1987). Customary international law is a rule of international law originating from either the repeated practices of states or *opinio juris*, the belief of states as to what constitutes customary international law. *Id.*; see generally BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 141-54 (1991) (explaining development and contemporary understanding of customary international law).

404. *Jackson v. People's Republic of China*, 550 F. Supp. 869, 872 (N.D. Ala. 1982), *rev'd on other grounds*, 596 F. Supp. 386 (1984), *aff'd*, 794 F.2d 1490 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987) (holding acts creating debt in Imperial China to be valid in both successor Republic of China and subsequent successor People's Republic of China); *Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396, 401 (2d Cir. 1927). In *Lehigh Valley*, the Second Circuit stated:

[C]hanges in the government or the internal policy of a state do not as a rule affect its position in international law. A monarchy may be transformed into a republic, or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired.

Lehigh Valley, 21 F.2d at 401 (quoting MOORE, *supra* note 402, at 249); see generally CARTER & TRIMBLE, *supra* note 403, at 474-78 (discussing development of obligations of successor governments under customary international law).

ise that the Argentine public would panic if they realized that rights vested⁴⁰⁵ by *de facto* laws could be revoked if Congress never expressly or tacitly ratified those *de facto* laws.⁴⁰⁶ The Court first expressed this fear, in dictum, in *Godoy*.⁴⁰⁷ The Court used the dictum in *Godoy* for its reasoning in *Gaggiamo*.⁴⁰⁸

a. The Dictum in *Godoy*

In *Godoy*⁴⁰⁹ a former teacher sued to be reinstated in his job.⁴¹⁰ In dictum, a majority of the Supreme Court stated that a change in the status of *de facto* laws would bring about an uncertainty of whether a right that a *de facto* law granted was a vested right and, therefore, one that a *de jure* legislature could not revoke.⁴¹¹ The Court feared that this uncertainty might lead to mass havoc and confusion.⁴¹² The Court also stated that a lack

405. See *supra* notes 149-50 and accompanying text (explaining guarantees of vested rights in Argentine Constitution's protection of property under Article 17).

406. *Godoy*, [1991-II] J.A. at 459; *Gaggiamo*, [1992-D] at 483-84; see *supra* notes 344-50 and accompanying text (discussing *Aramayo* standard requiring express or tacit congressional ratification of *de facto* laws); see *supra* notes 351-55 and accompanying text (describing overturning of *Aramayo* standard and restoration of *de facto* doctrine).

407. *Godoy*, [1991-II] J.A. at 459

408. *Gaggiamo*, [1992-D] L.L. at 483-84.

409. *Godoy*, [1991-II] J.A. at 457.

410. *Id.* In *Godoy*, Oscar Godoy, a teacher who the University of La Plata fired for political reasons in 1974, sued to be reinstated in his post. *Id.* In 1984, Congress enacted legislation reinstating teachers who had been dismissed from their posts for political reasons, but left the execution of the law to the schools' discretion. *Id.* The University of La Plata limited recovery to those teachers who the *de facto* government during *el proceso* dismissed for political reasons. *Id.* Because the school system did not dismiss Oscar Godoy during *el proceso*, the University refused to reinstate him. *Id.* Oscar Godoy sued on the grounds that the University's application of the law was too narrow. *Id.*

411. *Id.*; see *supra* notes 149-50 and accompanying text (explaining guarantees of vested rights in Argentine Constitution's protection of property under Article 17).

412. *Godoy*, [1991-II] J.A. at 459. The Court addressed the issue of uncertainty by stating:

[P]arece imprescindible destacar que la vida social se vería seriamente trastornada en la Argentina, si sus habitantes tomaran conciencia de que los tribunales de justicia entienden que en el país hay miles de leyes y varios centenares de miles de decretos, actos administrativos, contratos públicos y sentencias, así como numerosos tratados-provenientes de períodos *de facto*-que sólo tienen apariencia de tales, porque, en rigor, están viciados de ilegitimidad y subsisten únicamente por una especie de condescendencia-discrecional y revocable-de los actuales gobernantes *de jure*. . . . [C]omunicaría a todo el sistema político-social una imprevisibilidad y una incerteza que son colindantes con la anarquía.

Id. [[I]t seems essential to point out that social life would be seriously distorted in Argentina, if its inhabitants became aware that the courts believe that there are

of guidelines as to what constitutes implicit congressional ratification of a *de facto* law would make an enormous amount of laws passed by *de facto* governments potentially voidable upon the whim of the *de jure* Government.⁴¹³ The Court noted that the *Aramayo* standard⁴¹⁴ of express or tacit ratification⁴¹⁵ creates a special category of rights that are not absolute, but subject to the legislature's political leanings or whim.⁴¹⁶ The Court in *Godoy* stated that the uncertainty of expectations outweighs the benefit of denying authority to *de facto* laws.⁴¹⁷

b. The Holding in *Gaggiamo*

The Supreme Court took the dicta in *Godoy*⁴¹⁸ concerning the treatment of *de facto* laws and incorporated it into its holding in *Gaggiamo*.⁴¹⁹ During *el proceso*, Hectór Gaggiamo was the At-

thousands of laws and various hundreds of thousands of decrees, administrative acts, public contracts, and sentences-coming from periods of *de facto* governments-that only have that appearance, because, strictly speaking, they are fouled by illegitimacy and exist solely because they have a type of consent-discretionary and revocable-of the current *de jure* governments. . . . [T]hat would bring to all of the social-political system an unforeseeability and uncertainty that are bordering upon anarchy.] (translation by Note author).

413. *Id.* The number of laws vulnerable to abrogation is of particular concern in Argentina where military governments have been in power for so much of the recent history. *Id.* In *Godoy*, the Court puts that figure at 15 of the 25 years before the decision. *Id.* The Court listed such things as employment, pension rights, and the appointment of bishops as potentially voidable expectations that people have relied upon for over a decade. *Id.*

414. *Aramayo*, 306 Fallos at 74; see *supra* notes 344-50 and accompanying text (describing *Aramayo* standard of express or tacit ratification as sole means of validating *de facto* laws).

415. *Aramayo*, 306 Fallos at 74.

416. *Godoy*, [1991-I] J.A. at 459. The Supreme Court found that under the *Aramayo* standard, "existiría la extraña categoría de leyes, tratados y decretos desprovistos de 'legitimidad' que, sin embargo, tendrían vida jurídica, aunque precaria y fácilmente extinguido por decisión del Poder." *Id.* [there would exist the strange category of laws, deals, and decrees devoid of 'legitimacy' that, nevertheless, would have judicial life, although precariously and easily extinguishable by the decision of the State.] (translation by Note author).

In *Gaggiamo*, the Court repeated its distrust of the *Aramayo* standard and the category of laws it created that were dependent upon the legislature's acceptance of the laws and labeled them "subjective" rights. *Gaggiamo*, [1992-D] L.L. at 484.

417. *Godoy*, [1991-II] J.A. at 459. The Court in *Godoy* stated, "[n]inguna doctrina judicial es defendible si, en vez de asegurar el orden público, crea el riesgo de un absoluto desorden." *Id.* ["[n]o judicial doctrine is defendable if instead of assuring public order, it creates the risk of an absolute disorder."] (translation by Note author).

418. *Id.* at 458.

419. *Gaggiamo*, [1992-D] L.L. at 483.

torney General⁴²⁰ of the Province of Santa Fe.⁴²¹ The provincial *de facto* Government of Santa Fe granted Hectór Gaggiamo a privileged pension twelve days before the return of constitutional rule.⁴²² Less than two months after the return of constitutional rule in Argentina, the *de jure* provincial Government of Santa Fe passed a law voiding Gaggiamo's pension.⁴²³ Gaggiamo sued for the restoration of his pension claiming that *de jure* law violated Article 17 of the Constitution⁴²⁴ by denying him of property in the form of a vested right.⁴²⁵ In a five⁴²⁶ to three⁴²⁷ decision, the Supreme Court returned to the standard introduced in *Arlandini*⁴²⁸ of recognizing *de facto* laws as on par with *de jure* ones.⁴²⁹ The majority based its reasoning upon the dictum in *Godoy*.⁴³⁰

B. Illegitimacy of De Facto Laws

Those in opposition to the legitimization of *de facto* laws believe that *de facto* governments are not legitimate governments because they came to power by force.⁴³¹ These scholars and justices distrust the judicial opinions that granted legitimacy to *de*

420. VERBITSKY, *supra* note 119, at 155. Hectór Gaggiamo's official title in Spanish is "Fiscal de Estado de Santa Fe." *Id.*

421. *Id.*

422. *Id.*; *Gaggiamo*, [1992-D] L.L. at 482.

423. *Gaggiamo*, [1992-D] L.L. at 482.

424. CONST. ARG. art. 17.

425. *See supra* notes 149-50 and accompanying text (explaining guarantees of vested rights under Article 17 of Argentine Constitution).

426. *Gaggiamo*, [1992-D] L.L. at 485. The Justices Dr. Levene, Dr. Nazareno, Dr. Moliné O'Connor, Dr. Baggiano, and Dr. Barra voted in favor of Hectór Gaggiamo. *Id.* Each of these five Justices was appointed to the Supreme Court after the Peronist expansion of the Court under President Menem in 1990. VERBITSKY, *supra* note 119, at 53-68; *see supra* notes 294-95 and accompanying text (describing expansion of Supreme Court from five Justices to nine Justices in 1990).

427. *Gaggiamo*, [1992-D] L.L. at 485. The Justices Dr. Fayt, Dr. Belluscio, and Dr. Petracchi voted against Hectór Gaggiamo. *Id.* Each of these Justices was on the Court before the Peronist expansion of the Supreme Court under President Menem. VERBITSKY, *supra* note 119, at 53-68; *see supra* notes 294-95 and accompanying text (describing expansion of Supreme Court from five Justices to nine Justices in 1990).

428. *Arlandini*, 208 Fallos at 186.

429. *Gaggiamo*, [1992-D] L.L. at 484.

430. *Id.* (restating precedent for accepting *de facto* laws "como fue especialmente destacado en el caso 'Godoy.'" ["as was especially noted in the *Godoy* case."] (translation by Note author)).

431. Nino, *supra* note 17, at 310; Snyder, *supra* note 269, at 512; Alfonsín, *supra* note 2, at 42-43; VERBITSKY, *supra* note 119, at 154-58.

facto governments.⁴³² Furthermore, they believe that a standard of review for the legitimization of *de facto* laws exists, and that this standard protects valid expectations without rewarding injustices.⁴³³

1. *De Facto Governments Are Illegitimate*

Many scholars contest the proposition⁴³⁴ that *de facto* governments are the most efficient means of achieving the state's goals or of determining what those goals are.⁴³⁵ They point out that defining the goals of the state is not an easy task and that democracy is a better tool for defining them than an authoritarian state.⁴³⁶ They add that even goals that are clear and undisputed should not be brought about at the cost of authoritarianism which would bring arbitrary goals and methods along with it.⁴³⁷

The Supreme Court has taken the view that *de facto* governments, by their very nature, are disruptions of constitutional order.⁴³⁸ Scholars have echoed this sentiment.⁴³⁹ These scholars have also pointed out a flaw in the criterion of the *acordada* of 1930,⁴⁴⁰ that a *de facto* government must pledge respect for constitutional guarantees, by contrasting the *de facto* governments' stated intents of abiding by the Constitution and their actions.⁴⁴¹

432. *Gaggiomo*, [1992-D] L.L. at 490 (Petrachhi, J., dissenting); Alfonsín, *supra* note 2, at 44; Marvin E. Frankel, *Concerning the Role the Judiciary May Serve in the Proper Functioning of a Democracy*, in *TRANSITION TO DEMOCRACY*, *supra* note 2, at 23, 28; Stotzky & Nino, *supra* note 16, at 12; PAGE, *supra* note 208, at 167.

433. *Gaggiomo*, [1992-D] L.L. at 490 (Petracchi, J., dissenting); Nino, *supra* note 17, at 319; Vera Villalobos, *supra* note 18, at 466-67.

434. See *supra* notes 392-95 and accompanying text (presenting proposition that *de facto* governments are most effective means of governing Argentina).

435. Nino, *supra* note 17, at 310; see *supra* notes 392-95 and accompanying text (outlining argument that *de facto* government is most effective form of government in Argentina).

436. Nino, *supra* note 17, at 310.

437. *Id.*; see *supra* notes 267-71 and accompanying text (describing methods authoritarian regime in *el proceso* used to achieve state goals).

438. *Aramayo*, 306 Fallos at 73-74 (describing democracy as return to constitutional order); *Gaggiomo*, [1992-D] L.L. at 489 (Petracchi, J., dissenting).

439. Alfonsín, *supra* note 2, at 42-43; VERBITSKY, *supra* note 119, at 154-58; Snyder, *supra* note 269, at 512.

440. *1930 Acordada*, 158 Fallos at 290.

441. Snyder, *supra* note 269, at 512. In his first speech after his usurpation of power in 1976, the first leader of the military junta during *el proceso* stressed that his government would be based upon "the permanence and stability of juridical norms which will guarantee the primacy of law and the observance of it by the governors and

Furthermore, commentators⁴⁴² have questioned the independence and constitutionality of the Court when it issued opinions declaring *de facto* governments to be constitutionally legitimate governments.⁴⁴³

2. Precedence is Bad: *De Facto* Government's Usurped Judicial Power

Justices and scholars have questioned the independence of the Supreme Court during *de facto* governments because *de facto* governments interfered with the independence of the judiciary and intimidated both judges and those seeking to use the legal system.⁴⁴⁴ The military disrupted judicial continuity by replacing Supreme Court Justices in 1955, 1966, and 1976.⁴⁴⁵ During *el proceso*, the military government dismissed over thirty percent of all federal judges.⁴⁴⁶ The *de facto* Government's appointment of replacement judges did not conform with the procedure established in the Constitution.⁴⁴⁷ The military forced the remaining judges to pledge to uphold the military regime's validity as a prerequisite to staying in chambers.⁴⁴⁸ The military also intimidated judges, attorneys, and citizens with actual and threatened physical violence.⁴⁴⁹ The purpose of this intimidation was to prevent

governed alike." *Id.* at 508. The *de facto* Government's actions contradicted these stated goals. *Id.*; see *supra* notes 267-71 and accompanying text (describing *de facto* government's atrocities during *el proceso*).

442. *Gaggiamo*, [1992-D] L.L. at 490 (Petracchi, J., dissenting); PAGE, *supra* note 208, at 167; Alfonsín, *supra* note 2, at 44; Stotzky & Nino, *supra* note 16, at 12. Frankel, *supra* note 432, at 28.

443. *Gaggiamo*, [1992-D] L.L. at 490 (Petracchi, J., dissenting); Alfonsín, *supra* note 2, at 44; Frankel, *supra* note 432, at 28; Stotzky & Nino, *supra* note 16, at 12; PAGE, *supra* note 208, at 167.

444. *Gaggiamo*, [1992-D] L.L. at 490 (Petracchi, J., dissenting); Alfonsín, *supra* note 2, at 44; Frankel, *supra* note 432, at 28; Stotzky & Nino, *supra* note 16, at 12; NUNCA MÁS, *supra* note 177, at 387. The National Commission of the Disappeared reported that during *el proceso*, "the judiciary became a sham jurisdictional structure, a cover to protect its image," instead of being a "brake on the prevailing absolutism." *Id.*

445. Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. REV. L. 1, 26 (1987).

446. VERBITSKY, *supra* note 119, at 19. Not only did the military junta replace constitutionally appointed Supreme Court Justices with ones who would approve of the junta's actions, but they replaced nearly a third of all the federal judges in Buenos Aires and over 40% of those elsewhere in the country. *Id.*

447. NUNCA MÁS, *supra* note 177, at 391.

448. *Id.*; Kartheiser, *supra* note 31, at 250.

449. NUNCA MÁS, *supra* note 177, at 387 (describing intimidation of judiciary and military pressure upon judges to uphold junta's acts). *Id.* at 412-20 (printing testimony-

such parties from using the legal system to hamper the junta's goals.⁴⁵⁰

3. Dissenting Judges in *Gaggiamo* and *Godoy*

In *Gaggiamo*,⁴⁵¹ dissenting Justice Fayt⁴⁵² used the argument, espoused in the majority opinions in *Godoy*⁴⁵³ and *Gaggiamo*,⁴⁵⁴ of the public's uncertainty of what rights are vested, to counter the conclusions in those opinions.⁴⁵⁵ Like the majority in *Godoy*⁴⁵⁶ and *Gaggiamo*,⁴⁵⁷ Justice Fayt stressed that the public's concern for the stability of vested rights is a priority, but added that the most important vested right is governance by the Constitution.⁴⁵⁸ His argument is not a case of one vested right trumping another vested right, but, rather, of one vested right preventing the creation of another.⁴⁵⁹ He argued that the guarantee of constitutional order prevents a government of force from giving birth to a vested right.⁴⁶⁰ Justice Fayt warned that accepting *de facto* laws erodes the nation's belief in judicial security and poses a threat to order.⁴⁶¹

als from lawyers who military tortured); Kartheiser, *supra* note 31, at 250. One sign of judicial intimidation was that the only judge during *el proceso* to declare the military junta's government as illegal fled the country in fear, days after issuing his opinion. Snyder, *supra* note 269, at 517.

450. *NUNCA MÁS*, *supra* note 177, at 387; Kartheiser, *supra* note 31, at 250; Snyder, *supra* note 269, at 517.

451. *Gaggiamo*, [1992-D] L.L. at 487 (Fayt, J., dissenting).

452. *VERBITSKY*, *supra* note 119, at 20. Justice Fayt was one of the initial five justices that Congress appointed to the Supreme Court after the restoration of constitutional rule in 1983. *Id.*

453. *Godoy*, [1991-II] J.A. at 458.

454. *Gaggiamo*, [1992-D] L.L. at 487 (Fayt, J., dissenting).

455. *Id.*

456. *Godoy*, [1991-II] J.A. at 458.

457. *Gaggiamo*, [1992-D] L.L. at 487 (Fayt, J., dissenting).

458. *Id.* at 486. Justice Fayt stated, "el más cabal derecho adquirido es el que tiene la sociedad toda a vivir pacífica y ordenadamente bajo los principios de la Constitución Nacional. Ella es la fuente de todo derecho [L]o contrario implicaría el entronizamiento de mandatos nacidos del quebrantamiento de aquella seguridad." *Id.* ["the most absolute vested right is that that society has to live peacefully and orderly under the principles of the National Constitution. That is the source of all law [T]he contrary would imply the entrenchment of commands born from the destruction of that security."] (translation by Note author).

459. *Id.*

460. *Id.*; *VERBITSKY*, *supra* note 119, at 156.

461. *Gaggiamo*, [1992-D] L.L. at 486 (Fayt, J., dissenting). Justice Fayt wrote: Esa gradual inundación de disposiciones coercitivas de facto en la organización institucional y en el orden jurídico nacional sumió al pueblo argentino

Several Supreme Court Justices and commentators expressed their belief that the *Aramayo* standard⁴⁶² sufficiently protected expectations and provided a check against chaos.⁴⁶³ In *Gaggiomo*,⁴⁶⁴ Justice Petracchi⁴⁶⁵ stated that history did not support the majority's fears of uncertainty in *Godoy*.⁴⁶⁶ Justice Petracchi points out that in the seven years that Congress had the power to make *de facto* laws null and void *ab initio*, the dramatic threats of anarchy mentioned in *Godoy* never appeared.⁴⁶⁷ Commentators argue that while the *Aramayo* standard⁴⁶⁸ was in place, there was no mass fear for the validity of pensions, employment,

en la inseguridad jurídica y colocó el país en situaciones límites de desintegración nacional. La República se acostumbró . . . [a confiar] validez a las normas [de facto] no por su origen y justicia sino por la fuerza que los sustenta, subordinando el derecho al poder.

Id. [This gradual inundation of coercive *de facto* rules in the institutional organization and in the nation's judicial order, brings to the Argentine people a judicial insecurity and places the country in situations that border national disintegration. The Republic became accustomed . . . [to conferring] validity to [*de facto*] rules, not because of their origin or justice, but rather because force maintained them, subordinating law to power.] (translation by Note author). In *Pignatoro*, Justice Fayt further warned about the introduction of laws that originated outside of the constitutional system because of their effect on judicial security. *Pignatoro*, [1992-D] L.L. at 89.

462. *Aramayo*, 306 Fallos at 73-74; see *supra* notes 344-50 and accompanying text (describing *Aramayo* standard requiring express or tacit congressional ratification of *de facto* laws).

463. *Godoy*, [1991-II] J.A. at 459 (Fayt, J., dissenting); *Gaggiomo*, [1992-D] L.L. at 485 (Belluscio, J., dissenting); *Gaggiomo*, [1992-D] L.L. at 486 (Fayt, J., dissenting); *Gaggiomo*, [1992-D] L.L. at 488 (Petracchi, J., dissenting); Nino, *supra* note 17, at 319; Vera Villalobos, *supra* note 18, at 466-67.

464. *Gaggiomo*, [1992-D] L.L. at 488 (Petracchi, J., dissenting).

465. VERBITSKY, *supra* note 119, at 20. Justice Petracchi was one of the initial five justices that Congress appointed to the Supreme Court after the restoration of constitutional rule in 1983. *Id.*

466. *Gaggiomo*, [1992-D] L.L. at 490 (Petracchi, J., dissenting). Commentators have repeated the view that experience does not support the majority's fear of public panic over what rights are vested. Nino, *supra* note 17, at 319; Vera Villalobos, *supra* note 18, at 466-67.

467. *Gaggiomo*, [1992-D] L.L. at 490 (Petracchi, J., dissenting). Petracchi wrote: El más rotundo mentis a esos pronósticos apocalípticos lo constituye en hecho evidente de que-bajo el imperio de la doctrina que ahora [la mayoría] se pretende desplazar-los poderes constitucionales han hecho de ella una muy prudente aplicación, sin que ninguno de sus hipotéticos perjudiciales efectos se hayan concretado.

Id. [The most complete denial of these apocalyptic prophesies comes from the fact that under the reign of the doctrine that [the majority] now tries to displace-the constitutional powers applied it prudently, without any of their hypothetical prejudicial effects having come to be.] (translation by Note author). Several commentators reached the same conclusion. Nino, *supra* note 17, at 319; Vera Villalobos, *supra* note 18, at 466-67.

468. *Aramayo*, 306 Fallos at 73-74; see *supra* notes 344-50 and accompanying text

or the appointments of the nation's clergy.⁴⁶⁹ Commentators⁴⁷⁰ also argue that the *Aramayo* standard⁴⁷¹ sufficiently protected good faith expectations by allowing for a broad threshold of tacit ratification.⁴⁷² The argument concludes that by allowing expectations to validate *de facto* laws regardless of other circumstances, the Supreme Court in *Gaggiomo*⁴⁷³ and *Godoy*⁴⁷⁴ ignores morality.⁴⁷⁵

III. RECOGNIZING THE ILLEGITIMACY OF DE FACTO LAWS AND THE NEED TO REENFORCE CONSTITUTIONAL INSTITUTIONS

The *Aramayo* standard⁴⁷⁶ for the treatment of *de facto* laws, which requires that a constitutional legislature ratify all *de facto* laws before they are binding or rights under them vest, represents a feasible and just standard.⁴⁷⁷ This standard recognizes the illegitimacy of Argentina's *de facto* governments.⁴⁷⁸ Furthermore, this standard does not create the social unrest that the majority in *Godoy*⁴⁷⁹ and *Gaggiomo*⁴⁸⁰ feared.⁴⁸¹ The standard

(describing *Aramayo* standard requiring express or tacit congressional ratification of all *de facto* laws).

469. Nino, *supra* note 17, at 319; Vera Villalobos, *supra* note 18, at 466-67.

470. Nino, *supra* note 17, at 319; Vera Villalobos, *supra* note 18, at 466-67.

471. *Aramayo*, 306 Fallos at 73-74.

472. Nino, *supra* note 17, at 319; Vera Villalobos, *supra* note 18, at 466-67.

473. *Gaggiomo*, [1992-D] L.L. at 481.

474. *Godoy*, [1991-II] J.A. at 455.

475. Nino, *supra* note 17, at 319. The Argentine Supreme Court, "by refusing to recognize the positive evaluation of democracy as affective or ideological, ignores the fact that it is always necessary to resort to moral reasons to justify the application of the law, since positive law, depending on mere facts, cannot justify itself." *Id.*

476. *Aramayo*, 306 Fallos at 73-74; *see supra* notes 344-50 and accompanying text (describing *Aramayo* standard requiring express or tacit congressional ratification of all *de facto* laws).

477. *Gaggiomo*, [1992-D] L.L. at 490 (Petracchi, J., dissenting); Nino, *supra* note 17, at 319; Vera Villalobos, *supra* note 18, at 466-67.

478. *See supra* notes 434-43 and accompanying text (presenting arguments stressing illegitimacy of *de facto* governments).

479. *Godoy*, [1991-II] J.A. at 458; *see supra* notes 409-17 and accompanying text (discussing majority opinion in *Godoy*).

480. *Gaggiomo*, [1992-D] L.L. at 485; *see supra* notes 418-30 and accompanying text (discussing majority opinion in *Gaggiomo*).

481. *Godoy*, [1991-II] J.A. at 459 (Fayt, J., dissenting); *Gaggiomo*, [1992-D] L.L. at 485 (Belluscio, J., dissenting); *Gaggiomo*, [1992-D] L.L. at 486 (Fayt, J., dissenting); *Gaggiomo*, [1992-D] L.L. at 488 (Petracchi, J., dissenting); Nino, *supra* note 17, at 319; Vera Villalobos, *supra* note 18, at 466-67; *see supra* notes 463-69 and accompanying text (discussing absence of societal fear over status of rights vested by *de facto* laws).

also promotes the creation of strong constitutional institutions,⁴⁸² while simultaneously denouncing the authoritarian use of force to rule. Finally, the current standard, accepting *de facto* laws as legitimate regardless of congressional ratification,⁴⁸³ legitimizes rule by force and creates a dangerous precedent.

A. *The Inherent Illegitimacy of De Facto Governments*

In a constitutional system, no branch of government should tolerate a break from the constitutional order or declare one to be legitimate.⁴⁸⁴ The Constitutional Constituent Assembly of 1994⁴⁸⁵ stressed this point by adding the instant nullification of all future *de facto* governments as a new guarantee to the Constitution.⁴⁸⁶ The Supreme Court has found *de facto* governments to be disruptions of constitutional order several times.⁴⁸⁷ Even though *de facto* governments have facially recognized certain constitutional guarantees,⁴⁸⁸ claims to legitimacy on these grounds fails in the face of the gap between the words of *de facto* governments and their actions.⁴⁸⁹

B. *Aramayo Protected Expectations*

The Court in *Aramayo*⁴⁹⁰ held that *de facto* laws were only valid when Congress either expressly or tacitly ratified them.⁴⁹¹ The Court, in *Godoy*⁴⁹² and *Gaggiomo*,⁴⁹³ feared that the lack of a

482. Nino, *supra* note 17, at 317.

483. See *supra* notes 351-55 and accompanying text (discussing restoration of *de facto* doctrine in *Godoy* and *Gaggiomo*).

484. See *supra* notes 434-43 and accompanying text (presenting arguments finding *de facto* governments illegitimate).

485. See *supra* notes 358-63 and accompanying text (discussing Constituent Assembly's 1994 changes to Constitution).

486. CONST. ARG. art. 36; see *supra* note 359 and accompanying text (discussing addition of Article 36 of Constitution nullifying future *de facto* governments).

487. *Aramayo*, 306 Fallos at 74 (describing democracy as return to constitutional order); *Editora Popular*, 289 Fallos at 180; *Gaggiomo*, [1992-D] L.L. at 489 (Petracchi, J., dissenting).

488. See *supra* notes 386-91 and accompanying text (stating incidents where *de facto* governments professed to recognize constitutional guarantees).

489. See *supra* notes 440-41 and accompanying text (outlining disparity between *de facto* governments pledge to uphold constitutional guarantees and their actions).

490. *Aramayo*, 306 Fallos at 73-74; see *supra* notes 344-50 and accompanying text (discussing Court's adoption in *Aramayo* of standard requiring express or tacit congressional ratification of *de facto* laws).

491. *Aramayo*, 306 Fallos at 73-74.

492. *Godoy*, [1991-II] J.A. at 458.

clear definition of tacit ratification would lead to widespread social chaos because of an uncertainty over what rights were vested under it.⁴⁹⁴ Yet, this chaos never existed when the *Aramayo* standard⁴⁹⁵ applied, nor did it appear likely to become a threat.⁴⁹⁶ The Court in *Godoy*⁴⁹⁷ and *Gaggiomo*⁴⁹⁸ changed the treatment of *de facto* laws to solve a threat that did not exist. The cost of solving this non-existent threat is the prevention of benefits under the *Aramayo* standard.⁴⁹⁹

C. *Aramayo* Denounces Usurpation of Power

The *Aramayo* standard⁵⁰⁰ of express or tacit congressional ratification⁵⁰¹ denounced rule by force and reiterated the Argentina's commitment to the Constitution. *Godoy*⁵⁰² and *Gaggiomo*⁵⁰³ have the opposite effect. By granting validity to every law enacted by a *de facto* regime regardless of its content, the Court in *Godoy*⁵⁰⁴ and *Gaggiomo*⁵⁰⁵ holds that *de facto* regimes have the power to vest rights and bind others.⁵⁰⁶ The Court uses people's expectations as a grounds for legitimacy without considering whether those expectations were reasonable.⁵⁰⁷ By indirectly stating that people are reasonably justified in expecting all

493. *Gaggiomo*, [1992-D] L.L. at 485.

494. *Id.*; *Godoy*, [1991-II] J.A. at 459.

495. *Aramayo*, 306 Fallos at 73-74; see *supra* notes 344-50 and accompanying text (discussing Court's adoption in *Aramayo* of standard requiring express or tacit congressional ratification of *de facto* laws).

496. *Gaggiomo*, [1992-D] L.L. at 490 (Petracchi, J., dissenting); Nino, *supra* note 17, at 319; Vera Villalobos, *supra* note 18, at 466-67; see *supra* notes 463-69 and accompanying text (discussing absence of societal fear over status of rights vested by *de facto* laws).

497. *Godoy*, [1991-II] J.A. at 458.

498. *Gaggiomo*, [1992-D] L.L. at 483.

499. *Aramayo*, 306 Fallos at 73-74; see *supra* notes 344-50 and accompanying text (discussing Court's adoption in *Aramayo* of standard requiring express or tacit congressional ratification of *de facto* laws).

500. *Aramayo*, 306 Fallos at 73-74.

501. *Id.*

502. *Godoy*, [1991-II] J.A. at 458.

503. *Gaggiomo*, [1992-D] L.L. at 483.

504. *Godoy*, [1991-II] J.A. at 458.

505. *Gaggiomo*, [1992-D] L.L. at 483.

506. *Id.*; *Godoy*, [1991-II] J.A. at 458.

507. *Gaggiomo*, [1992-D] L.L. at 483; *Godoy*, [1991-II] J.A. at 458; see *supra* notes 411-17 and accompanying text (detailing Court's use of expectations as grounds for recognizing *de facto* laws).

de facto legislation to be legitimate, the Court in *Godoy*⁵⁰⁸ and *Gaggiamo*⁵⁰⁹ implies that the legitimacy of *de facto* laws comes from a legitimate source, a *de facto* government, and not from equitable circumstances or the Constitution. The *Aramayo* standard⁵¹⁰ standard, in contrast, labels *de facto* governments and the use of force as illegitimate⁵¹¹ and defines the only legitimizing source of laws as the constitutional legislature.⁵¹²

D. Strengthening of Institutions

Argentina's democratic and constitutional institutions have never had strong and deep popular support.⁵¹³ The nation emerged from a background steeped in authoritarianism and control by the powerful.⁵¹⁴ A legacy of authoritarianism carried over to the independent Argentine State⁵¹⁵ and well into its constitutional government.⁵¹⁶ Although a constitution and an institutional framework existed for much of this time, those in power often circumvented or ignored it.⁵¹⁷ A combination of economic and political factors cut short the Nation's attempt at an open democratic government in 1930.⁵¹⁸ With the passing of democratic and constitutional government in 1930,⁵¹⁹ many of

508. *Godoy*, [1991-II] J.A. at 458.

509. *Gaggiamo*, [1992-D] L.L. at 483.

510. *Aramayo*, 306 Fallos at 773-74; see *supra* notes 344-50 and accompanying text (discussing *Aramayo* standard requiring express or tacit congressional ratification of *de facto* laws).

511. *Aramayo*, 306 Fallos at 73-74.

512. *Id.*

513. *Corporatism*, *supra* note 176, at 129-30; *Constitutional Reform*, *supra* note 83, at 635-38; Peralta-Ramos, *supra* note 176, at 46-47; see *Garro*, *supra* note 15, at 9 (stating, "institutional problems have been a constant threat to the survival of democracy in Argentina, but it is precisely at the junction of transition when governments must seize the opportunity to strengthen the civic values that have never been in great supply").

514. See *supra* notes 43-58 and accompanying text (describing authoritarian Spanish rule in colonial Argentina).

515. See *supra* notes 74-79 and accompanying text (detailing lack of political change following independence).

516. See *supra* notes 157-64 and accompanying text (describing maintenance of non-democratic tendencies following founding of Constitution of 1853).

517. See *supra* notes 154-56 (examining *caudillo* defiance of government following founding of Constitution); see *supra* notes 157-164 (commenting on restrictive democracy).

518. See *supra* notes 184-85 and accompanying text (outlining factors leading to General Uriburu's Coup).

519. See *supra* notes 182-89 and accompanying text (discussing coup that overthrew civilian rule in 1930).

the nascent institutions slowly ceased to exist.⁵²⁰ The ensuing five decades of *de facto* and civilian governments that followed⁵²¹ did not provide the stable background necessary for the creation of strong institutions as the state persecuted political parties,⁵²² tinkered with the judiciary,⁵²³ altered the Constitution,⁵²⁴ disbanded Congress,⁵²⁵ dismissed presidents,⁵²⁶ and hampered the freedom of the press.⁵²⁷ The lack of strong institutions often forced those who could not otherwise participate in government to resort to force to achieve their goals.⁵²⁸

Even though Argentina has had a democratic and constitutional government since 1983,⁵²⁹ its democratic and constitutional institutions are not yet stable.⁵³⁰ The Menem administration has decreased the independence of the Judicial Branch.⁵³¹

520. Alfonsín, *supra* note 2, at 43; *see supra* notes 282-83 and accompanying text (describing need to construct new democratic and constitutional institutions upon return to democratic government in 1983).

521. *See supra* notes 182-281 and accompanying text (discussing civilian and military governments between 1930 and 1983).

522. *See supra* note 191 and accompanying text (discussing fraudulent elections between 1932 and 1943); *see supra* note 212 and accompanying text (detailing interference with political parties during Juan Perón's first era); *see supra* notes 226-55 (describing exclusion of Peronist party from political system between 1955 and 1973); *see supra* note 269 and accompanying text (discussing political oppression during *el proceso*).

523. *See supra* notes 444-49 and accompanying text (detailing interference with judiciary by *de facto* governments).

524. *See supra* note 210 and accompanying text (describing Peronist Constitution of 1949); *see supra* notes 221-26 and accompanying text (discussing restoration of Constitution of 1853); *see supra* notes 358-65 and accompanying text (detailing constitutional changes made in 1994).

525. *See supra* notes 27-31 and accompanying text (listing coups where military disbanded Congress).

526. *See supra* notes 27-31 and accompanying text (listing coups where military dismissed presidents); *see supra* notes 232-39 and accompanying text (discussing military's removal of Argentine president when removal was not followed by military government).

527. *See supra* notes 213-15 and accompanying text (discussing press restrictions during first Peronist era); *see supra* note 269 and accompanying text (discussing repression of media during *el proceso*).

528. *See supra* note 193 and accompanying text (describing failure of political system resulting in civilians using military to achieve their political goals).

529. *See supra* notes 282-300 and accompanying text (describing Argentine democracy since 1983).

530. *Corporatism*, *supra* note 176, at 129-30; *Constitutional Reform*, *supra* note 83, at 635-38; *see Stotzky*, *supra* note 32, at 127-28 (describing creation of Centro de Estudios Institucionales [Center for Institutional Studies] devoted to study of growth and strength of democratic institutions in Argentina).

531. *See supra* notes 294-95 (describing Menem Administration's expansion of Supreme Court to include four new Justices aligned with President Menem).

The increase in the use of executive decrees to legislate encroaches upon the power of the Legislative Branch.⁵³² The constitutional amendments disrupt the stability of certain institutions.⁵³³ The Federal Government has infringed upon provincial sovereignty by replacing the governors of several provinces.⁵³⁴

The establishment of constitutional institutions is a necessary step in Argentina's transition to democracy.⁵³⁵ Entrenchment of constitutional institutions, however, will not occur without popular support.⁵³⁶ Granting validity to *de facto* laws and, thus, treating *de facto* governments as equals to *de jure* governments, hampers the establishment of a strong institutional legal system by tarnishing the public's belief in the Constitution and the rule of law.⁵³⁷ This particularly concerns Argentina because the rule of law does not enjoy a strong confidence among the public.⁵³⁸ Because the *Aramayo* standard⁵³⁹ did not tarnish the

532. See *supra* note 297 (detailing President Menem's increase in use of executive decrees of urgency and necessity as means to legislate).

533. See *supra* notes 104, 363-65 and accompanying text (explaining abandonment of traditional one-term limit of president for two-term limit); see *supra* note 360 (detailing change in composition of Senate); see *supra* note 360 (discussing creation of Public Ministry as independent branch of government).

534. See *supra* note 298 and accompanying text (discussing President Menem's political intervention in provinces).

535. Alfonsín, *supra* note 2, at 43. President Alfonsín wrote, "only through institutionalization of democratic procedures, dialogue, and participation [is it] possible to lay the groundwork to establish the sovereignty of law." *Id.* See *Corporatism*, *supra* note 176, at 146 (defining strong democracy as involving "broad and deep popular participation in decision making and control led by strong participative and ideologically committed political parties and parliamentary bodies").

536. Jean-Bertrand Aristide, *The Role of the Judiciary in the Transition to Democracy*, in *TRANSITION TO DEMOCRACY*, *supra* note 2, at 35, 39-40. In regard to constitutional institutions, the former President of Haiti warned, "we must not be naive about the institutions of government. The institutions as we have painfully learned, are extraordinarily fragile." *Id.* He continues that justice and the institutions that bring it about must be, "accepted and furthered at all levels of society." *Id.*; see also Garro, *supra* note 15, at 4 (warning, "the most troubling issues posed by the transition to democracy in Latin America are therefore centered not so much on the creation of new legal institutions, but rather on the need to develop the necessary degree of consensus in support of those institutions").

537. See Nino, *supra* note 17, at 317 (calling acceptance of *de facto* laws "the most obvious contribution to the impairment of the democratic process on the part of the Supreme Court").

538. Garro, *supra* note 15, at 76-78. In a 1992 poll, 70.5% of Argentina felt that there was no judicial security in the nation and 63.3% believed that the judicial branch was not independent from the executive branch. Editorial, *Legal Integrity?*, BUENOS AIRES HERALD, Nov. 1, 1992, at 14. In a different poll in 1992, only 30% believed that

rule of law by recognizing validity in the rule of force, it is more beneficial to the creation of legal institutions in Argentina than the standard set forth in *Godoy*⁵⁴⁰ and *Gaggiamo*.⁵⁴¹

E. Validity and the Dangerous Precedent

De facto governments kept the courts open for two reasons, to help govern⁵⁴² and to validate their regimes.⁵⁴³ The *de facto* governments of Argentina viewed themselves as the vanguard of the society that they were trying to protect.⁵⁴⁴ These governments sought a seal of legitimacy from the courts, an institution of logic and order.⁵⁴⁵ To obtain legitimacy, the *de facto* governments kept the courts open and tinkered with the judiciary, ensuring that the *de facto* governments controlled the courts and, subsequently, the granting of legitimacy.⁵⁴⁶

The acceptance of *de facto* laws indirectly grants legitimacy to *de facto* governments. Recognizing that *de facto* governments have the ability to create a law that binds society as thoroughly as a *de jure* government, bestows upon the *de facto* government a judicial equality with a *de jure* government, and, thus, a certain legitimacy. A judicial standard, such as Argentina's current standard on *de facto* laws, that grants legitimacy to any aspect of a *de facto* government, accomplishes what *de facto* governments were

the rule of law was healthy in Argentina and 20% that the executive branch treated the judiciary as an independent branch of government. *Según una encuesta, la mayoría duda de la Justicia*, CLARIN, Mar. 26, 1992, at 5.

539. *Aramayo*, 306 Fallos at 74; see *supra* notes 344-50 and accompanying text (discussing Court's adoption in *Aramayo* of standard requiring express or tacit congressional ratification of *de facto* laws).

540. *Godoy*, [1991-II] J.A. at 458; see *supra* notes 409-17 and accompanying text (discussing standard Court suggests in *Godoy* of treating all *de facto* laws as valid).

541. *Gaggiamo*, [1992-D] L.L. at 483; see *supra* notes 418-30 and accompanying text (discussing *Gaggiamo* majority treating all *de facto* laws as legitimate).

542. Owen M. Fiss, *The Limits of Judicial Independence*, 25 U. MIAMI INTER-AM. L. REV. 57, 68 (1993).

543. Snyder, *supra* note 269, at 519.

544. See *supra* note 196 and accompanying text (describing Nationalist military government's perception of self as savior of Argentina); see *supra* note 247 and accompanying text (describing *de facto* government of 1966 to 1973 view of self as national savior); Snyder, *supra* note 269, at 510 (noting that junta during *el proceso* saw itself as "the guardian of the national heritage, the exponent of the noblest values of Argentine society and the true defenders of its Constitution").

545. Snyder, *supra* note 269, at 519.

546. *Id.* The *de facto* governments used the courts to appear as an "actual player in the game of legal rhetoric, a partner with court, petitioner, and legal analysis in the search for legality and justification." *Id.*

unable to accomplish on their own, veiling their authoritarian regimes behind a facade of legitimacy.

Granting legitimacy to a *de facto* government creates a dangerous precedent. The more legitimate *de facto* governments appear to Argentines, the less repulsive these governments seem. The standard in *Godoy*⁵⁴⁷ and *Gaggiamo*⁵⁴⁸ suggests that if the Supreme Court found past *de facto* governments to be legitimate, they might find future ones to be as well. The removal of the stigma of illegitimacy creates a precedent that casts a shadow over Argentina's transition to democracy.

CONCLUSION

The Argentine Supreme Court's treatment of *de facto* laws as legitimate endangers Argentina's transition to democracy without achieving the intended greater protection of the public's expectations based on those laws. By failing to reject the validity of laws born from authoritarian rule, the current treatment of *de facto* laws weakens Argentina's constitutional institutions by allowing for methods of legislation not enumerated in the Constitution and eroding public confidence in the legal system. The Supreme Court's retreat from a standard requiring express or tacit congressional ratification of all *de facto* laws before the Court would recognize them as valid, sets a dangerous precedent by recognizing the ability to legislate by force. In order to best denounce rule by force and to strengthen the rule of law, the Argentine Supreme Court must stress the inability of *de facto* governments to bind constitutional rule by returning to a standard requiring congressional ratification of *de facto* laws. Failure to return to a standard requiring congressional ratification of *de facto* laws bodes ill for the health of Argentina's democracy and serves as a poor example for other nations undergoing similar transformations from authoritarian to democratic government.

547. *Godoy*, [1991-II] J.A. at 458; see *supra* notes 409-17 and accompanying text (discussing *Godoy* Court's suggestion of treating all *de facto* laws as valid).

548. *Gaggiamo*, [1992-D] L.L. at 483; see *supra* notes 418-30 and accompanying text (discussing *Gaggiamo* majority re-establishing *de facto* doctrine).