

**THE SUPREME COURT AND CONSTITUTIONAL POLITICS
IN POST-MENEM ARGENTINA**

Diana Kapiszewski
Department of Political Science
University of California, Berkeley
March 31, 2006

INTRODUCTION¹

On March 5, 2003, the Argentine *Corte Suprema de Justicia de la Nación* (CSJN) ruled on a suit in which the Province of San Luis demanded the return of a US\$ 250,000 bank deposit. San Luis's money had been caught in a freeze on bank accounts imposed by the federal government, and forcibly converted into devalued pesos. The province claimed that both the freeze and the forced conversion of funds, undertaken by the federal government in an effort to stabilize the economy during Argentina's dramatic 2001-2002 crisis, were unconstitutional. In a startling challenge to the federal government, the CSJN upheld San Luis's claim, declaring the forced conversion unconstitutional and ordering the "re-dollarization" and return of the province's money. To justify its ruling, the Court argued that the decree establishing the forced conversion had been issued through an unconstitutional procedure, and that it violated property rights and was an unreasonable and inequitable response to the crisis. Some experts on the CSJN imputed political motivations to the Court's ruling however, interpreting it as a hostile reaction to an ongoing initiative of the federal government: to impeach the entire Court.²

A year and a half later, the Court handed down a contradictory ruling on a closely related case (*Bustos*). In that case, four plaintiffs brought suit against the federal government and various banks questioning the constitutionality of measures imposed between 2001 and 2002 to combat Argentina's economic crisis, and demanding the return of the portion of their assets that those measures had frozen and devalued (a combined US\$ 1,300,000). This time the Court *validated* the forced conversion of funds – the same policy it had declared unconstitutional only 18 months before – as well as every other measure questioned in the case. The Court argued

¹ This article will appear in the *Revista Jurídica de la Universidad de Palermo*, año 7, número 1 (June 2006). Writing this article would have been impossible without the absolutely exceptional work of my two Research Assistants in Argentina, Lucas Arrimada Antón, and Claudia González. Lisa Hilbink, Sally Roever, and Matthew M. Taylor provided excellent comments on earlier drafts of the article.

² According to this interpretation, the Court ruled as it did in order to send the following message to President Duhalde (2002-2003): should your government continue its attempt to impeach justices of this Court, we will

that, taken together, the measures were a reasonable response to the crisis, which required that the general good be prioritized over individual interests. Some attributed a different sort of political motivation to this ruling: the Court's desire to facilitate economic stabilization by upholding policies that appeared to have ameliorated the economic turmoil of the previous years.

These decisions illustrate a novel trend in the CSJN's jurisprudence, and mark a stark contrast with the Court's rulings during the Menem era. During the 1990s, the Court was fairly consistent in endorsing the exercise of government power in its rulings.³ However, between 2000 and 2005, the CSJN zigged and zagged precipitously when deciding politically important cases, alternating between attempting to limit significantly the exercise of government power, and firmly endorsing it. More significantly, the high court issued different decisions on very similar cases in various policy realms in the post-Menem period. What explains this variation?

Four possible explanations stand out. First, this pattern of unstable decisions may simply reflect the political and economic instability that marked Argentina during the period after Menem left office in December 1999. Yet this explanation appears unlikely. The peak of the crisis extended from mid-2001 to early 2003, while the CSJN continued to rule erratically between late 2003 and at least the end of 2005. Further, the Court zig-zagged in cases that had nothing to do with either the economic or political crisis. Thus, while crisis is no doubt one factor that contributed to instability in the Court's jurisprudence after 2000, it is insufficient on its own to explain the volatility in the Court's decision-making.

A second possibility is that the CSJN's rationales for its rulings on these politically crucial cases should be taken at face value. The Court almost always offers logical and convincing explanations for its decisions, and usually justifies any departure from its previous

continue to declare the forced conversion of dollars to *pesos* unconstitutional in the thousands of cases questioning the policy that are rising through the judiciary, thus placing your government in a financially untenable situation.

jurisprudence. Based on the CSJN's written decisions, we could conclude that its jurisprudence on the most critical cases to come before it in the new millennium was *consistent*, given the evolution in the legal framework, and the lack of similarity between the cases on which, at first glance, it appeared to issue inconsistent rulings. Yet legal scholars and political scientists alike have long doubted that the rationales offered by courts in their rulings fully and faithfully reflect the motivations behind their decisions (Shapiro). This skepticism leads me to look more closely at alternate explanations of the CSJN's behavior after 2000.

The third and fourth potential explanation can be drawn from the literature on judicial decision-making. The attitudinal model, advocated most clearly and forcefully in the U.S. literature by Segal and Spaeth (1993, 1999), suggests that judges make decisions in much the same way as other political actors: their ideological attitudes regarding policy outcomes dictate how they vote on cases. Given the rapid turnover in both presidents and justices in Argentina during the period under study, this approach would suggest that the CSJN's dramatic jurisprudential inconsistency reflected the evolution in the Court's ideological biases as its composition changed. Yet this explanation cannot account for all of the observed jurisprudential variation during the period under study for a simple reason: identical configurations of CSJN justices issued sharply contrasting rulings on quite similar cases.⁴

The strategic actor approach, which understands judges as ambitious political actors who issue rulings guided by the opportunities and constraints in the political system within which they operate, also holds promise. Scholars of Argentina have recently adopted this approach to explain the CSJN's willingness and ability to challenge the government. Helmke's (2002) study

³ In a separate analysis I am writing on CSJN decisions handed down between 1984 and 2003 on cases in which the constitutionality of crucial economic policies was questioned, I find that the CSJN did not endorse the exercise of government power in its rulings as consistently as conventional wisdom suggests.

⁴ To give just two examples, while the same members sat on the court from December 1995 through October 2002, the CSJN's decision on the similar *Kiper* and *Smith* cases (decided December 28, 2001 and February 01, 2002,

of the CSJN's jurisprudence between 1977 and 1995, for example, found that in Argentina's uncertain institutional environment, justices ruled against the sitting government more often towards the end of its tenure, in hopes of gaining favor with the incoming administration. Based on an analysis of the Court's jurisprudence between 1935 and 1998, Iaryczower et al. (2000) hold that the probability that Argentine justices will vote against the constitutionality of a federal law or presidential decree increased as the number of justices nominated by the sitting president fell, and dropped as the degree of control the executive retains over the legislature rose. In her study of the jurisprudence of the Argentine and Chilean Supreme Courts from the 1940s through the 1990s, Scribner (2004) argues that justices' willingness to challenge presidential authority depended upon their appointment and tenure relationships with presidents, and the likelihood that they would face coherent majorities or political retaliation.

Each of these strategic actor-oriented studies partially explains the Argentine Supreme Court's behavior in the post-Menem era, but again, none accounts sufficiently for the zig-zagging we observe in the Court's jurisprudence since 2000. Like other studies in the strategic actor school, these accounts highlight the determinative importance of only one or at most two objectives to strategic decision-making (concern for tenure security in Helmke, the desire to support the appointing president and fear of being overturned in Iaryczower et al., and the desire to maintain the institutional integrity of the Court and guarantee compliance with its rulings in Scribner). Yet as the cases analyzed later in this article demonstrate, Supreme Court justices have a range of goals that might also motivate their decision-making. Because the strategic school primarily examines high courts' relationships with other branches of government, these studies also fail to consider how the Court's changing relationship with society may influence its strategic objectives. Finally, the strategic model fails to account for why the Court would issue

respectively) were conflicting, as were its rulings on the similar *Guida* and *Tobar* cases (issued June 02, 2000 and August 22, 2002 respectively).

conflicting decisions on cases in which the government appeared to have no strong policy preference, and which appeared to have little strategic importance either to the political branches or the Court.

In short, standing alone, none of the four approaches just reviewed is sufficient to explain the CSJN's wavering jurisprudence across politically important cases over the past six years. Instead of discarding these accounts, however, I build on them to generate an alternate explanation, based on both micro- and macro-level analysis.

On the micro-level, rather than viewing the high court's behavior as a response to one or two over-arching political dynamics as suggested by the strategic actor approach, I propose that Argentine justices and their rulings in the post-Menem era were at times primarily motivated by constitutional imperatives, but were more often heavily influenced by short-term political conditions, notably threats and pressure from the Executive, and economic and political crisis. These conditions varied in salience over time, impinging on the high court in different ways at different decision-making moments, and thereby leading the high court to issue contrasting rulings on similar cases.

But why was the Court so permeable to the effects of these short-term political dynamics? I argue, on a broader level, that extreme values on four key institutional variables increased the high court's vulnerability to these political factors, in addition to facilitating its response to them. First, the high court's legitimacy deficit, which spiked during the Menem years, may have motivated the CSJN to "cast about" to try to regain support, from the government at some moments (through issuing deferential decisions), and from society at others (by challenging unpopular high-priority government initiatives). Second, high levels of decision-making discretion offered justices the latitude to respond to the political conditions that were most salient at each decision-making moment.

Likewise, the fact that Argentine justices have not developed a consensual notion of the high court's role made them particularly vulnerable to the short-term pressures and the ever-evolving circumstances of the tumultuous post-Menem period. Finally, because no depersonalized institutional relationship has been established between the high court and the political branches of government, each turnover in the Presidency has had the potential to change radically the relationship between the Court and the Executive. Given the extremely tight alignment between justices and President Menem through the 1990s, Menem's departure from office in 1999 generated especially significant upheaval with important consequences for the CSJN's jurisprudence.

This article proceeds in three sections. The first section describes a series of relevant formal and informal institutional attributes of the CSJN, and builds four key institutional variables that offer an alternative explanation for the Court's behavior. Section 2, drawing on extensive field research in Argentina, offers a detailed qualitative analysis of a systematically selected medium-N number of politically crucial cases decided by the CSJN in the post-Menem era, of the social, economic, and political context in which they were decided, and of the rulings on each. In Section 3, I develop further my two-level theory to account for the CSJN's jurisprudential inconsistency when deciding politically important cases since 2000.

1. KEY INSTITUTIONAL ATTRIBUTES OF THE ARGENTINE SUPREME COURT

In the first part of this section, I outline a series of relevant formal institutional attributes of the CSJN; when informal practices diverge from formal mandates, I also offer a description of the corresponding informal realities. The second part draws on the first to highlight four key institutional variables that I propose facilitated the CSJN's jurisprudential zig-zagging when ruling on the most politically crucial cases it decided in the post-Menem era.

A. Formal Institutional Attributes and their Informal Counterparts

1. Appointment – No judicial career exists in Argentina: lateral entry occurs at all levels of the federal judiciary, including to the Supreme Court (Government of Argentina 2002: 23). Until 1994, Supreme Court appointments were made by the president and approved by the Senate; approval required a positive vote by the majority of Senators present at the time of the vote (with quorum) (Molinelli 2000: 656). The 1994 reform to the 1853 Constitution changed the process somewhat: thereafter, presidential appointments had to be approved by two-thirds of the Senators present at the time of the vote (with quorum) (Article 99). Soon after assuming office in 2003, President Kirchner issued Decree 222, which increased the transparency of the process of appointing Supreme Court justices.

It seems logical that the objective of the increasingly strenuous checks on the appointment process is to augment the likelihood that presidents will appoint well-qualified, centrist justices to the highest court in the land. However, given that the Senate has rarely objected to a presidential nominee, presidents have had an extraordinary degree of discretion in terms of who they appoint, and “appointment styles” have varied tremendously since the 1983 transition to democracy in Argentina.⁵ While most believed that President Alfonsín (1983-1989) strove to appoint well-qualified jurists of various political leanings to the new post-transition Court, the popularly held image of the justices appointed by President Menem (1989-1999) was quite different. In fact, beginning in 1990, evolving configurations of Menem appointees to the CSJN became known as the “*mayoría automática*” – that is – justices who could be counted upon to vote *en bloc* to “automatically” support Menem’s interests and his government’s policies when the former were in play or the latter were questioned. While this description is almost certainly overblown, the fact

⁵ In other Latin American countries, the Executive is less able to affect justices’ political and jurisprudential leanings. For example, as Hilbink (1999) describes the situation in Chile, there is no lateral entry to the high court: when a Supreme Court vacancy arises, the justices themselves provide the president a list of candidates for the

that Menem's appointees to the CSJN were widely considered to be illegitimate is an important feature of the Argentine political landscape.⁶ These justices dominated the Court from the early 1990s through mid-2003 (i.e. during most of the time period under study), and their institutional legacy is persistent.

There is greater ambiguity regarding the ideological alignment between President Kirchner and the four justices he has appointed since assuming power in May 2003. Nonetheless, two important changes have occurred: first, most of President Kirchner's appointees are considered to be well-qualified jurists. Second, for the first time since the transition to democracy, the newest appointees have not been (as candidates or since appointment) referred to in partisan terms.

2. Tenure and Removal – Both the 1853 constitution and its 1994 reform (Article 110) indicated that justices would have life tenure as long as they exhibited “good conduct.”⁷ Further, the constitution stipulates that impeachment is the only way to remove a Supreme Court justice. Impeachment requires a vote of two thirds of the members present in the Chamber of Deputies at the time of the vote (Constitution post-1994 reform, Article 53), and removal from office of a Supreme Court justice (already impeached by the Chamber) requires a vote of two-thirds of the members present in the Senate at the time of the vote (Constitution post-1994 reform, Article 59).

empty seat drawn from the lower ranks of the judiciary. The president nominates one of those candidates, and that nominee is subsequently vetted by the legislature.

⁶ To emphasize, the point here is not whether the justices were “actually” of high quality or not; this is an extraordinarily subjective evaluation, and this article makes no judgment on that issue. The important empirical reality highlighted here is that President Alfonsín's appointments were *considered* to be well-qualified jurists, while the majority of President Menem's appointments were *considered* to be weaker jurists. These popular opinions had important implications for the perceived legitimacy of the high court.

⁷ Article 99 of the 1994 constitutional reform, which came into effect in August of 1999, required justices who reached the age of 75 to be reconsidered and reappointed by the Senate every five years. Nonetheless, in the *Fayt* case (decided August 1999), one of the few cases in Argentine history in which the constitutionality of a constitutional clause was called in question, this Article of the constitution was declared unconstitutional. Justice Fayt, aged 88 in 2006, remains on the CSJN and has not been reconfirmed or reappointed by the Senate. The only other justice to subsequently reach the reconsideration age, Justice Belluscio, resigned on September 1, 2005 at the age of 75.

Nonetheless, institutional reality has again strayed from these strictures. As has been explored in depth in the literature on the Argentine high court (see Chavez 2001, Finkel 2001, Helmke 2000, Larkins 1998, and Ungar 2002), perhaps encouraged by the fact that “good conduct” is a vague notion and nowhere defined, the Executive has long had a penchant for modifying the CSJN’s size and composition.⁸ Further, the threats to the high court and the instability in its composition during the period under study were extreme.

The Argentine Congress initiated several unsuccessful attempts to radically change the composition of the Court in late 2001 and early 2002.⁹ Soon after President Kirchner assumed office in May 2003, various strategies to impeach justices began to be openly discussed,¹⁰ and in early June, President Kirchner, activating the constitutionally mandated rules for judicial impeachment and dismissal, called on Congress to reinstate impeachment proceedings against several justices.¹¹ Appendix 1 outlines the 12 changes in composition that the CSJN underwent between 2000 and 2005.

⁸ Beginning in 1947 with Perón’s “witch-hunt” of Supreme Court Justices, the composition of the Court changed dramatically on eight occasions between the late 1940s and the 1983 transition to democracy: the Court was replaced in its entirety in 1955; three-fifths of its members were replaced in 1958; the Court was expanded to seven members in 1960 (two new members were added; the sitting five remained in place); the Court was reduced back to five members in 1966 and all its members replaced; and the Court was completely replaced again in 1973 and in 1976 (Bercholz 2004: 99-101). Subsequently, the entire court was replaced with the transition to democracy in 1983, and in April 1990, at the behest of President Menem, the Argentine Congress passed the *Ley de Ampliación* (Law of Expansion), which increased the size of the CSJN from five to nine justices. While this law only created four new seats on the Court, due to the resignation of one sitting justice prior to, and another in response to, the passage of the law, Menem would appoint six justices (a full two-thirds of the expanded Court) within 11 months of assuming office. Later, as part of the political bargain struck to facilitate constitutional reform in 1994, three Menem appointees resigned and were replaced between February 1994 and December 1995.

⁹ In late 2001, the Argentine Congress established a committee to evaluate dozens of complaints against various Supreme Court justices, and in early February 2002 legislators promised to accelerate the process of impeaching the entire Supreme Court.

¹⁰ *La Nación*, 04 June 2003, “*Se ahonda el conflicto con la Corte.*”

¹¹ Impeachment proceedings were soon initiated against five justices, and by September 2005, all five had resigned or been removed and a sixth had retired. This most recent series of removals generated significant opposition from legal scholars who considered them to exceed the limits of the constitutional framework for impeachments. By March 2006, President Kirchner had only filled four of the six vacancies and had suggested that he would delay indefinitely in filling the remaining two empty seats, while simultaneously insisting that he would not shrink the size of the Court from nine to seven justices as various civil rights groups had been advocating. Some suggested that, in this way, Kirchner could continue to deny that he had appointed “a majority” of the CSJN (major decisions require a five-justice majority), while simultaneously thwarting the Court’s work by keeping it in institutional limbo.

3. Jurisdiction¹² – The Argentine Supreme Court has original jurisdiction over cases concerning ambassadors, ministers, foreign consuls, and cases in which a province is a party. The Court has appellate jurisdiction over cases involving issues regulated by the constitution and the laws of the nation; involving treaties with foreign nations; involving maritime law; in which the nation is a party; and in which a foreign country or citizen is the defendant (Constitution of 1853, Articles 100 and 101; 1994 reform, Articles 116 and 117). Appellate jurisdiction may be either ordinary or extraordinary; the Court has ordinary jurisdiction over all federal matters, and extraordinary jurisdiction over any case in which the interpretation of a federal norm is at stake, or a contradiction is alleged between the constitution and another act or norm at any level (Molinelli et al. 1999, 639-650).

While the high court’s jurisdiction is formally quite broad, it has, in effect, been informally augmented in recent years through the constitutionalization of politics (the increasing tendency to understand conflicts in constitutional terms) that has occurred in Argentina. Further, the Executive has, on several occasions, in effect broadened the high court’s jurisdiction by implementing temporary measures to hasten the arrival of cases of economic transcendence to the high court.¹³

4. Docket control – The Argentine Supreme Court has historically had little formal control over its docket. It must rule on all cases in its original jurisdiction and on all

¹² Note that Argentine Supreme Court traditionally had both administrative and judicial functions. Once the *Consejo de la Magistratura* (created in the 1994 Constitution) began to function in February 1999, it ostensibly ceased to handle judicial administration. This article does not examine the high court’s administrative role or jurisdiction. .

¹³ For instance, an article of Law 24.464 (la *Ley de solidaridad provisional*, 1995) allowed the *Administración Nacional de Seguridad Social* to appeal rulings of the special social security appeals court directly to the CSJN. (Interestingly, in 2005 in the *Itzcovich* case, the CSJN declared that clause unconstitutional, *La Nación*, 30 March 2005, “*La Corte falló a favor de los jubilados.*”) Further, in November 2001, through Article 50 of Delegated Decree 1387/01, the Executive introduced a new clause to the *Civil and Commercial Procedural Code* (Article 195 bis) establishing a temporary “*per saltum*” that allowed the direct appeal from the first instance to the CSJN of *medidas cautelares* that blocked the development of activities of essential state services. This special *per saltum*, which remained in place through April 2002, facilitated the arrival to the high court of cases challenging the series of policies that the government imposed between December 2001 and February 2002 to address the grave economic crisis the country was at that point facing. The mechanism was often employed by banks to contest *medidas*

appeals via *recurso ordinario* (though cases that can be construed to suffer from a technical deformity can be rejected without hearing). Government policy enhanced docket control in April 1990, however, when Law 23.774 (the same law that expanded the Court from five to nine members) modified article 280 of the Civil and Commercial Procedural Code, affording the Court the ability to refuse to hear some cases that come before it via "*recursos extraordinarios*" and "*recursos de queja*" (the routes through which the majority of cases arrive to the Supreme Court) should the Court deem those cases as lacking sufficient "transcendence."¹⁴ The Court has utilized this mechanism to reject an important number of *recursos extraordinarios*.¹⁵

Further, over time, the CSJN itself has developed various informal docket control mechanisms that have increased its "*jurisdicción discrecional*" with respect to the *recurso extraordinario* (Bianchi n.d.: 924). While the Court has used some of these informal practices to decrease its case load,¹⁶ the employment of several others not only facilitated the Court's "grabbing" of cases it wished to decide, but worked to increase its overall case load.¹⁷

cautelares granted by first instance courts in favor of releasing bank deposits caught in the *corralito* (*La Nación*, 29 December 2001, "*La Corte impide que los jueces ordenen devolver los ahorros*;" Gelli JA 2003-II-1294).

¹⁴ While case review procedures are somewhat abbreviated when the Court rejects a case due to a technical deformity or using the mechanism established in article 280 of the legal code, the case must still be prepared for consideration, and must be considered by at least three justices. In the latter case, the Court need provide no specific justification for its rejection beyond invoking article 280 of the legal code. The rejection of a case using this mechanism neither confirms the lower court ruling nor establishes "precedent"

¹⁵ In 2001 for instance, more than half of the *recursos extraordinarios* and *recursos de queja* rejected by the Court (372 of 807 *recursos extraordinarios*, 34% and 3,060 of 3,787 *recursos de queja*, 80%) were rejected using the mechanism provided by the 1990 law; the rest were rejected for "traditional" (technical) justifications – lack of a definitive sentence from the last instance lower court, and lack of *fundamento*. The wave of individual cases having to do with social security and pensions that has inundated the Court in the 1990s are excluded from these figures (Legarre 2004: 1267-80).

¹⁶ For instance, when the 1994 constitutional reform instituted a form of class action suit, the Court was initially very restrictive in terms of deciding which groups and associations had standing to file such a case. In addition, over time, the court has developed a confusing political questions doctrine that it applies in what some Argentine scholars describe as an arbitrary manner (Bianchi n.d.: 924).

¹⁷ For instance, the doctrine of "arbitrariness of sentences;" the doctrine of "institutional graveness" (a mechanism with certain affinities to U.S. *certiorari*); the mechanism of *per saltum* (which the Court adopted for itself in a case in 1990 [*Dromi*] and another in 1997 [*Rodríguez*]); and the so-called *certiorari* "of admission." Some suggest that the already overloaded Court might have instituted mechanisms to *increase* its caseload because some justices interpreted the number of cases the Court could decide as an indicator of power. Further, and in particular recently, the CSJN has also "bent the rules" in a more piece-meal fashion in order to facilitate the selective "grabbing" of cases that it wanted to resolve. For example, in three of the cases examined in the second section of this article (*San Luis*, *Bustos*, and *Portal de Belén*), the dissents argued that the particular legal mechanism used to bring the case before the CSJN, an *amparo*, was not the appropriate mechanism to utilize. Nonetheless, the Court accepted the

5. Case load – As Appendix 2 highlights, in the early 1990s, the Argentine Supreme Court decided fewer than 10,000 cases annually. However, in 1997 that number skyrocketed to 41,318 cases, and between 1997 and 2004, the Court decided an average of almost 28,000 cases per year.

There are many reasons for this gigantic case load. First, as noted above, the CSJN's jurisdiction is quite broad, and it possesses relatively few formal docket control mechanisms; further, as points 3 and 4 above highlight, in recent years the government has instituted measures and the Court has developed mechanisms that have served to increase the Court's case load. What is more, there are startling few obstacles to appeal to the high court: it is possible to find a way to raise most cases to the highest instance. Also, the government at times uses appeal as a way to "stall" a final ruling against its policies, a practice that significantly overloaded the court in the face of the repetitive cases generated by macroeconomic reform and adjustment in the later 1990s (particularly regarding pension policy as Appendix 2 highlights), and by the policies implemented to address the dramatic economic crisis of 2001-2003.

Further, Argentina has a sea of laws, decrees, and other legal norms as a result of its tumultuous history of regime instability. Consequently, it has long been difficult to ascertain which laws are actually in force in the country, and conflicts among the norms are a constant challenge for the country's judiciary. The legal landscape became even more complex in 1994 when the international treaties to which Argentina is signatory were integrated into the Constitution with constitutional status. However, again, the extraordinary barrage of decrees and legislation passed between 2001 and 2002 in an attempt to address the latest economic crisis was an extreme case. This most recent dramatic instability in Argentina's legal framework enhanced

cases and decided them on the merits. (*Amparo* is a type of remedy that requests that the Court use an accelerated process to decide a case and thus assure the effective exercise of constitutional rights against arbitrariness and illegality by a governmental authority, Helmke 2000: 272). Further, the Court ruled on the merits in the *Smith* case even though the constitutionality of the involved policy was not being questioned.

the possibility of collisions between new norms and existing laws or constitutional clauses, and encouraged the questioning of the government's policies in the judiciary.¹⁸

6. Case review and decision procedures – The Argentine Supreme Court is designed as a deliberative, collegial body: it consists of only one chamber, and with limited exceptions,¹⁹ all justices must vote on all cases. In reality, however, the high court fails dramatically as a deliberative institution. First, the Court's case review procedures are written and piece-meal in style. Following a case's arrival to the Court and some initial bureaucratic processing, it is distributed to one Secretariat, or to the chambers of one justice, where an initial draft opinion is written. That opinion and the case itself then circulate through the justices' chambers, and each justice reviews the case and the opinion to determine whether he or she wishes to sign the opinion, amend it, concur separately, or include a dissent with the draft opinion. The president of the Court²⁰ votes last and determines whether the *Procurador General* should also write an opinion (Helmke 2000: 99, 204, 273-75).

Justices meet in weekly or bi-weekly sessions to discuss and sign opinions on cases that all justices have already reviewed. While the high court's sessions are not public, conventional wisdom holds that it is the exception, rather than the rule, that cases are discussed in depth. These practices are reflected in the Court's decisions. On the most politically important cases

¹⁸ Two additional dynamics partially explain the number of *constitutional* cases in the CSJN. The first has to do with the inertia of the Argentine Congress: because Congress does not legislate with the speed or effectiveness that it might, the CSJN is sometimes called upon to generate public policy solutions (for instance, in the *Chocobar* case [1996], in which the Court established the level for certain retirement benefits). Further, to an increasing degree through the 1990s, the Argentine Executive ruled by decree in general and by *Decretos de Necesidad y Urgencia* (DNU) in particular. When the Executive's ability to issue DNUs was established in the 1994 constitutional reform, it was simultaneously stipulated that a bi-cameral congressional committee be created to verify the "necessity" and "urgency" of DNUs prior to their approval by Congress. However, the commission was never created. Consequently, the judicial route to challenging these decrees has become the only viable option, with their "constitutionalization" facilitating their arrival to the high court.

¹⁹ One such exception is the one mentioned in footnote 14 above regarding how the court can reject cases based on the stipulations outlined in Article 280 of the legal code.

²⁰ The president of the Argentine Supreme Court is elected by the justices of the Court to a three-year term.

the Court considers, justices rarely arrive at a unanimous verdict, and are often badly split.²¹ Further, the Court’s written opinions are often lengthy, including not only detailed dissents, but long concurrences that offer, in essence, another “version” of the decision (highlighting different rationales); these can cause the Court’s rulings to extend to hundreds of pages. Further, justices often abstain from ruling on cases (which they can do without any justification).²² In short, the court has great difficulty speaking with one voice.

7. Timing of decisions – In general, the president of the Supreme Court exercises agenda-setting power by deciding which opinions will be signed in the Court’s weekly session. While there are no constitutionally mandated timelines for the CSJN to make its decisions, due process would suggest that cases should be decided as efficiently as possible. Nonetheless, as Table A below illustrates, there is startling variation with respect to the speed at which the Court rules on the most politically crucial cases to come before it. This has led some to suggest that the CSJN “*juega con el tiempo*” – that is, that it uses decision-making speed as a political tactic. The Court’s ability to do so was facilitated in recent years by its immense case load (detailed above and in Appendix 2): due to the fact that the CSJN has tens of thousands of cases to decide at any moment, it can justify slow decision-making by insisting that certain rulings are not forthcoming due to the extraordinary number of cases on which it must rule.

8. Accountability mechanisms – Few formal accountability mechanisms bind the Argentine Supreme Court – that is – neither the other branches of government nor any other actor has much official ability to control its behavior. As indicated above, it is formally difficult to remove a justice from the Court; further, under no circumstances can justices’ compensation (determined by law) be reduced during their tenure on the court (Constitution, Article 110).

Also, the *Ley Complementaria Permanente del Presupuesto* (11.672/1933) and the *Ley de*

²¹ The Court was badly split on three out of eleven decisions analyzed here: *Tanus* (5-3 with one abstention), *Portal de Belén* (5-4) and *San Luis* (5-3 with one abstention).

Table A -- Time Elapsed Between Filing of and Ruling on CSJN Cases Considered in this Article (in Increasing Order of Time Elapsed)

Case	Issue area	Date entered CSJN	Date decided by CSJN	Time elapsed (incl. January holiday) ¹		
				Years	Months	Days
Kiper	<i>Corralito</i>	27 December 2001	28 December 2001			1
Tanus	Abortion debate	29 December 2000	11 January 2001			8
Smith	<i>Corralito</i>	02 January 2002	01 February 2002			30
Stancanelli	Abuse of power	13 August 2001	20 November 2001		3	7
Tobar	Public sector salaries	26 April 2002	22 Aug. 2002		3	27
San Luis	<i>Pesificación</i>	20 February 2002	05 March 2003	1	0	13
Portal de Belén	Abortion debate	30 August 2000	06 March 2002	1	7	7
Bustos	<i>Pesificación</i>	24 February 2003	26 October 2004	1	8	2
Poblete	Abuse of power	06 June 2002	14 June 2005	3	0	8
Guida	Public sector salaries	22 Abril 1997	02 June 2000	3	1	11
Vázquez	Abuse of power	09 August 2000	30 September 2003	3	1	21

¹ The inclusion of the January holiday can be significant; *Smith* was decided one *working* day after it entered the CSJN.

Autarquía Judicial (23.853/1990) assign the CSJN the power to prepare the *Presupuesto de Gastos y Recursos del Poder Judicial* (which is then forwarded to the Executive for incorporation in the *Presupuesto de la Administración Nacional* presented annually to Congress). The high court also establishes the judiciary's annual *Plan de Obras*.²³ In short, formal mechanisms of accountability serve as only a weak incentive for the CSJN to carry out effectively its constitutional mandate.

As noted above however, in actuality, the Executive has enjoyed relative freedom in changing the composition of the high court, and presidents have a great deal of latitude with respect to high court appointments. These informal “*ex ante*” controls that the Executive possesses over who sits on the Court partially compensate for the weakness of formal accountability mechanisms.

²² Among the 11 cases considered here, in seven at least one justice abstained.

²³ <http://www.asap.org.ar/documentos/Informes/OBSERVATORIO%20FISCAL/Parte%20de%20prensa%2021-05.pdf>, accessed 28 March 2006. The CSJN establishes the judiciary's budget and activity priorities even though, as noted in fn 12 above, the CSJN was divested of most of its administrative duties with the creation (via the 1994 constitutional reform) and entering into function (in February 1999) of the *Consejo de la Magistratura*. As stipulated in Point 3 of Article 114 of the amended constitution, that body administers the resources and manages the budget assigned by law to the administration of justice.

B. Consequences – Four Key Institutional Variables

The eight formal and informal attributes of the Argentine Supreme Court mentioned above can be combined to form four key institutional variables that I will argue in Section 3 of this article have allowed the CSJN to engage in the jurisprudential inconsistency that has marked its rulings in the post-Menem era.

The first institutional attribute relates to the high court's legitimacy. The CSJN gained significant legitimacy shortly after the country's transition to democracy due to the perceived strong qualifications of President Alfonsín's appointments to the court, and its courageous confirmation of the Appeals Courts' verdicts in the series of trials of the Generals who led the previous military regime. However, weakly institutionalized rules regarding the number of justices who may sit on the Court, and presidential discretion in terms of appointments allowed President Menem to pack the court with justices widely considered to be underqualified.²⁴ This, together with the "Menem Court's" early high-profile rulings endorsing policies considered by many to be unconstitutional, resulted in a dramatic **legitimacy deficit for the high court** by the mid-1990s. One indicator of the Court's lost legitimacy were scenes, repeatedly featured on the front-page of national newspapers and on news programs around the country, of hoards of angry Argentines gathered in front of the *Palacio de Tribunales* vociferously urging the justices to resign by screaming the same slogan used to demand the renovation of the entire political class: "*que se vayan todos.*"²⁵

The second feature relates to the **multi-faceted discretion the high court enjoys** in deciding cases. As was shown above, despite the CSJN's broad jurisdiction, immense case load, and lack of formal docket control, the Court has developed a series of informal docket control

²⁴ Again I insist that the important point is not whether the justices were "actually" qualified or not, but rather what the popular perception of their merit was, as these perceptions impact the perceived legitimacy of the high court.

²⁵ To give just two examples, "*La Corte de las cacerolas,*" and "*Más protestas contra el alto tribunal,*" both appearing in *La Nación* in January 2002.

mechanisms that have augmented its ability to manage its case load – that is – to decide on *what* cases it will rule. Further, the CSJN’s enormous case load combined with the absence of formal stipulations regarding the timeframe within which it must rule means that it wields a great deal of control over *when* it decides cases. This allows it to determine the temporal relationship its ruling will have to a particular political controversy, a source of significant political power. And, as the cases mentioned in Section 3 of this article evidence, while sometimes the Court has decided cases with amazing celerity (offering it the opportunity to rule in the midst of a politico-economic storm, as in the *Kiper* and *Smith* cases), at other moments it has chosen to delay significantly a decision. Taking the latter route not only enabled it to stay out of the middle of the most heated moments of some controversies, but also allowed it to claim that a questioned norm had “become” constitutional or unconstitutional due to ensuing events or legislation.²⁶ In this way, the Court’s ability to choose when it decides cases afforded it additional latitude in terms of *how* it decided cases.

This freedom is further augmented by the reality that very few formal mechanisms exist through which other actors can hold the high court accountable for its decisions. However, it is important to remember that the Executive has often sought to maximize the alignment between sitting justices’ ideology and priorities and his own (either pre-emptively, in the case of Menem, or *ex post*, in the case of Duhalde). To the degree that the Executive is successful in his implementing such “informal controls” on the high court (Menem was successful while Duhalde was not, for instance), the strength of formal accountability mechanisms is a less robust indicator of how much leeway the CSJN actually possesses in deciding politically crucial cases.

²⁶ This is an important point. In four cases discussed in Section 3 of the article (*Smith*, *Tobar*, *Bustos*, and *Poblete*), the Court pointed to legal and/or economic changes since the government’s implementation of a particular policy or since the Court’s original ruling on that policy to justify a subsequent apparently contradictory decision on that same policy. The Court’s willingness to use the argument that a policy can *become* constitutional or unconstitutional afforded it significant flexibility in decision-elaboration.

Third, evidence from interviews I carried out with sitting and former justices of the CSJN suggested a marked **absence of consensus among its members concerning the Court's main institutional role**. When asked what the Court's fundamental role is, some justices automatically responded "to act as guardian of the Constitution." Others suggested that the Court's most important function is to support the institutional system more generally, which could at times necessitate adhering less closely to a particular constitutional clause in the interest of maintaining the integrity of the larger system. Another justice explained that the Court should carry out different "levels" of constitutional review depending upon the type of government policy or act in question, and that in cases regarding economic policy or in which the government indicates a compelling interest, the Court should respect government policy and carry out more superficial constitutional review.²⁷

High court justices' traditional tenure instability (described above) doubtless has contributed to this lack of institutional consensus, and the failure of collegiality that marks the institution both exemplifies and exacerbates the problem. Further, the dramatic institutional insecurity generated by the perpetual threat – and periodic success – of replacement initiatives in combination with the constant upheaval in terms of the Court's personnel during the 2000-2005 may have made it even more difficult for the Court to develop a consensual notion of its institutional role during the post-Menem era.

The final and related key institutional attribute is the **lack of a defined, depersonalized institutional relationship between the elected branches and the high court**. The personalized nature of some presidential appointments in the post-transition era, the tenure instability

²⁷ At least some justices appear to be less concerned than they might be about this lack of institutional consensus. When one Kirchner appointee was asked during her Senate confirmation hearings whether the changing composition of the CSJN would imply changes in the Court's jurisprudence, she answered without hesitation, "of course." Obviously any Court's jurisprudence changes gradually over time as justices of differing political and judicial ideologies leave and join the Court. What makes Argentine different is the degree to which and speed at which such changes occur.

highlighted above, and the fact that Argentina had seven presidents between its 1983 transition to democracy and 2005 (six of whom held office between 1999 and 2005) have prevented the formation of an institutionalized relationship between the executive and the high court.

Consequently, each successive administration in post-transition Argentina was characterized by a different type of elected branch-high court relations.

President Alfonsín, who chose to replace the entire Supreme Court at the moment of regime transition, apparently did not seek to create a reflection of his own ideology and priorities on the high court; consequently, courageous high court challenges to government policies occurred with some frequency in the early years of the post-transition period. President Menem, however, anticipated that he would need consistent high court support in order to implement his policies, and consequently sought to maximize the ideological alignment between the Executive and the high court; as a result, the high court was more deferential to government preferences during the Menem years.

President de la Rúa ruled with a Court whose ideological profile differed dramatically from his own; nonetheless, since he sought a truce with the high court rather than attempting to manipulate it. Due to this reality and the impending crisis that marked the last months of his presidency (which may have dissuaded the Court from issuing challenging rulings that could have further destabilized the country), De la Rúa was handed few resounding defeats by the CSJN. President Duhalde wished to change the membership of the Court, presumably to create one in his own image (rather than that of his nemesis former President Menem) but was unsuccessful; his attempt and failure resulted in significant conflict between the Executive and the Court marked by several hostile rulings by the latter against the former. Relations between the Court and President Kirchner are still evolving, as high court membership has been in flux since Kirchner assumed office in May 2003.

2. JURISPRUDENTIAL ZIG-ZAGGING IN THE POST-MENEM ERA

This section of the article analyzes 11 politically crucial cases on which the CSJN ruled in the post-Menem era.²⁸ The cases are arranged in four issue areas: public sector salaries; measures imposed to address the economic crisis that rocked Argentina from mid-2001 to early 2003; punishing abuses of power of previous governments; and individual rights (the abortion debate). Within each issue area, the cases are presented in chronological order. The short-hand “zig” and “zag” in each sub-heading refers to the alternation between limiting and endorsing the exercise of government power that characterizes the CSJN’s rulings on the pairs or trio of cases presented within each topic. Given that a multi-faceted, rigorous qualitative method (described in Appendix 3) was used to select the 11 cases discussed here, I consider the CSJN’s rulings on them to be illustrative of how the high court decided politically important cases since 2000.²⁹

A. *Public Sector Salaries – Guida (zig) and Tobar (zag)*

By the mid-1990s, the negative effects of the Mexican financial crisis of 1994 had begun to be felt in Argentina. In an attempt to address the country’s economic woes, President Menem issued Decree of Necessity and Urgency (DNU) 290/95 (later ratified by the Argentine Congress in the budget law passed at the end of 1995, Law 24.624) which decreased public sector spending.³⁰ The decree reduced the total monthly salary of most personnel in the public sector by as much as 15 percent (with the exact percentage being determined by the level of the

²⁸ This study defines “politically important cases” as cases in which the high court had the opportunity to limit or endorse significantly the exercise of government power by issuing a ruling regarding the political system, the behavior of the government, a national law, or a policy of the central government.

²⁹ This article is being written in association with my doctoral dissertation, and thus reflects the methodology used to select the cases my dissertation analyzes. In general terms, that case selection methodology involved triangulating data from three sources: articles and books addressing the CSJN’s jurisprudence from 1984 to 2003 (the time period my dissertation addresses), articles on the CSJN’s jurisprudence from the Argentine daily *La Nación*, and interviews with experts on and justices of the CSJN. Of the 11 cases analyzed in this article, two were *not* chosen using that methodology (*Bustos* [2004] and *Poblete* [2005]) as they fall outside the temporal confines of my dissertation research. Nonetheless, “imminent decisions” on these cases were mentioned repeatedly as important in my case selection interviews, and more than 25 *La Nación* articles were written regarding each.

employee's monthly income). Public sector employees began to file suit against the Decree. Liliana Guida's claim, one of many such suits, was upheld in both the first instance court and an appeals court. The federal government appealed to the Supreme Court. The CSJN, ruling more than five years after the implementation of the policy and more than three years after Guida's case had entered the Court, declared DNU 290/95 constitutional in June 2000.

To justify that decision, the CSJN confirmed that the DNU met the requisites for measures implemented under economic emergency (it was generalized, proportional, reasonable, temporary, and non-retroactive), and argued that Congress's acknowledgement of the measure in the 1995 budget law translated into both recognition of the emergency situation invoked by the Executive and the control of DNUs required of the Congress (Gelli 2003a: 706-07; Fayt 2004: 423). Yet some analysts pointed out that the CSJN had only ruled on *Guida* when the De la Rúa administration indicated, in mid-2000, that it hoped to effect a public sector salary cut and "needed" a decision on Menem's previous reduction in order to know what, if any, limits the Court would enforce on such measures.³¹ The timing involved seems to bear out that idea: the *Procurador General's* ruling on DNU 290/95 (declaring it constitutional) occurred on the same day that De la Rúa's public sector salary cut went into effect (May 29, 2000) – just four days before the CSJN's ruling on the case.

Not long after the high court's ruling on *Guida*, Argentina would become embroiled in one of the worst economic, political, and social crises in its history. That crisis would eventually entail the cessation of internal and international debt payments, the blocking of savings accounts, the imposition of fiscal adjustment requirements by international lenders, corruption scandals,

³⁰ Argentine presidents have the power to issue various types of decrees. Among them are "Decrees of Necessity and Urgency" (DNUs), which are in theory reserved for urgent situations in which quick Executive action is necessary, and "Delegated Decrees," which regulate laws passed by the Argentine Congress.

³¹ The suggestion is that the administration wished to be able to either adjust its measure accordingly, or anticipate a CSJN ruling on its policy in the event its constitutionality was subsequently questioned (interview, lawyer, 28 September 2004).

and a generalized panorama of unemployment, insecurity, and social upheaval – as well as the constant questioning, in the judiciary, of government actions (Cavallo 2002: 216).

As part of a series of efforts to try to forestall total economic collapse, in view of Argentina's gigantic deficit, and heartened by the high court's ruling in *Guida* a year earlier, President De la Rúa emitted DNU 896/2001 on July 11, 2001; 20 days later, Law 24.453 (*Ley de déficit zero*) went into effect. The two norms imposed a budget cut on the entire national public sector, and the reduction in public sector salaries was subsequently set at 13 percent. Leonidas Tobar, a civilian Army employee, initiated a case against the federal government questioning the constitutionality of DNU 896/2001 and Law 24.453, and demanding the reimbursement of the 13 percent that had been discounted from his salary. A first instance judge ruled in favor of Tobar, and when the government appealed, the appeals court confirmed the lower court's ruling. The government then appealed to the CSJN (Bianchi 2002a: 64).

Following a series of frenetic last minute government attempts to convince the CSJN to postpone or alter its imminent decision, the Court handed down a ruling that appeared to contradict the one it had made in *Guida*. In a strong challenge to the exercise of government power, the Court decided in favor of Tobar, declaring unconstitutional the public sector wage cut. To justify its decision, the Court argued that the questioned norms were unconstitutional in that they failed to impose a reasonable and temporary limit on public sector salaries and thus affected property rights.³² The Court justified the seeming departure from its ruling on *Guida* by pointing out that the norm questioned in *Guida* had set temporal and quantitative limits on the imposed salary reduction, while the policies questioned in *Tobar* had failed to do so, and that due to the important economic changes had occurred between the Court's ruling on the two cases, the

³² *La Nación*, 23 August 2002, "La noticia enmudeció el gobierno."

measures in question in *Tobar* had *become* unreasonable (confiscatory), and thus unconstitutional (Gelli 2003a: 133).³³

Some constitutional scholars, however, noted that the CSJN may have been trying to win back some of its lost credibility with the ruling, in view of the fact that it seemed to open the door to thousands of active and retired public functionaries filing cases to achieve the restitution of the 13 percent that had been deducted from their salaries for the previous year.³⁴ Others suggested the importance of the political setting: given that the ruling was handed down in the midst of Duhalde's continuing attempts to impeach the Court, they suggested that the decision might have been a strategic threat to illustrate the economic problems the Court could cause were the government to proceed with its impeachment initiative.

B. The “Corralito” – Kiper (*zig*) and Smith (*zag*)

Throughout 2001, as Argentina's economic situation grew increasingly unstable, Argentines began to withdraw their *pesos* from bank accounts, buy dollars, and remove their savings from the Argentine banking system. As this practice spread, the decrease in bank deposits began to affect the liquidity of national banks. In an effort to reaffirm citizens' trust in financial institutions and thus prevent a full-scale run on the banks, on September 24, 2001, the De la Rúa government promulgated Law 25.466 (*Intangibilidad de los depósitos*). The law guaranteed that the government could under no circumstances change the “*condiciones pactadas*” between depositors and the financial entity in which they had deposited their money.

³³ The longer-term interplay between the government and the high court over public sector salary cuts clearly illustrates the tug-of-war that has characterized the relationship between the two. In August 1999, in *Verocchi*, the high court declared *unconstitutional* DNUs 770 and 771 from 1996, which had suspended family stipends for some workers. In 2000 in *Guida*, as described in the text, the Court declared *constitutional* DNU 290 (which reduced public sector salaries but exempted family stipends). The next public sector salary cut (effected through DNU 430, which was quite similar to DNU 290) was finally declared *constitutional* by the court in *Müller* in April 2003. In the meantime, however, as we saw, the Court had declared *unconstitutional* DNU 896, in which the government had allowed itself considerably more latitude than it had in the decrees whose constitutionality the Court had confirmed, or would eventually confirm.

³⁴ *La Nación*, 17 July 2002, “*Para la Procuradoría no es válida la ley de déficit cero*,” Gelli 2003b: 987.

Amidst increasing economic upheaval however, the government soon adopted a different strategy for preventing banks from collapsing and dollars from leaving the country. On December 3, 2001, the Executive issued Decree 1570/01 (which would subsequently become known as the “*corralito*”), which set a ceiling on bank withdrawals of \$1,000 *pesos* per month and blocked transfers out of the country of cash, foreign currency or precious metals with a value in excess of \$1,000 *pesos*.³⁵ Fewer than three weeks later, on December 20, 2001, President De la Rúa resigned the Argentine presidency, fleeing the *Casa Rosada* by helicopter amid pot-banging public demonstrations. And in the last days of the year, Argentina defaulted on most of its US\$ 141 billion debt, the most comprehensive and complicated sovereign debt default in world history.³⁶

It was in this unstable context that the Court ruled on the *Kiper* case, on December 28, 2001, just 25 days after the imposition of the *corralito*.³⁷ Claudio Kiper, a federal judge, had brought suit against the government in a first instance court questioning the constitutionality of Decree 1570 and requesting that US\$ 200,000 frozen in his savings account be liberated. The lower court issued an injunction³⁸ that allowed Kiper to recover his funds, and the *Banco de la Ciudad de Buenos Aires* appealed to the CSJN, requesting that it declare the questioned norm constitutional.

The Court first argued that the procedural route through which the case had arrived to the CSJN made it manifestly impossible for the Court to rule on the constitutionality of the questioned norm. Restricting its ruling to the viability of the lower court injunction, the CSJN struck down that injunction and ordered Kiper to return the money to the *Banco de la Ciudad de*

³⁵ This would be the first of a dizzying array of decrees and laws imposed in an effort to stabilize Argentina’s financial situation and prevent the country from hemorrhaging funds. For a comprehensive list of all of the norms (decrees and legislation), see: <http://infoleg.mecon.gov.ar/basehome/corralito-cuadro.htm> (accessed July 22, 2005).

³⁶ *The Economist*, Sept. 11, 2003.

³⁷ This was not the Court’s first ruling on the *corralito*; justices had rebuffed a series of earlier attempts to weaken or overturn the bank freeze, which had made them very unpopular with the populace (Gargarella 2003: 21).

Buenos Aires. To justify its ruling, the high court argued that the lower court injunction was invalid because compliance with it had the same effect as definitively ruling in favor of Kiper, when in actuality the case still had not been decided on its merits. It further argued that the awarding of monies through such measures could lead to grave damage to the public patrimony. Despite the fact that the CSJN had not ruled on the constitutionality of the *corralito*, the decision was interpreted by some as the Court's (at least tacit) legitimation of its policy (Gargarella 2003: 21), a potentially prudent decision that many courts might have taken under similar circumstances.

Following De la Rúa's resignation in late December 2001 and brief stints in office by three interim leaders, the Argentine Congress appointed Eduardo Duhalde president on January 1, 2002. Five days later Law 25.561 (*Emergencia económica*) was promulgated. Among other measures, the norm suspended Law 25.466 (*Intangibilidad de los depósitos*), declared a public emergency with respect to social, economic, administrative, financial, and currency-exchange matters, and tightened the *corralito*.³⁹ Most importantly, the law peremptorily abolished convertibility:⁴⁰ the *peso* would no longer be pegged to the dollar.⁴¹

³⁸ An injunction is a temporary, stop-gap measure that sustains, modifies, or creates a certain situation that holds until the court in question can rule on the case "on its merits" (issue its final decision on the conflict at hand).

³⁹ The tightening of the *corralito* was actually effected through this law and various presidential decrees issued together with and shortly after its promulgation. It also bears noting that declaring emergencies is actually a faculty of the Executive Power, not Congress.

⁴⁰ In March 1991, in an attempt to address domestic financial upheaval, the Argentine government had promulgated Law 23.298 establishing the Convertibility Plan. Convertibility, which allowed for the free conversion of the *peso* to the dollar, had excellent short-term results: between 1991 and 1997, Argentina's economy grew at an annual average rate of 6.1% -- the highest growth rate in the region -- and productivity increased. However, the currency board was a demanding regime. Having renounced both exchange-rate policy and monetary policy (interest rates were, in effect, those set by the United States' Federal Reserve, plus whatever risk-margin lenders assigned to Argentina), the government was left with few tools to respond to outside events in general, and to four external economic shocks in particular: the flattening out in prices for Argentina's commodities; the rise in the cost of capital for emerging economies; the appreciation of the dollar against other currencies; and the 1999 devaluation in Argentina's main trading partner, Brazil. Many believe that the Argentine government kept convertibility in place for far longer than was economically prudent, leading to the extreme overvaluation of the *peso* (Rohter, *New York Times*, February 3, 2002; Smulovitz 1997, 11).

⁴¹ On January 9, 2002, President Duhalde emitted Decree 71/2002 which included norms to regulate Law 25.561, including "reprogramming" bank deposits. With this measure, the freeze on bank accounts ceased to be called the "*corralito*" and began to be known as the "*corralón*." Decree 141/2002 (issued on January 17, 2002) modified

In the midst of the political, economic, and judicial turmoil,⁴² and after a series of failed negotiations in which the Executive pleaded with the Court to endorse the *corralito* in its imminent sentence on the constitutionality of the measure,⁴³ on February 1, 2002, the Supreme Court ruled on the *Smith* case. In that case, plaintiff Carlos Smith, like Kiper, had questioned the constitutionality of the *corralito* and demanded access to the portion of his savings that had been frozen by the measure. The first instance judge ruling on the case had issued an injunction (similar to the one issued in the *Kiper* case) that allowed Smith to withdraw his deposit once the time period of his fixed-time account had expired.

In a dramatic reversal of the decision the Court had issued just one working day earlier, the CSJN not only upheld the injunction that mandated the restitution of Carlos Smith's savings, but clearly and emphatically declared the *corralito* unconstitutional. Further, though the decision only pertained to the *Smith* case, the Court spoke in very broad terms about the unconstitutionality of Decree 1570 in its ruling. And in a communiqué the same afternoon, the high court indicated that the ruling would “set precedent” for all further rulings by Argentine courts with respect to the *corralito*. The CSJN offered two main justifications for its decision. First, it argued that Decree 1570, taken together with the subsequent modification of the currency regime, unreasonably threatened people's right to freely access their property and constituted the complete annihilation of property rights (that is, that the *corralito* had “become” unconstitutional – an argument similar to the one the Court would subsequently use in the *Tobar* case). Second, it insisted that the federal government could not ignore rights cemented under previous legislation (a reference to the *Ley de intangibilidad de los depósitos*) (Gelli 2003c: 1294). The Court also highlighted procedural differences between the *Kiper* and *Smith* cases to explain why it

Decree 71/2002, adding stipulations regarding salaries denominated in foreign currency (http://www.portalbioceanico.com/re_legnac_politica_emerg_dec141_docp04.htm).

⁴² As outlined above, it was during this period that President Duhalde was initiating his attempts to impeach the Court.

considered it appropriate to make a ruling on the merits in *Smith* but not in *Kiper*, and why it ruled that *Kiper* could not reacquire his funds through an injunction while legitimating *Smith*'s retrieval of his funds via that mechanism.⁴⁴

The shocking decision caused immediate panic, not least of all because it was patently clear that banks could not comply with the ruling were it to become more generalized. As one journalist put it, the decision “placed (Argentina’s) economic, political and social crisis almost at the terminal point, and put the immediate future of the country in question.”⁴⁵ While interpretations abound for why the Court ruled as it did, many understood the ruling as a “strategic threat” from the Court to the government (of the same nature as the one imputed to the *Tobar* decision) in view of the impeachment proceedings being initiated against it.

C. “*Pesificación*” and Beyond – *San Luis (zig) and Bustos (zag)*

Just two days after the *Smith* ruling, on February 4, 2002, the Duhalde administration released a modified version of its economic plan via DNU 214/2002. The new plan readjusted the strategy for liberating monies trapped in the *corralito*, prohibited the execution of injunctions against the *corralito* for six months, and instituted *pesificación asimétrica* of all debts and deposits.⁴⁶ The decree was sharply criticized and its legality questioned by lawyers and legal scholars.

⁴³ *La Nación*, 02 February 2002, “*Dura respuesta de Duhalde a la Corte.*”

⁴⁴ Of the seven justices who had formed the majority or concurred in the *Kiper* decision, five formed part of the majority or concurred in the CSJN’s ruling on *Smith*. The CSJN ruling in *Smith* also appeared to contradict its decision on the *Peralta* case from 1990, in which the constitutionality of the freeze on bank deposits instituted by President Menem on 03 January 1990 (*Plan Bonex*, DNU 36/90) was questioned. To justify this inconsistency, the Court noted in its decision on *Smith* that in *Peralta*, property rights had not been suppressed, but rather “delayed.” *Plan Bonex*, rather than confiscating funds, had simply postponed their owners’ ability to use them for ten years (when the bond issued in their stead came due). De la Rúa’s economic measure (questioned in *Smith*), the justices maintained, established no similar concrete time period during which property rights would be “delayed” (*La Nación*, “La decisión que sonó a declaración de guerra,” 02 febrero 2002).

⁴⁵ *La Nación*, 03 February 2002, “*Una suerte de intento de golpe de estado judicial.*”

⁴⁶ *Pesificación* refers to the forced conversion of dollars to pesos. According to the measure, while debts would be transferred to pesos at the rate of one peso per dollar, deposits would be converted at a rate of 1.4 pesos to the dollar. Subsequent legislation would liberate the peso to float freely against the dollar (*La Nación*, “*Consiguió un fallo de la Corte, pero aún no recuperó su dinero.*” February 13, 2002, p. 8 and *La Nación*, “*Récord de juicios contra el*

On February 20, 2002, the Province of San Luis filed a case with the Supreme Court contesting the constitutionality of DNU 214/2002 and demanding the return of the US\$ 250,000 that it had deposited with the State-owned *Banco de la Nación* that had been “entrapped” in the *corralito*, and then forcibly converted into devalued pesos by the questioned decree. The Argentine Supreme Court made no ruling on this case, or on any other case having to do with *pesificación*, for more than a year.

In early March 2003, by which point many cases contesting *pesificación* had accumulated in the Court, the CSJN’s decision on the Province of San Luis’s case became its first on the measure: in a narrow 5-3 ruling the Court found in favor of the province, declaring part of Decree 214/2002 unconstitutional and ordering the *Banco de la Nación* to “re-dollarize” and return the province’s bank deposits within 60 days. Yet the Court took pains to highlight that the ruling applied only to the case at hand; further, the ruling failed to establish the means by which the restitution of the province’s funds should occur (thus leaving open the possibility that the money could be returned in government bonds, rather than in cash), and made clear that claims formulated by those who had opted for any of the reimbursement alternatives offered to depositors by the government subsequent to *pesificación* could not be favored with a similar ruling (Wetzler 2003: 1007). To justify its decision, the Court indicated that *pesificación* violated property rights and was an unreasonable and inequitable response to the crisis at hand; the Court further argued that Duhalde’s measure was a delegated decree and not a DNU, and that understood as such, it exceeded the confines of the law on which it depended (the *Ley de emergencia económica*) and was thus unconstitutional.

The *San Luis* ruling, the first in the CSJN’s history in which it declared unconstitutional a key economic policy while the government that imposed the policy was still in power, was

estado,” 15 febrero 2002, 1 y 20). A decree issued 11 days later (320/2002) softened DNU 214, but retained the suspension of the execution of injunctions (Gelli 2003a: 708).

extraordinarily significant (Santiago 2003: 1236). Some commentators understood it as another strategic threat to the government in the style of *Tobar* and *Smith*. Others, however, noted that the ruling did not pose nearly as strong a limitation on the power of the federal government as had the Court's decision on the *Smith* case, and highlighted that the Court's year-long delay in deciding the case had allowed the popular outrage regarding Duhalde's economic policies to fade somewhat (and given the government time to implement a debt swap plan).⁴⁷ Those in the latter camp suggested that the ruling functioned as a societal pressure valve with a cruel twist: while the decision offered citizens hope of regaining the original worth of their frozen and devalued funds, the specific stipulations the Court included in the ruling meant that it would not apply to a significant number of people.⁴⁸

The Argentine Supreme Court made no further decisions on *pesificación* for more than a year. Beginning in July 2004 however, in a marked reversal, the Court handed down a number of rulings that appeared to be laying the groundwork for a decision declaring the measure *constitutional*. That trend culminated in the Court's ruling on the *Bustos* case on October 26, 2004. In *Bustos*, four plaintiffs brought suit against the federal government and various banks questioning the constitutionality of the most important measures imposed between 2001 and 2002 to address the crisis, and demanding the return of their (combined) US \$1,300,000 that had been trapped and devalued by the measures.⁴⁹ A first instance court declared all of the norms unconstitutional and the appeals court confirmed that ruling. The federal government and the defendant banks subsequently appealed to the CSJN.

⁴⁷ Phase one was established in May 2002, phase two was established in September 2002, and phase three would open in April 2003 (<http://www24.brinkster.com/paronetto>).

⁴⁸ Interviews, legal assistants of Prior Minister of Public Works, 22 October 2004.

⁴⁹ *La Nación*, 23 October 2004, "Dictamen en favor de la pesificación."

In an about-face with respect to its previous jurisprudence, the CSJN declared the entire group of questioned policies constitutional.⁵⁰ While the Court's justification, like the case, was complex and multi-faceted, its main arguments were that it was not clear that reimbursement in *pesos* at the rate established by the government failed to offer savers the same purchasing power as the money they had originally deposited; that the questioned measures had been taken in an officially declared state of Emergency under which rights could be suspended and that, taken together, the measures were reasonable;⁵¹ and that to overcome the dramatic multi-faceted crisis, all societal sectors should prioritize the general good over their individual interests. In its decision, the Court made sure to highlight that it had clearly emphasized in its ruling on the *San Luis* case that that ruling held only for the province and provinces in a similar position.⁵²

Commentators suggested two alternate explanations for the Court's decision. Some analysts suggested that there was a "new automatic majority" on the Court that responded to Kirchner.⁵³ According to other analysts however, the Court's ruling constituted an effort to contribute to economic recovery by upholding a series of policies that appeared to have stabilized the country's economic situation. The latter notion is substantiated by a comment made to me by one senior justice as we discussed the wisdom of the ruling just after it was handed down: "this morning I was happy to read in the newspaper that the stock market was up notably. That's proof that it was the right decision."⁵⁴

⁵⁰ The ruling had an escape clause, however: specific stipulations made in Justice Zaffaroni's concurrence, which recommended that savers be treated differently depending upon the amount of money claimed, opened the door for lower courts to question the spirit of the decision and resist applying it (which they proceeded to do).

⁵¹ In other words, here the Court is using the same argument that it had used in *Smith* and *Tobar* and that it would later use in *Poblete* to declare laws unconstitutional: that, over time, due to changing circumstances, the norms had "become" (un)constitutional.

⁵² This is, of course, always the case in a civil law system. However, the justices had significantly emphasized the point in the *San Luis* decision, as if to suggest that other decisions on subsequent cases were possible.

⁵³ *La Nación*, 27 October 2004, "Cauto apoyo y duras críticas entre juristas, políticos, y economistas"

⁵⁴ Interview, Supreme Court justice, 28 October 2004.

D. Abuse of Power – Stancanelli (Zig), Vázquez (Zig), and Poblete (Zag)

The above discussion demonstrates that the CSJN has alternately limited and endorsed the exercise of government power in the realm of economic policy, and specifically crisis-related economic policy. The cases in this part of the article relate to sitting governments' efforts to prosecute previous rulers' abuse of power, whether that abuse took the form of corruption, or state-sponsored violence. The zig-zagging in the high court's jurisprudence on these cases shows that its inconsistency is not limited to the economic policy realm.

While Argentina achieved significant economic progress under the Menem administration (1989-1999), allegations of corruption and other criminal behavior were often leveled at the government. Those accusations continued following Menem's exit from office, and cases regarding alleged corruption began to work their way through the Argentine judiciary. Those cases represent the most significant judicial challenges to the actions and legacy of a democratic government since the return to democracy.

Stancanelli (2001) is, at heart, a case about guarantees relating to the application of criminal law and criminal due process. Nonetheless, as one of many cases grouped together in the so-called "mega-case" of alleged arms contraband during the Menem administration, it had significant political content and implications. An Argentine first-instance court tried and convicted Emir Fuad Yoma (former President Menem's ex-brother-in-law and former minister and advisor) on charges of having organized an illicit group that sold arms to other countries during the Menem administration, and sentenced him to house arrest. An appeals court upheld that ruling and sentence. Yoma appealed to the CSJN, which overturned the existing conviction on all but one count. The CSJN justified that decision noting that, due to several technical and definitional deficiencies, there was insufficient evidence to support the conviction.

A similar case regarding arms smuggling had been initiated against former President Menem. He was convicted and sentenced to house arrest in early June 2001 by a first instance court, but subsequently appealed that decision. Once the CSJN had decided the Yoma case, it immediately sent its ruling to the appeals court holding Menem's case. On the basis of the CSJN's decision, the appeals court canceled the house arrest sentence against Menem (and other government officials), and the former president was set free. The case was considered a test of the country's judicial independence, and while jurists of various political stripes had doubted the charges of criminal organization,⁵⁵ critics suggested that the CSJN had only ruled the way it did because the majority of the justices were Menem-appointees.⁵⁶

The next case takes us back to the immediate post-transition period. A brutal military dictatorship had ruled Argentina from 1976 to 1983 ("*el proceso*"). In contrast to the experience of other South American countries previously led by bureaucratic authoritarian regimes, within two years of Argentina's transition, the generals who had led the dictatorship were brought to trial, convicted, sentenced, and jailed. This, in combination with the subsequent initiation and progress of countless cases involving lower-ranking military and security officers accused of repression during *el proceso* engendered considerable discontent within the military.

To pacify the armed forces, Argentine President Alfonsín oversaw the promulgation of two laws, the *Ley de punto final* (December 1986), which set a final deadline for the filing of any further cases against the military, and the *Ley de obediencia debida* (June 1987), which freed from responsibility for their actions those officials and sub-officials who had lacked "decision power" and/or who had not participated in the creation of orders. The CSJN declared the *Ley de obediencia debida* constitutional in 1987, and in October 1989 and December 1990, President Menem issued pardons benefiting nearly 300 civilians and military officers accused or convicted

⁵⁵ *La Nación*, 21 November 2001, "*Alfonsín se mantuvo en silencio.*"

⁵⁶ *Washington Post*, 21 November 2001, A19.

of engaging in terrorism or state-sponsored violence. Combined, these measures – all of which limited the power of the state to prosecute – were meant to draw to a close the era of prosecuting the military for its abuse of power during *el proceso*.

Yet through the 1990s, attitudes regarding the authoritarian past and how to deal with its legacy evolved, placing pressure on the CSJN. In April 1998, the *Ley de punto final* and the *Ley de obediencia debida* were repealed by the Congress,⁵⁷ and in 2003, Congress passed a law annulling both norms. Further, through the early 2000s, lower court decisions calling the laws unconstitutional multiplied, and various European countries requested the extradition of military officers they feared would not be tried in Argentina. And when Kirchner assumed the presidency, he vowed to put in place a Supreme Court that would void the *Ley de punto final* and the *Ley de obediencia debida*. In the post-Menem years, then, the CSJN would not be short of opportunities or the motivation to evaluate the process employed to deal with the excesses of the previous regime.

Like the ruling on the *Stancaelli* case, the ruling on the *Vázquez* case would also limit the state's power to prosecute. The *Vázquez* case regards a young Argentine woman, Evelin Vázquez, who until the age of 19 believed herself to be the daughter of ex Navy sub-official Policarpo Luís Vázquez and his wife Ana Maria Ferrá. However, in 1999, Inocencia Luca de Pegoraro, backed by the influential human rights group the Mothers of the Plaza de Mayo, entered the Argentine judiciary alleging that Evelin was the daughter of her daughter and son-in-law (who had been arrested and jailed in July 1977 suspected of guerrilla activity); that Evelin was born in the Argentine Navy's *Escuela de Mecánica* (ESMA); and that she had been appropriated by the Navy and given to Policarpo Vázquez.⁵⁸

⁵⁷ *La Nación*, 07 March 2001, “*Derechos humanos: anulacion de leyes exculpatorias.*”

⁵⁸ *La Nación*, 09 August 2000, “*Acepta el ADN, pero no acusar a su padre.*”

In connection with that case, de Pegoraro requested that Evelin be required to submit to a DNA exam with the objective of determining her true identity, and the first instance judge ordered Evelin to submit to the test. Evelin, unwilling to undergo an exam that could produce evidence of wrong-doing on the part of her (adoptive) father, appealed the ruling to an appeals court, where it was confirmed. She subsequently appealed to the CSJN.⁵⁹ The CSJN overturned the previous rulings, recognizing Evelin's right to refuse to submit to a DNA exam against her will. In its ruling, the Court offered various reasons for why Vázquez's right to privacy and her own identity should be prioritized over society's and the state's right to seek the truth and carry forward a criminal investigation (the latter being a right, the lower instance courts had argued, which must be respected if public order is to be maintained).⁶⁰

While the CSJN's ruling on the *Vázquez* case limited the exercise of government power, its long-awaited decision in the *Poblete* case, handed down on 14 June 2005, would be a step in the opposite direction. In that case, former police official Julio Héctor Simón was accused of playing a role in the disappearances of Marta Gertrudis Hlaczik and Chilean José Liborio Poblete, and the appropriation of their daughter, Claudia Poblete (who was adopted by a Lieutenant Colonel in the Argentine army and only discovered the identity of her birth parents 20 years later).⁶¹ Rather than Simón's guilt, however, the fundamental issue at stake in the case was the constitutionality of the *Ley de punto final* and the *Ley de obediencia debida*, as well as the 2003 law that annulled them. In a landmark decision, the CSJN voided both the *Ley de punto final* and the *Ley de obediencia debida* and convicted Simón, confirming the decisions of the first and second judicial instances and firmly endorsing the power of the state to investigate and prosecute the criminal activity of previous governments. Five justices, in their individual votes,

⁵⁹ *La Nación*, October 2003, "Desaparecidos: no será obligatorio el examen de sangre."

⁶⁰ *La Nación*, October 2003, "No será obligatorio el examen de ADN."

⁶¹ *Santiago Times*, 16 June 2005, "Chilean's 'disappearance' to be investigated after Argentine Amnesty Law scrappe."

went so far as to declare valid the 2003 law that had annulled the two norms, even though the Constitution awards the power to retroactively void laws to the Supreme Court only.⁶²

In addition to being a decision that, in contrast to the Court's rulings on *Stancanelli* and *Vázquez*, augmented the state's power to investigate and prosecute previous leaders for their alleged illegalities and excesses, the ruling also directly contradicted the CSJN's 1987 decision that had declared the *Ley de obediencia debida* constitutional. The CSJN cited a series of events that had occurred between 1987 and the ruling to justify the change in its jurisprudence: Argentina's signing of the *Pacto de San José De Costa* (an international human rights treaty) and the treaty's subsequent incorporation into the Constitution via the 1994 amendment; and a 2001 Inter-American Court of Human Rights ruling that amnesty cannot be granted for crimes against humanity. Due to those changes in the country's legal framework, the Court concluded that in the year 2005, the two laws violated the Constitution – that is – they had *become* unconstitutional. Many, however, again highlighted the potential effect of political pressure on the Court, suggesting that the high court issued the ruling simply to grant the president his long-standing wish to see the two laws voided.

E. The Abortion Debate -- Tanus (zig) and Portal de Belén (zag)

High courts in many traditionally Catholic and (socially) conservative Latin American countries are only now beginning to be solicited to help reconcile the new international rights agenda (and its fledgling domestic counterparts) with traditional societal values. In contrast, since Argentina's transition to democracy in 1983, the Argentine high court has often been called upon to adjudicate cases involving individual rights, and in particular the right to privacy.⁶³ The Court's rulings on at least two such cases in the 2000s, like its rulings on the cases discussed

⁶² *La Nación*, 15 June 2005.

above regarding economic policy and the abuse of government power, would be marked by inconsistency.

Given the very controversial nature of the abortion issue in Argentina, and the complex conflict between the right to life and the right to privacy with which judicial decisions on the matter must grapple, it was almost inevitable that disputes related to abortion would eventually be filed with the CSJN. In one of the first crucial cases on the issue to reach the high court, the *Tanus* case, the Court issued an assertive ruling limiting the applicability of relevant abortion legislation and thus the exercise of government power.

Silvia Tanus discovered that the fetus she was carrying suffered from anencephaly.⁶⁴ She requested that her hospital induce birth or take some other appropriate action to evacuate the fetus. The hospital staff refused, and Tanus filed a case with a first instance state court to obtain authorization to interrupt her pregnancy given the risk to her physical and psychological health its continuation implied, and given the dramatic problems the fetus would suffer upon birth. After a complicated conflict regarding which court should decide the case, the first instance judge denied Tanus's claim, opining that it was not clear that the continuation of the pregnancy put the health of the mother in grave danger. When that decision was confirmed by the appeals court, Tanus appealed to a third instance state court, which overturned the previous rulings, authorizing the hospital to proceed with the inducement of birth or employ some other surgical intervention to end the pregnancy. The *Asesor General de Incapaces del Ministerio Público de la Ciudad Autónoma de Buenos Aires* appealed that ruling to the CSJN.

The high court, taking pains to cite the unique nature of the case, ruled in favor of Tanus, highlighting that, given the age of the fetus, the case did not have to do with abortion, a process

⁶³ Relevant cases include the Court's landmark ruling in 1986 (*Sejean*) that resulted in the legalization of divorce in Argentina; its 1989 ruling in favor of conscientious objection (*Portillo*); and its conflicting decisions on cases involving the legality of drug possession (*Bazterrica* - 1986, *Capalbo* - 1986, and *Montalvo* - 1990).

that directly provokes death, but rather simply with the acceleration of a birth, after which the child's inevitable death would actually be caused by his/her illness.⁶⁵ Given the inevitable death of the fetus, the Court argued, it was important to protect the mother from psychological harm. In this complicated case that touched on ethics, medicine and law, the Court's justifications for its decision boiled down to the prioritization of the mother's feelings and welfare over the right to life of the fetus. In its decision then, the Court limited the applicability of relevant legislation by carving out an exception. Some suggested that with the ruling, the Court had begun to lay the legal groundwork for an eventual decision legalizing abortion.⁶⁶ Others placed this interpretation in doubt however, highlighting that the justices' votes did not appear to coincide with their ideological postures; the latter group attributed the ruling, instead, to the Court's desire to stop the mother's suffering.⁶⁷

If the *Tanus* decision could be understood through the abortion debate prism, however, in *Portal de Belén* the Court handed down a ruling that took a step in the polar opposite direction. Portal de Belén, a non-profit civil society association that cares for single mothers and is affiliated with the Catholic Church, filed a case against the *Ministerio de Salud y Acción Social de la Nación* requesting that it prohibit the manufacture, distribution and sale of an emergency contraception pill that the organization considered to have abortive effects. The first-instance court decided for Portal de Belén. When the appeals court, in a provisional ruling, overruled that decision, Portal de Belén appealed to the CSJN.

Despite the inexistence of a definitive ruling by the appeals court (which would generally prevent the CSJN from ruling on the merits of the case), and even in view of the dubious appropriateness of the particular remedy through which the case was brought, the high court

⁶⁴ Anencephaly is "a defect in brain development resulting in small or missing brain hemispheres" (<http://www.anencephaly.net/>).

⁶⁵ *La Nación*, January 2001, "Autorizó la Corte a interrumpir un embarazo."

⁶⁶ Interview, lawyer, 24 September 2004.

accepted the case (Basterra 2002). It revoked the appeals court's (preliminary) ruling, thus effectively banning emergency contraception.⁶⁸ In its decision, the high court accepted Portal de Belén's argument that the pill was indeed abortive, using the interpretation of when life begins established in the Argentine civil code as well as in several international human rights treaties to which Argentina is signatory; the fact that abortion is illegal is indicated in the penal code (Bianchi 2002b: 476). While in *Tanus* the Court relied on arguments that could be labeled "sentimental" and took pains to avoid labeling a certain behavior "abortive" (i.e. carving out an exception to a law and thus limiting the government's legislative reach), scientific/medical arguments were used in *Portal de Belén* in order to justify labeling a certain behavior abortive (and thus illegal), thus endorsing or perhaps even extending the legislative reach of the government. As five of the Court's most conservative members voted together on the case, some suggested that those justices were simply using the case to forward their ideological agenda, placing judicial obstacles in the way of the legalization of abortion.⁶⁹

3. A TWO-LEVEL EXPLANATION

Section 2 of this article offered a detailed analysis of the most politically crucial cases the Argentine Supreme Court heard in the post-Menem era, and of the high court's rulings on those cases. Table B lists the cases by issue area and, based on the above analysis, offers a rough estimate of the degree to which the high court's ruling on each case limited or endorsed the exercise of government power.

⁶⁷ *La Nación*, January 2001, "Cuando la ideología quedó al lado."

⁶⁸ The impact of the decision was considerably weakened by the fact that the high court ruling only prohibited the sale of one particular brand of the "morning after pill" – a brand that was, by the time the Court decided the case, no longer being sold in Argentina (*La Nación*, March 2002, "Seguirá en venta la píldora del día después").

⁶⁹ The timing of the decision is important: the Court rendered its decision (two years after the case was filed with it) at precisely the moment at which the populace was anxiously awaiting the Court's ruling on the group of policies that the government had imposed to deal with the ongoing economic crisis (a decision the Court would not hand down until it ruled on *San Luis* more than a year later). As one constitutional scholar put it, "hearing about the *Portal de Belén* ruling was like turning the TV to the channel that was supposed to be televising a soccer match, and finding that it was broadcasting the ballet instead" (Interview, constitutional scholar, 31 August 2004).

Table B – 11 CSJN Cases (Arranged by Issue Area)and the Relationship of those Rulings to the Exercise of Government Power

Case	Ruling in terms of the exercise of government power
<i>Guida</i> (Public sector salaries) (2000)	Firmly endorse
<i>Tobar</i> (Public sector salaries) (2002)	Firmly limit
<i>Kiper</i> (Corralito) (2001)	Firmly limit
<i>Smith</i> (Corralito) (2002)	Firmly endorse
<i>San Luis</i> (Pesificación) (2003)	Middle ground
<i>Bustos</i> (Pesificación) (2004)	Firmly endorse
<i>Stancanelli</i> (Abuse of power) (2001)	Middle ground
<i>Vázquez</i> (Abuse of power) (2003)	Firmly limit
<i>Poblete</i> (Abuse of power) (2005)	Firmly endorse
<i>Tanus</i> (Abortion debate) (2001)	Middle ground
<i>Portal</i> (Abortion debate) (2002)	Firmly endorse

As Table B illustrates, the CSJN has both firmly limited and firmly endorsed the exercise of government power in the post-Menem era. More significantly, the table demonstrates that the Court issued very different decisions (in terms of the degree to which it ruled to limit vs. endorse the exercise of government power) on similar cases in all of the issue areas considered here.

The question immediately arises: why has the high court’s jurisprudence been so inconsistent in the post-Menem era? The fact that in some cases the Argentine Supreme Court issued conflicting decisions regarding the constitutionality of *the same policy* implies that

“constitutionality of government action” cannot be the cause of the observed jurisprudential zig-zagging. Further, it seems that neither case content nor time explains the Court’s inconsistency: the high court offered conflicting rulings on similar cases in each of the policy areas under study, and offered contrasting rulings on similar cases throughout the post-Menem period.

I propose an alternative explanation for the Argentine Supreme Court’s inconsistent decision-making. While Argentine justices and their rulings in the post-Menem era were no doubt often motivated at least in part by the constitutional imperatives justices suggested, I argue, following the lead of the experts on the Court whose opinions are registered here, that the high court’s decisions were just as often significantly influenced by an evolving series of short-term political conditions, notably threats and pressure from the Executive, and economic and political crisis. These pressures and conditions gained and lost importance over time, impinging on the CSJN in different ways at different decision-making moments, leading the Court to issue contrasting rulings on similar politically crucial cases since 2000.⁷⁰ Columns 1 and 2 of Table C below summarize these constitutional/legal and political motivations.

This explanation, however, immediately raises another question: why were the high court and its jurisprudence so vulnerable to the effects of this dynamic set of political pressures and conditions? I argue that the four key institutional variables outlined in Section 1 explain the high court’s vulnerability to pressures generated by short-term political dynamics. As noted above, the characteristics these variables capture were present to some degree in previous eras, but reached a critical point during the time period under study.

⁷⁰ The fact that Argentina is a civil law system in which the decisions of courts only hold for the case at hand may increase the potential for zig-zagging of the type seen here. That is, when the Court issues decisions that contradict previous rulings, it is not as much an affront to juridical security as it would be were *stare decisis* (which emphasizes the importance of maintaining judicial precedents) a feature of the judicial system.

Table C – 11 CSJN Cases Arranged by Issue Area; Decision Motivations, and Ruling’s Effect on the Exercise of Government Power

Case	1. Constitutional/legal motivation	2. Political motivation	3. Ruling in terms of the exercise of government power
<i>Guida</i> (Public sector salaries) (2000)	<ul style="list-style-type: none"> Defending presidential legislation that follows constitutional procedural guidelines (D)* Defending presidential legislation that does not contradict constitutional content (D) 	<ul style="list-style-type: none"> Supporting governments that do not threaten Court independence and power (E)** 	Firmly endorse
<i>Tobar</i> (Public sector salaries) (2002)	<ul style="list-style-type: none"> Defending constitutional procedure (controlling emergency powers) (D) Defending constitutional substance (D) 	<ul style="list-style-type: none"> Retaliating against a government that threatened the Court’s power (E) Gaining popular respect (E) 	Firmly limit
<i>Kiper</i> (<i>Corralito</i>) (2001)	<ul style="list-style-type: none"> Defending constitutional procedure (<i>note: this is the justification given for not deciding the case on the merits</i>) (D) 	<ul style="list-style-type: none"> Maintaining social and/or economic equilibrium (D, E) Supporting governments that do not threaten Court independence and power (E) 	Firmly endorse
<i>Smith</i> (<i>Corralito</i>) (2002)	<ul style="list-style-type: none"> Defending constitutional procedure (D) Defending constitutional substance (D) 	<ul style="list-style-type: none"> Retaliating against a government that threatened the Court’s power (E) Gaining popular respect (E) 	Firmly limit
<i>San Luis</i> (<i>Pesificación</i>) (2003)	<ul style="list-style-type: none"> Defending constitutional procedure (D) Defending constitutional substance (D) 	<ul style="list-style-type: none"> Maintaining social and/or economic equilibrium (E) Retaliating against a government that threatened the Court’s power (E) 	Middle ground
<i>Bustos</i> (<i>Pesificación</i>) (2004)	<ul style="list-style-type: none"> Defending presidential legislation that does not contradict constitutional content (D) 	<ul style="list-style-type: none"> Maintaining social and/or economic equilibrium (E) Supporting governments that do not threaten Court independence and power (E) 	Firmly endorse
<i>Stancanelli</i> (Abuse of power) (2001)	<ul style="list-style-type: none"> Lack of technical merit of claim (D) 	<ul style="list-style-type: none"> Direct support of Menem (E) 	Middle ground
<i>Vázquez</i> (Abuse of power) (2003)	<ul style="list-style-type: none"> Protection of constitutional rights (D) 	<ul style="list-style-type: none"> Maintaining social and/or economic equilibrium (D, E) 	Firmly limit
<i>Poblete</i> (Abuse of power) (2005)	<ul style="list-style-type: none"> Defending international treaties that had become part of the constitution (D) 	<ul style="list-style-type: none"> Supporting governments that do not threaten Court independence and power (E) 	Firmly endorse
<i>Tanus</i> (Abortion debate) (2001)	<ul style="list-style-type: none"> Protection of constitutional rights (D) 	<ul style="list-style-type: none"> Forwarding liberal agenda (E) Maintaining social and/or economic equilibrium (E) 	Middle ground
<i>Portal</i> (Abortion debate) (2002)	<ul style="list-style-type: none"> Defense of the penal code (D) 	<ul style="list-style-type: none"> Forwarding conservative agenda (E) 	Firmly endorse

* (D) = drawn from the CSJN’s written decision

** (E) = suggested by experts

First, the Court's legitimacy deficit may have motivated it to "cast about" to try to regain some support, from the government at some moments (through issuing deferential decisions), and from society at others (through issuing controversial decisions that clearly challenged high-priority government policies); when such decisions happened to be issued on cases regarding similar policies or issues, the result was jurisprudential zig-zagging. Second, the high degree of discretion that justices enjoy offered them a great deal of leeway in their decision-making, giving them the ability to respond to the pressures and react to the contextual conditions under which they were deciding the most politically crucial cases.

Likewise, the fact that Argentine justices have not developed a consensual notion of the high court's role (of exactly what the Court is defending) left them relatively free to shrug off their mandate to defend the constitution, and to prioritize competing objectives (such as enhancing political or economic stability). Finally and related, because no depersonalized institutional relationship has been established between the high court and the political branches, each turn-over of government has had the potential to radically change the relationship between justices, and the president and legislature. As suggested above, given the tight alignment between President Menem and the high court through the 1990s, Menem's departure from office in 1999 generated especially significant relational upheaval, with important implications for the high court's rulings.

In short, the high court's legitimacy deficit, the tremendous amount of discretion it enjoys in issuing rulings, the lack of consensus among justices as to the Court's institutional role, and the fact that the high court and the Executive in post-transition Argentina have not established a depersonalized institutional relationship left it vulnerable to the effects of a series of short-term political factors when ruling on the most politically important cases to come before it in the post-Menem era. These factors in effect "dragged around" the Court's decisions, leading it to issue conflicting rulings on similar cases.

CONCLUSION

The Argentine Supreme Court, like many other high courts, plays three potentially conflicting roles. First, as the ultimate guardian of the constitution, it must defend the charter against violations by the elected branches, as well as protect the elected branches from attacks on their constitutionally mandated power. Second, as a branch of the federal government in its own right, the Court sometimes acts in concert with the other branches in order to facilitate governance; on occasion, carrying out this governing function requires the Court to uphold policies that seem unconstitutional, as in the *Kiper* and *Bustos* cases discussed here. Finally, as head of the federal judiciary, the Court must at times rule with the interests of the judiciary in mind, as it is the ultimate protector of all federal magistrates' prerogatives.

While playing these potentially conflicting roles simultaneously is difficult under any circumstances, it is particularly challenging to do so when the cases the Court is called upon to decide involve issues of crucial importance to society and the federal government, when the Court's own institutional prerogatives are fragile, and when the environment is crisis-prone. This article evaluated how the CSJN met that challenge through a detailed analysis of the 11 most politically important cases it decided between 2000 and 2005.

Close analysis revealed that the Argentine Supreme Court's rulings on important cases exhibited striking inconsistency. I argue that the Court's conflicting decisions regarding the constitutionality of similar policies and its contradictory rulings within the same issue area – which I term jurisprudential zig-zagging – resulted from the CSJN's permeability to the effects of an evolving series of short-term political conditions, notably threats and pressures from the Executive, and economic and political crisis. The Court's vulnerability to the effects of short-term political dynamics is largely determined by four institutional variables that were present to some degree in previous eras, but reached a critical point during the time period under study: the

high court's legitimacy deficit, the significant discretion it enjoys in issuing rulings, the lack of consensus among justices as to the Court's institutional role, and the fact that the high court and the Executive in post-transition Argentina have not established a depersonalized institutional relationship.

The logical follow-up question is: what difference does the Court's inconsistent jurisprudence make? As the countries across which the third wave of democracy rolled in the 1980s and 1990s grapple with the "consolidation" phase of the transition from authoritarian rule, scholars struggle to understand what factors enhance the quality and stability of those new regimes. Much of the consolidation literature produced by U.S. political scientists over the past decade reasons that courts' brave exercise of constitutional review is crucial to strengthening democracy, since by carrying out a "horizontal accountability" function, courts can prevent overweening Executives from exceeding constitutional limits on power (O'Donnell 1999, Linz and Stepan 1996, Przeworski 1995, Zakaria 2003, among many others). Yet constitutional theorists have long emphasized the inherent and perpetual *tension* between constitutionalism and democracy, in view of the fact that the two prioritize radically different values: constitutionalism emphasizes the decisions made by yesterday's super-majorities, the protection of minorities, and the diffusion of the power of temporary majorities, while democracy reifies the goals and policies of today's majority-elected governments.

Perhaps the theoretical battle has not yet been resolved because, to date, few studies have focused directly on discerning the actual empirical connection between the rule of law (and judicial review in particular), and the quality and stability of democracy. Many scholars of new democracies have tried to explain judicial decision-making, and especially courts' desire or reluctance to carry out judicial review. To my knowledge, however, no one has systematically studied and generated empirical findings regarding how high courts' enforcement of (or failure

to enforce) constitutional limits on the political branches of the federal government affects the quality or stability of democracy.

Were scholars to carry out such an analysis, they might be surprised at the results. The CSJN's rulings on the politically-charged cases regarding economic policy analyzed above offer an enticing example. Had the Court consistently ruled the *corralito* and *pesificación* unconstitutional, would the government have complied with all of those decisions when it insisted that doing so would bring financial ruin? Or would it have failed to do so with the negative implications its refusal would have had for juridical security (often considered crucial for foreign investment)? Would either route have necessarily implied an enhancement of democratic quality and stability in Argentina? We will never know. But we do know that, perhaps in spite of, perhaps because of, or perhaps without connection to the Argentine Supreme Court's inconsistent rulings on these economic measures, Argentina is still a democracy – one that withstood the presidency changing hands four times in twelve days in the midst of one of the most dramatic economic crises in the country's history.

Further, we have little evidence that desiring or requiring consistent and effective constitutional control is realistic. As Shapiro highlights in a discussion of judicial review in the United States (an arguably stable and high-quality democracy), the U.S. Supreme Court has been quite inconsistent in its exercise of judicial review, and was in fact quite timid in using it for much of the country's early history. While the Court has been a relatively adamant defender of the constitution in cases having to do with federalism and, increasingly, with rights, its protection of the constitution in conflicts having to do with the separation of powers has been decidedly more hesitant (Shapiro 2004: 7-8). Further, specifically with respect to judicial review of federal government norms, one recent account suggests that between the inception of the U.S. Supreme Court in 1790 and 1991, the Court struck down only one Congressional statute every

other year on average, and did so only twice in the first 68 years of its existence.⁷¹ As these examples and recent discussions regarding the jurisprudence of lower courts in the United States suggest, the lengths to which judicial review should go remains a big question in one of the most established democracies in the world.⁷²

The Argentine example illustrates the complexity of evaluating the role that high courts play in post-transition polities marked by institutional uncertainty. Under such unstable conditions, perceptions of the Court's role (even among high-ranking members of the legal community including justices themselves) are often still embryonic, traditions that direct decision-making in developed democracies (such as protecting minority rights or checking majorities and powerful Executives) are unavailable, and respect for the Court and its rulings by the potentially affected parties are still nascent. When such notions have not yet been instilled in institutional history and culture, the concepts and motivations guiding judicial behavior are more tenuous, leaving history and contemporary events to play a critical role in influencing judicial decisions. What implications this contingency has for the short-term and long-term quality and sustainability of democratic governance are pressing empirical questions.⁷³

⁷¹ *New York Times*, 06 July 2005, "So Who Are the Activists?" While post-transition Argentina is not analogous to the newly independent United States, Argentina's transition away from authoritarian rule did represent a sea change that to some extent reset the institutional clock.

⁷² *New York Times*, 23 March 2005, "Casting Angry Eye on Courts, Conservatives Prime for Bench-clearing Brawl in Congress."

⁷³ One way to begin to address these question is to look closely at governmental reactions to, and more general political dynamics resulting from, Supreme Court rulings on cases in which the constitutionality of a government norm or action is questioned (both when the Court declared the norm or action constitutional *and* when it ruled it unconstitutional). With enough over-time analysis of the *mutual* interplay between high courts and the political branches of the federal government, it could eventually become possible to draw broader conclusions regarding the effects of the Court's actions on the quality and stability of democracy. While this article does not fully engage in this type of inquiry, my doctoral dissertation attempts to do so.

Appendix 1 -- Changes in the Composition of the CSJN, December 1999 – March 2006

Time period begin	Time period end	President of Argentina	# of justices	Change at beginning of period	Justices appointed by Alfonsín	Justices appointed by Duhalde	Justices appointed by Menem	Justices appointed by Kirchner
10 Dec. 1999 (assumption of De la Rúa)	21 Oct. 2002	De la Rúa (10 Dec. 1999 – 20 Dec. 2001) Puerta (21 Dec. 1999 – 23 Dec. 1999) Rodríguez Saa (23 Dec. 1999 – 01 Jan. 2000) Camaño (01 Jan. 2000 – 02 Jan. 2000) Duhalde (02 Jan. 2002 --)	9		Belluscio Fayt Petracchi		Boggiano Vázquez Moliné O'Connor López Nazareno Bossert	
21 Oct. 2002	30 Dec. 2002	Duhalde	8	Resignation of Bossert	Belluscio Fayt Petracchi		Boggiano Vázquez Moliné O'Connor López Nazareno	
30 Dec. 2002	27 Jun 2003	Duhalde (30 Dec. 2002 – 25 May 2003) Kirchner (25 May 2003 -)	9	Appointment of Maqueda	Belluscio Fayt Petracchi	Maqueda	Boggiano Vázquez Moliné O'Connor López Nazareno	
27 June 2003	31 Oct. 2003	Kirchner	8	Resignation of Nazareno	Belluscio Fayt Petracchi	Maqueda	Boggiano Vázquez Moliné O'Connor López	
31 Oct. 2003	01 Dec. 2003	Kirchner	9	Appointment of Zaffaroni	Belluscio Fayt Petracchi	Maqueda	Boggiano Vázquez Moliné O'Connor López	Zaffaroni
01 Dec. 2003	21 Dec. 2003	Kirchner	8	Resignation of López	Belluscio Fayt Petracchi	Maqueda	Boggiano Vázquez Moliné O'Connor	Zaffaroni
21 Dec. 2003	18 June 2004	Kirchner	7	Dismissal of Moliné O'Connor	Belluscio Fayt Petracchi	Maqueda	Boggiano Vázquez	Zaffaroni
18 June 2004	01 Sept. 2004	Kirchner	8	Appointment of Highton	Belluscio Fayt Petracchi	Maqueda	Boggiano Vázquez	Zaffaroni Highton
01 Sept. 2004	22 Dec. 2004	Kirchner	7	Resignation of Vazquez	Belluscio Fayt Petracchi	Maqueda	Boggiano	Zaffaroni Highton
22 Dec. 2004	03 Feb. 2005	Kirchner	8	Appointment of Lorenzetti	Belluscio Fayt Petracchi	Maqueda	Boggiano	Zaffaroni Highton Lorenzetti
03 Feb. 2005	22 Jun 2005	Kirchner	9	Appointment (assumption) of Argibay	Belluscio Fayt Petracchi	Maqueda	Boggiano	Zaffaroni Highton Lorenzetti Argibay
22 Jun 2005	01 Sept. 2005	Kirchner	8	Suspension of Boggiano*	Belluscio Fayt Petracchi	Maqueda		Zaffaroni Highton Lorenzetti Argibay
01 Sept. 2005		Kirchner	7	Retirement of Belluscio	Fayt Petracchi	Maqueda		Zaffaroni Highton Lorenzetti Argibay

* Justice Boggiano was subsequently dismissed by the Senate on September 28, 2005.

Appendix 2 – CSJN Cases, Annual Statistics 1991-2004

Year	Total Pre-Existing	% Pre-Existing Prvsnals²	Total Entered	% Prvsnals Entered	Total Decided	% Prvsnals Decided	Total in course at end of year	% prvsnals in course at end of year
1991	8,939		5,532		6,036		8,435	
1992	8,435		6,546		5,804		9,177	
1993	7,723		24,815		6,604		24,877	
1994	24,900		36,723		5,393		56,329	
1995	56,994	86%	16,910	63%	7,628	13%	66,875	89%
1996	66,875	89%	23,544	78%	9,443	33%	81,619	92%
1997	82,453	92%	9,811	43%	41,318	86%	55,626	88%
1998	55,638	88%	8,057	20%	54,043	89%	17,896	59%
1999	17,896	59%	13,818	16%	21,208	54%	15,842	24%
2000	17,488	47%	17,971	59%	15,544	57%	20,005	50%
2001	20,005	50%	14,631	48%	15,333	55%	19,373	44%
2002	19,373	44%	42,055	28%	36,526	22%	24,902	49%
2003	37,147 ³	35%	31,470	55%	18,980	60%	49,637	37%
2004	46,109 ³	40%	37,726	33%	20,963	62%	62,872	28%

Source: Oficina de Estadísticas del Poder Judicial de la Nación. *Estadísticas - Poder Judicial de la Nación* (tomos anuales). Buenos Aires, Argentina.

For 2003: http://www.pjn.gov.ar/estadisticas/Libros/Estadi_03/PJUDN_03.htm;

For 2004: http://www.pjn.gov.ar/estadisticas/Libros/Estadi_04/PJUDN_04.htm.

¹ “Prvsnals” (an abbreviation for “*previsionales*”) are cases that have to do with pensions and other retirement funds (social security); as this chart illustrates, throughout the time period under study, these cases made up an important percentage of the cases ruled on by the CSJN.

² I do not know why this figure does not match the figure for “Total in course at end of year” for 2002.

³ I do not know why this figure does not match the figure for “Total in course at end of year” for 2003.

Appendix 3 – Case Selection Methodology

This article was written in association with my dissertation, which analyzes and compares the most politically important cases to come before the Argentine Supreme Court (CSJN) between 1984 and 2003, and the most politically important cases to come before the Brazilian Supreme Federal Tribunal between 1985 and 2004. The case selection process described below was employed in my dissertation research to select a “universe” of cases in each country. The cases considered in this article are simply the nine cases in the Argentine universe that were decided between 2000 and 2003, plus two cases from 2004 and 2005 that were also indicated as important in the case selection interviews I carried out (see part 3 below) but could not have been chosen for the Argentine “universe of cases” because they fall outside the temporal confines of my dissertation.

The case selection process employed in my dissertation research consisted of three discrete parts. I initiated the first two simultaneously, and the third was carried out after the first was completed.

1) **Mentions of cases in articles and books:** upon arriving to Argentina, I assembled a bibliography of books and articles addressing the jurisprudence of the CSJN since Argentina’s transition to democracy. In order to facilitate the selection of relevant books and articles, I conducted 15 introductory interviews with constitutional scholars and leaders of NGOs that deal with judicial themes to solicit their opinions, and consulted with Research Assistant (RA) Lucas Arrimada Antón, who had recently completed his degree in law at the *Universidad de Buenos Aires*. The “first level” bibliography included 26 books and articles written by Argentine constitutional scholars and lawyers, 4 dissertations written by U.S. graduate students (all in political science), and one article by a U.S. law professor who focuses on the Argentine Supreme Court; in these works, high court cases were discussed in some detail. A “second level” bibliography included 4 Argentine constitutional law texts that each mentioned hundreds of CSJN decisions and rarely discussed their details.

Once the bibliography was complete and the materials assembled, I skimmed all of the books and articles and made a list that included every CSJN case that they mentioned. That list was divided by topic (cases having to do with politics, cases having to do with economic policy, and cases having to do with individual/civil rights). Then, I made a separate list containing just the cases that had been mentioned three or more times in the “first level” bibliography (noting the number of times the case was mentioned in works from both the “first level” and “second level” bibliographies).

2) **Mentions in *La Nación*:** I hired two RAs to read every copy of *La Nación* (an important Argentine daily newspaper) from December 1983 (Argentina’s transition to democracy) through December 2003 searching for articles that **focused on** a case of the Argentine CSJN. Over a month of full-time work, these two RAs and I developed a systematic methodology for how to assess and choose articles, and developed three types of forms, one of which would be filled out for each article selected. (These forms required the RAs to chronicle each selected article’s bibliographic material and information regarding the case the article dealt with.) As the RAs read *La Nación*, they selected articles that coincided with our article selection criterion, took a digital picture of each article selected, and filled out the appropriate form. Simultaneously, we created a running list (in chronological order) of all the cases mentioned in *La Nación* and the articles associated with each case.

3) **Mentions in “case selection interviews:”** Following completion of Step 1, I carried out 25 interviews with experts (including Justices, retired Justices, lawyers, constitutional scholars, members of NGOs dealing with judicial themes, and government officials) to solicit their opinions regarding

which were the most politically important cases to come before the CSJN between 1984 and 2003. Prior to initiating the interviews, I designed a structured questionnaire which a) laid out clearly my specific definition of “politically important” and b) requested that respondents indicate *three* politically important cases from the period during which Alfonsín was president (1984 to 1989), *three* politically important cases from the period during which Menem was president (1989 to 1999), and *three* politically important cases from the “post-Menem” period (2000-2003). Two days before each interview, I sent the questionnaire to each respondent to reinforce the fact (already mentioned in my initial communication) that my questions required respondents to think of specific CSJN cases. Upon arriving at the interviews, I reinforced my definition of “politically important,” and solicited the case mentions. (This methodology worked well; often respondents had thought through and created a list of politically important cases in advance of the interview.)

After completing the portion of the interview in which respondents were requested to name the cases they considered to be the most politically important, I presented respondents with the “list of politically important cases” that was created through Step 1 above, and asked them to indicate which cases on that list they considered to be politically important. (Because those cases were mainly found in legal articles and texts, I was sure that they all had *juridical* importance, but was less sure of their *political* importance. It was for this reason, and in the interest of having some standard data across all 25 interviews, that I requested interviewees to check cases on the list.)

After the completion of all three parts of the case selection process outlined above, I assembled another list of cases that included (a) the cases from the original list from Step 1 above AND (b) all of the cases that had been mentioned in the spontaneous portion of my “case selection interviews” that did not appear on that original list. I placed those cases in a chart with the headings below, and, for each case, counted and filled in the number of mentions.

Case	Year	(i) # of mentions in literature (first level)	(ii) # of mentions in literature (second level)	(iii) # of mentions in case selection interviews	(iv) # of times checked on list in case select interviews	(iv) # of mentions in newspaper	SCORE
------	------	---	---	--	---	--	-------

I then established strict decision rules to determine which of the cases on this list would constitute my universe of cases. Specifically, I set a number of mentions “bar” for each of the categories above, and included a case in my universe if it met or exceeded that bar in three categories; an additional requirement for a case to enter the universe was that it be mentioned in the spontaneous portion of at least one “case selection interview.”

The bars set for categories (i) and (iv) varied slightly among my three time periods because a) the bibliography mentioned in Step 1 above contained many more sources analyzing the first two periods (1984-1989 and 1989-1999) than the last (although the “second level” sources were all very recent), and b) the coverage of the CSJN increased *dramatically* in *La Nación* between 1984 and 2003 (not strictly because cases became more important, but rather because the media began to focus much more heavily on the CSJN). Further, I raised the bar for “number of mentions in case selection interviews” slightly for the final period (2000-2003) because it was shorter than the other two, and respondents found it much easier to name three (or more) cases for that period.

RELEVANT LITERATURE

- Basterra 2002. “Prohibición de la píldora del “día después” . Un lamentable retroceso del principio de la autonomía personal.” *Jurisprudencia Argentina*, Nota a Fallo: RDF 2002-21-198.
- Bercholg, Jorge. 2004. La Independencia de la Corte Suprema de Justicia de la Nación respecto de los otros poderes políticos del Estado, a través del control de constitucionalidad, 1935-1998. Doctoral Dissertation, School of Law, University of Buenos Aires.
- Bianchi, Alberto. 2002a. “De Guida a Tobar (La sinuosa ruta de los salarios de los gentes públicos.” *Jurisprudencia Argentina* 2002-III, suplemento del fascículo no. 11.
- Bianchi, Alberto. 2002b. *Control de constitucionalidad, Tomo I y II*. Buenos Aires: Abaco.
- Cavallo, Claudio. 2002. “Esto... ¿Será Justicia? Una visión sobre la decisión de la Corte acerca del recorte de haberes del sector público y jubilados.” *La Ley*, Nota a fallo, 2002-F.
- Chavez, Rebecca. 2001. “The Construction of the Rule of Law in Nascent Democracies: Judicial Autonomy in Latin America.” Doctoral Dissertation, Political Science, Stanford University.
- Cooter, Robert and Tom Ginsburg. 1996. “Comparative Judicial Discretion: An Empirical Test of Economic Models.” *International Review Law and Economics*, Vol. 16: 295-313.
- Epstein, Lee, Jack Knight, & Olga Shvetsova. 2001. “The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government.” *Law and Society Review*, 35:2.
- Fayt, Carlos. 2004. *La Corte Suprema y la Evolución de su Jurisprudencia Leading Cases y Holdings Casos Trascendentes*. Buenos Aires: La Ley.
- Finkel, Jodi. 2001. “Judicial Reform in Latin America: Market Economies, Self-Interested Politicians, and Judicial Independence.” Doctoral Dissertation, Department of Political Science, U.C. Los Angeles.
- Frühling, Hugo. 1984. “Law in Society: Social Transformation and the Crisis of Law in Chile, 1830-1970.” Doctoral Dissertation, Harvard University School of Law.
- Gargarella, Roberto. 2003. “Inconsistencia y parcialidad. Un examen histórico de la jurisprudencia de la Corte Suprema Argentina.” *Lexis Nexis Jurisprudencia Argentina*, 26 de noviembre 2003 (Número especial, “140 años de la Corte Suprema de Justicia de la Nación”), JA 2003-IV, fascículo n. 9, p. 19-35.
- Gelli, María Angélica. 2003a. *Constitución de la Nación Comentada y Concordada*. Buenos Aires: La Ley.
- Gelli, María Angélica. 2003b. “El mundo jurídico y los dilemas del poder de la Corte Suprema.” Especial para la Ley. T.2003-E, Sec. Doctrina, 986-89.
- Gelli, María Angélica. 2003c. “El caso “Provincia de San Luis v. Estado Nacional”, entre el debido proceso adjetivo y el control de razonabilidad.” *Jurisprudencia Argentina*, 2003-II-1294.
- Helmke, Gretchen. 2000. “Ruling Against the Rulers: Court-Executive Relations in Argentina Under Dictatorship and Democracy.” Doctoral Dissertation, Department of Political Science, University of Chicago.
- Helmke, Gretchen. 2002. “The Logic of Strategic Defection: Court-Executive Relations in Argentina.” *American Political Science Review*, Vol. 96, No. 2: 291-303.
- Hilbink, Lisa. 1999. “Legalism against Democracy: The Political Role of the Judiciary in Chile, 1964-1994.” Doctoral dissertation, Department of Political Science, U. C. San Diego.
- Iaryczower, Matías, Pablo T. Spiller, and Mariano Tommasi. 2000. “Un Enfoque Estratégico para Entender el Comportamiento de la Corte Suprema de Justicia de la Nación.” Paper presented at the Conferencia en Honor a G. Molinelli, 27 de noviembre, Centro de Estudio para el Desarrollo Institucional, Buenos Aires, Argentina.
- Karst, Kenneth L. and Keith S. Rosenn. 1975. *Law and Development in Latin America*. Berkeley, CA: University of California Press.
- Larkins, Christopher. 1998a. “The Legacies of Hyper-Presidentialism: Executive-Judicial Relations, Constitutional Cultures, and The Future of Democratic Governance in Argentina and Peru.” Ph.D. dissertation, University of Southern California.
- Legarre, Santiago. 2004. “Una puesta al día en materia de ‘certiorari’.” *La Ley*, 1267-74.

- Linz, Juan J. and Alfred Stepan. 1996. *Problems of Democratic Transition and Consolidation: Southern Europe, South America and Post-Communist Europe*. Baltimore: JHU Press.
- Moustafa, Tamir. 2003. "Law Versus the State: The Judicialization of Politics in Egypt." *Law and Social Inquiry*, Vol. 28, no. 4 (Fall).
- O'Donnell, Guillermo. 1999. "Horizontal Accountability in New Democracies." *Journal of Democracy*. Vol. 9, No. 3, 112-26.
- Przeworski, Adam. 1995. *Sustainable Democracy*. New York: Cambridge University Press.
- Ramseyer, Mark. 1994. "The Puzzling (In)Dependence of Courts: A Comparative Approach." *Journal of Legal Studies*, Vol. 23: 721-747.
- Ríos-Figueroa, Julio. 2003. "A Minimum Condition for the Judiciary to Become an Effective Power: The Mexican Supreme Court, 1994-2002." Paper presented at the Congress of the Latin American Studies Association, Dallas, TX, March 27-29.
- Santiago, Alfonso. 2003. "La delegación legislativa en el caso 'Provincia de San Luis.'" *Jurisprudencia Argentina*, 2003-II-1236.
- Scribner, Druscilla. 2004. "Limiting Presidential Power: Supreme Court – Executive Relations in Argentina and Chile." Doctoral Dissertation, Department of Political Science, University of California, San Diego.
- Segal, Jeffrey A. and Harold J. Spaeth. 1993. *The Supreme Court and the Attitudinal Model*. Cambridge: Cambridge University Press.
- Segal, Jeffrey A. and Harold J. Spaeth. 1999. *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court*. Cambridge: Cambridge University Press.
- Shapiro, Martin. 2004. "Judicial Review in Developed Democracies." In Siri Gloppen, Roberto Gargarella and Elin Skaar, eds. *Democratization and the Judiciary*. London: Frank Cass.
- Skaar, Elin. 2001a. "Judicial reform in Latin America, Why?" Paper prepared for delivery at the Norwegian Annual Political Science Conference, Honesfoss, 10-12 January, 2001.
- Smulovitz, Catalina. 1997. "The Discovery of Law: Political Consequences in the Argentine Case." Paper presented at the Conference, "New Challenges for the Rule of Law: Lawyers, Internationalization, and the Social Construction of Legal Rules," organized by the American Bar Foundation and CNRS.
- Staton, Jeffrey. 2002. "Judicial Activism and Public Authority Compliance: The Role of Public Support in the Mexican Separation-of-Powers System." Doctoral Dissertation, Department of Political Science, Washington University.
- Ungar, Mark. 2002. *Elusive Reform: Democracy and the Rule of Law in Latin America*. Boulder, CO: Lynne Rienner Publishers.
- Wetzler Malbrán, Ricardo. 2003. "El fallo." *El Derecho*: 201-1007, part 7.
- Whittington, Keith. 2000. "Once More Unto the Breach: Post-Behavioral Approaches to Judicial Politics." *Law and Social Inquiry*, 601-32.
- Zakaria, Fareed. 2003. *The Future of Freedom: Illiberal Democracy at Home and Abroad*. New York: W.W. Norton.