

# ONE TEXT, TWO TALES:

## WHEN EXECUTIVE/JUDICIAL BALANCES DIVERGED IN ARGENTINA AND THE UNITED STATES

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### INTRODUCTION

Liberal democracy is hard work. Today we are quicker to spot the fallacy of electoralism, the “faith that merely holding elections will channel political action into peaceful contests among elites and accord public legitimacy to the winners. . . .”<sup>1</sup> Experience has taught us that democratic transition and consolidation depend on other institutions of liberal constitutionalism, including free and independent courts.<sup>2</sup> We are still learning, however, that there is often a wide difference between what a constitution provides and how it operates. “The gap between rules and practices highlights the need to focus on informal patterns of power.”<sup>3</sup>

In evaluating judicial independence, for instance, “an analysis of formal institutions – such as the text of the national constitution or the law on the books, . . . – might suggest independence, but how political actors apply and work around those formal institutions appears to be a much more important

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1. Christopher J. Walker, *Toward Democratic Consolidation? The Argentine Supreme Court, Judicial Independence, and the Rule of Law*, 18 FLA. J. INT'L L. 745, 752 (2006) (quoting TERRY LYNN KARL, IMPOSING CONSENT? ELECTORALISM VERSUS DEMOCRATIZATION IN EL SALVADOR, IN ELECTIONS AND DEMOCRATIZATION IN LATIN AMERICA 34 (Paul W. Drake & Eduardo Silva eds., 1986)).

2. See generally Mark Freeman, *Constitutional Frameworks and Fragile Democracies: Choosing Between Parliamentarism, Presidentialism and Semi-Presidentialism*, 12 PACE INT'L L. REV. 253 (2000); William Maley, *Democratic Governance and Post-Conflict Transitions*, 6 CHI. J. INT'L L. 683 (2006); Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 750-65.

3. Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 763 (quoting REBECCA BILL CHAVEZ, THE RULE OF LAW IN NASCENT DEMOCRACIES: JUDICIAL POLITICS IN ARGENTINA 23 (2004)).

indicator[.]”<sup>4</sup> To evaluate whether a nation’s highest court is independent, “formal independence is a singularly unhelpful construct,” particularly in evaluating nations in Latin America, where formal rules and informal rules are often separated by a wide gap.<sup>5</sup> As Rebecca Bill Chavez has noted, “[I]nformal institutions and practices that allow Latin American presidents to control the courts are often stronger than the formal constitutional guarantees of judicial independence.”<sup>6</sup>

Although the constitution of Argentina was heavily borrowed from the U.S. Constitution, those constitutions operated in entirely different ways in the 1930s and 1940s, when each of those nations’ presidents directly challenged the autonomy and independence of their national supreme court. In the twentieth century, Argentina, unlike the United States, experienced military coups, dictatorships, human rights abuses, and corruption – all of which departed from the Argentine constitution’s written text.<sup>7</sup> “To understand the role of the judiciary in Argentina, the constitutional text does not tell the entire story. One has to look at how the text was applied and how the courts responded.”<sup>8</sup>

In this Article, I shall consider Argentina’s experience with growing executive power after the military coup of 1930 (Part 1), and the U.S. experience during the rise and fall of Franklin Roosevelt’s ill-fated Court-packing proposal in 1937 (Part 2). In Part 3, I shall say more about the very different outcomes of both episodes, with some thoughts on the wide variation between these nations’ constitutional histories. It is fascinating to consider those histories at the same time because, taken together, they demonstrate the severe limitations of the explanatory value of constitutional text. I shall close with a few thoughts on the limitations of text and the importance of understanding constitutional culture in seeking to understand how constitutions actually operate.

## I. ARGENTINA: THE DE FACTO DOCTRINE AND IMPEACHMENT

The men who drafted Argentina’s original Constitution of 1853 borrowed heavily from the Constitution of the United States, in the hope that copying the

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4. Christopher J. Walker, *Judicial Independence and the Rule of Law: Lessons From Post-Menem Argentina*, 14 SW. J. L. & TRADE AM. 89, 114 (2007); Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 763.

5. See Daniel Brinks, *Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?* 40 TEX. INT’L L.J. 595, 597-98 (2005); Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT’L L.J. 1, 5-7 (2006).

6. Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 764-65 (citing CHAVEZ, *supra* note 3, at 23-24).

7. Walker, *Judicial Independence and the Rule of Law*, *supra* note 4, at 95-96; Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 765.

8. Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 749.

U.S. constitutional system would help Argentina copy U.S. prosperity.<sup>9</sup> The father of Argentine constitutionalism, Juan Bautista Alberdi, argued in *Bases y puntos de partida para la organización política de la República Argentina* (*Bases and Points of Departure for the Political Organization of the Argentine Republic*) that adopting the political liberties of the U.S. system would lead to similar economic prosperity.<sup>10</sup> Alberdi and others in his intellectual circle, known as the Generation of '37, embraced the cause of emulating the United States.<sup>11</sup> Most of the delegates to the 1853 constitutional convention approved of Alberdi's vision of a new Argentina patterned after the United States.<sup>12</sup>

As a result, the 1853 constitution borrowed heavily from the U.S. Constitution of 1787.<sup>13</sup> Like the U.S. Constitution, the Argentine constitution established a republican and federalist form of government, designed according to the separation-of-powers principle, with power divided between a judiciary, a president, and a bicameral congress.<sup>14</sup> In the words of one of the convention's most prominent delegates, José Benjamin Gorostiaga, the Constitution of Argentina was "cast in the mold of the Constitution of the United States, the only model of a true federation which exists in the world. . . ."<sup>15</sup> Indeed, the textual similarities were so close that many courts and commentators believed later that the framers had adopted by implication U.S. constitutional jurisprudence, thereby giving decisions of the U.S. Supreme Court the status of

9. See Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith*, 46 AM. U. L. REV. 1483, 1492, 1502-03 (1997); see also Raul Alfonsín, *Address on the Occasion of the Bicentennial of the United States Constitution: June 19, 1987*, 60 TEMP. L.Q. 971, 973 (1987).

10. Miller, *The Authority of a Foreign Talisman*, *supra* note 9, at 1501-03 (citing Juan Bautista Alberdi, *Bases y puntos de partida para la organización política de la República Argentina*, in 3 OBRAS COMPLETAS DE JUAN BAUTISTA ALBERDI 371, 409, 426-38, 449-52, 456, 527 (Buenos Aires, La Tribuna Nacional 1886)); see also Alfonsín, *supra* note 9, at 973.

11. See NICOLAS SHUMWAY, *THE INVENTION OF ARGENTINA* 126-32 (1991); see generally JEREMY ADELMAN, *REPUBLIC OF CAPITAL: BUENOS AIRES AND THE LEGAL TRANSFORMATION OF THE ATLANTIC WORLD* (1999).

12. Miller, *The Authority of a Foreign Talisman*, *supra* note 9, at 1512; see also Jonathan M. Miller, *Courts and the Creation of a "Spirit of Moderation": Judicial Protection of Revolutionaries in Argentina, 1863-1929*, 20 HASTINGS INT'L & COMP. L. REV. 231, 239 (1997).

13. See Robert S. Barker, *Constitutionalism in the Americas: A Bicentennial Perspective*, 49 U. PITT. L. REV. 891, 892 (1988); Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT'L J. CONST. L. 269, 270-71 (2003); Horacio Spector, *Constitutional Transplants and the Mutation Effect*, 83 CHI.-KENT L. REV. 129, 132-33 (2008); Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 767-68; see also William C. Banks & Alejandro D. Carrio, *Presidential Systems in Stress: Emergency Powers in Argentina and the United States*, 15 MICH. J. INT'L L. 1, 12-13 (1993).

14. Banks & Carrio, *supra* note 13, at 12-13 (citing CONST. ARG. arts. 1-35); Manuel José García-Mansilla, *Separation of Powers Crisis: The Case of Argentina*, 32 GA. J. INT'L & COMP. L. 307, 310 (2004) (citing CONST. ARG. art. 1); Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 767-68 (citing CONST. ARG. art. 2).

15. Rosenkrantz, *supra* note 13, at 270.

controlling authority in Argentine constitutional cases.<sup>16</sup>

Argentina's embrace of U.S. constitutional law and practice accomplished many of its early goals: from 1860 to 1930, Argentina enjoyed spectacular economic growth and unbroken constitutional rule – an impressive record, particularly for a Latin American nation.<sup>17</sup> Notwithstanding this constitutional stability and economic success, Argentina struggled to establish broad-based democratic institutions and a culture of political participation.<sup>18</sup>

The balance of executive/judicial power in Argentina began to change in the 1930s, in part because of the Supreme Court's recognition of de facto executive authority.<sup>19</sup> Argentina's seven decades of unbroken constitutional rule ended on September 6, 1930, when the government of President Hipolito Yrigoyen was brought down in a military coup.<sup>20</sup> The leader of the coup, retired General José F. Uriburu, after declaring himself president and promising "respect for the Constitution and basic laws in force," sent a message to the Supreme Court, informing its members that he had established a provisional government and seeking recognition of that government's de facto authority.<sup>21</sup>

The military regime's bid for legitimacy presented the Supreme Court with a dilemma. In the words of William Banks and Alejandro Carrio:

If [the Court] declared the new government unconstitutional, there was no mechanism to assure that its decree would be obeyed. Nor was there any protection for the justices' independence or, for that matter, their tenure. The Court could risk losing whatever ability it had retained to control the excesses of the military government. On the other hand, if it upheld the government, it would legitimate an unconstitutional seizure of power and thereby lessen the Court's independence

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16. Barker, *supra* note 13, at 908 (citing Segundo V. Linares Quintana, *Comparison of the Constitutional Basis of the United States and Argentine Political Systems*, 97 U. PA. L. REV. 641 (1948-49)).

17. Thomas H. Hill, *Introduction to Law and Economic Development in Latin America: A Comparative Approach to Legal Reform*, 83 CHI.-KENT L. REV. 3, 21 (2008) (citing Spector, *supra* note 13, at 132-34); Edward C. Snyder, *The Menem Revolution in Argentina: Progress Toward a Hemispheric Free Trade Area*, 29 TEX. INT'L L.J. 95 (1994) (citing DANIEL PONEMAN, ARGENTINA: DEMOCRACY ON TRIAL 155 (1987)).

18. Emilio Mignone, *The Role of Private Parties and the Media in Creating Accountability*, 12 B.C. THIRD WORLD L.J. 317, 337-38 (1992).

19. See Banks & Carrio, *supra* note 13, at 28-29; Tim Dockery, *The Rule of Law Over the Law of Rulers: The Treatment of De Facto Laws in Argentina*, 19 FORDHAM INT'L L.J. 1578, 1594-98 (1996); García-Mansilla, *supra* note 14, at 348-52.

20. See Banks & Carrio, *supra* note 13, at 25-27 (citing generally ROBERT D. CRASSWELLER, PERÓN AND THE ENIGMAS OF ARGENTINA, ch. 3 (1988)); García-Mansilla, *supra* note 14, at 349-50; Mignone, *supra* note 18, at 338-39.

21. Banks & Carrio, *supra* note 13, at 25 (quoting ROBERT POTASH, THE ARMY AND POLITICS IN ARGENTINA, 1928-1945, at 58 (1969)); García-Mansilla, *supra* note 14, at 349.

and the integrity of the legal system.<sup>22</sup>

Faced with this dilemma, the Court chose the path of institutional self-preservation, opting to grant constitutional authority to the military regime. Four days after the coup, the Court issued a brief opinion, signed by all of the Court's members, announcing that it would consider the new government to possess *de facto* authority, beyond the power of courts to question.<sup>23</sup>

The Court's logic was not elaborate. The justices noted the longstanding principle that the people have a right to revolution or insurrection.<sup>24</sup> They reasoned that the regime enjoyed *de facto* authority because it possessed the power and will to secure national peace and order; it had vowed to maintain the supremacy of the constitution; and it was in a position to protect life, liberty, and property.<sup>25</sup> The Court justified recognizing the regime's *de facto* authority due to "necessity," "public policy," and for the purpose of "protecting the citizens, whose interests could be affected because it is not now possible for them to question the legality of those now in power."<sup>26</sup> By adopting the *de facto* doctrine, the Court held that a *de facto* government can provisionally exercise all national power as a result of its successful revolution against an existing *de jure* authority.<sup>27</sup>

Whatever the merits of the Court's reasoning, the effect of the *de facto* doctrine was apparent. As one commentator has written, "[T]he obvious purpose [of the *de facto* doctrine was] . . . to give the new government a semblance of regularity and legality . . . to invest, in other words, the government with a *colorable title* to office, a *plausible investiture* and an appearance of general acceptance by and support of the people."<sup>28</sup> At the same time, it allowed the Court to avoid hearing challenges to the constitutional legitimacy of the military authorities.

In light of these purposes, recognizing the *de facto* doctrine allowed the Court to accomplish its goals in the short term: the Court was able to preserve itself as an institution – the military regime did not remove the justices from office – and the Court continued to rule on the constitutionality of government

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22. Banks & Carrio, *supra* note 13, at 27; *see also* García-Mansilla, *supra* note 14, at 349-50; Walker, *Judicial Independence and the Rule of Law*, *supra* note 4, at 98-99.

23. Decree of Sept. 10, 1930, 158 Fallos 290-91 (Arg.); *see* Dockery, *supra* note 19, at 1617; García-Mansilla, *supra* note 14, at 349-50; Walker, *Judicial Independence and the Rule of Law*, *supra* note 4, at 98-99.

24. *See* Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 773; *see also* Decree of Sept. 10, 1930, *supra* note 23.

25. *See* Dockery, *supra* note 19, at 1596, 1609-10 (citing Decree of Sept. 10, 1930, *supra* note 23, at 290).

26. Banks & Carrio, *supra* note 13, at 27-28 (citing Decree of Sept. 10, 1930, *supra* note 23, at 291).

27. Walker, *Judicial Independence and the Rule of Law*, *supra* note 4, at 98-99 (citing García-Mansilla, *supra* note 14, at 350-51); *see also* Dockery, *supra* note 19, at 1596-98.

28. J. Irizarry y Puente, *The Nature and Powers of a "De Facto" Government in Latin America*, 30 TUL. L. REV. 15, 33 (1955).

action (although not on the constitutionality of the government itself).<sup>29</sup> But while the Court was able to accomplish these short-term goals, in the long run it paid a heavy price for departing from the established rules. “[O]nce the Court started down that path, it gradually lost the ability to say ‘no’ to the Executive in an authoritative fashion,” Jonathan Miller wrote.<sup>30</sup> “[I]t never developed the authority to design new constitutional restrictions on executive authority.”<sup>31</sup>

In the de facto doctrine are “the origins of the decline of legal thought in Argentina and the initial path to continuous destruction of separation of powers by both action of the executive and omission by the Legislative and judicial branches.”<sup>32</sup> In 1930, the new government was itself illegitimate, having asserted its right to rule without the benefit of elections and constitutional processes. “The Supreme Court simply abdicated its responsibility to measure official conduct against legal norms.”<sup>33</sup>

Whether or not the Court had foreseen all of these long-term consequences, in the 1930s and 1940s it did make several attempts to limit the scope of the de facto doctrine.<sup>34</sup> Its recognition of the de facto doctrine in 1930 had recognized only the constitutional legitimacy of the military government as a whole; it had not addressed the constitutional validity of specific exercises of the de facto government’s powers. The Court therefore continued to assert its own role as the final arbiter of de facto authority.<sup>35</sup>

For instance, the Court initially maintained that the authority of a de facto executive afforded no basis for powers that belonged rightfully to Congress or to the courts.<sup>36</sup> (The Court later modified this position.)<sup>37</sup> Moreover, the Court held generally that a de facto law might have temporary legitimacy if it arose from necessity and urgency, but that the de facto law would lose that legitimacy later upon the return of democratic rule.<sup>38</sup> This theory, known as *caducidad*, was followed by the Court between 1933 and 1947, with some modifications in 1945. Taking the position that de facto authority was limited essentially to acts required to keep the government operating, the Court was willing to strike down many of the executive decrees issued by de facto governments.<sup>39</sup>

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

30. Jonathan M. Miller, *Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and Its Collapse in Argentina*, 21 HASTINGS INT’L & COMP. L. REV. 77, 176 (1997).

31. *Id.* at 176.

32. García-Mansilla, *supra* note 14, at 350 (citing Banks & Carrio, *supra* note 13, at 28-29).

33. Banks & Carrio, *supra* note 13, at 28; see also García-Mansilla, *supra* note 14, at 349-50.

34. García-Mansilla, *supra* note 14, at 350.

35. *Id.* at 351.

36. *Id.* at 350-51; Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 773-74.

37. Dockery, *supra* note 19, at 1617-18; Irizarry y Puente, *supra* note 28, at 42-44; Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 773-74.

38. See Dockery, *supra* note 19, at 1610.

39. *Id.*; García-Mansilla, *supra* note 14, at 351.

An example of the Court's attempts to limit the scope of the de facto doctrine was its decision in *Administracion de Impuestos Internos v. Malmonge Nebreda*, decided in 1935.<sup>40</sup> In *Malmonge Nebreda*, the Court reaffirmed the position it had taken since 1930, that the Uriburu government had replaced only the executive branch, not the entire national government; and that any de facto authority exercised by that regime or its successors was therefore limited to executive authority, and did not extend to legislative or judicial powers.<sup>41</sup>

But the Court also acknowledged that in instances of extraordinary necessity, and when Congress was itself absent, a de facto executive might be compelled to issue emergency decrees that amounted to de facto legislative enactments. However, this was only permissible in cases of extreme urgency, and such de facto laws would become ineffective upon the return of Congress (unless Congress chose to ratify them).<sup>42</sup> By striking such balances between legitimacy and exigency, the Court sought to close the "Pandora's Box" it had opened in the wake of the 1930 coup.

While the Court in *Malmonge Nebreda* and other cases sought to limit the scope of the de facto doctrine, the health of Argentine politics continued to flag. As presidents began to rely more and more on emergency executive decrees, Congress and the political parties failed to object, essentially acquiescing in a dramatic shift of legislative power to the executive branch. Rather than performing their constitutional functions as a check against the abuse of executive powers, Congress and the courts largely stood aside.<sup>43</sup> In the words of a contemporary commentary in *La Nación*:

The facts reveal that Congress is planning its own ruin in consenting to the usurpation of its privileges by the Executive Power. Not only does it fail to stop the advance, but it does not adopt measures designed to avoid it in the future. In its indifference toward the alteration of the constitutional balance, the chambers are permitting themselves to be despoiled even of the traditional prerogatives of parliaments.<sup>44</sup>

Congressional acquiescence in the expansion of executive authority thus was altering the traditional balance of power even before the advent of Perónism. The failure of the political parties – what Manuel García-Mansilla has called "the lack of seriousness of political parties" during this period – made matters worse. Widespread electoral fraud and the corruption of the political parties had been contributing factors in the 1930 coup, and democratic

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40. Corte Suprema de Justicia [CSJN], 1935, "Administracion de Impuestos Internos v. Malmonge Nebreda," Fallos (1935-172- 365) (Arg.).

41. See Dockery, *supra* note 19, at 1610-11.

42. See García-Mansilla, *supra* note 14, at 350-51.

43. *Id.* at 356; Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 176.

44. See García-Mansilla, *supra* note 14, at 377 (citing Linares Quintana, *supra* note 16, at 656).

dysfunction made it harder to prevent the post-1930 expansion of executive power.<sup>45</sup> As members of both the Radical and Conservative blocs increasingly lost faith in the democratic process and sought instead to enlist the support from outside the system, the military deepened its involvement in the nation's politics.<sup>46</sup>

These pressures on the Argentine political system, combined with the military's continuing role in national politics, led to a second coup in June 1943.<sup>47</sup> The leaders of the new military regime, unlike those of the previous coup, suspended constitutional rule; but the Supreme Court faced essentially the same question as in 1930: whether to recognize the new government's de facto authority in exchange for its own survival.<sup>48</sup> Predictably, the Court made the same choice, recognizing the new regime's authority in a resolution that was an exact replica of the one the Court had issued in 1930.<sup>49</sup>

But the Court also sought to preserve its independence during the next few years: it continued to maintain its previous limitations on de facto authority, and struck down enactments it deemed to exceed those limitations.<sup>50</sup> Thus, while the justices had again conferred constitutional legitimacy on a regime that had gained power through extra-constitutional means, they were nevertheless unafraid to collide with that regime on specific questions arising under the constitution.

In the mid-1940s the Court found itself increasingly at odds with the person who – though he officially held the title of Vice President – was in fact the military regime's most powerful figure: Colonel Juan Perón.<sup>51</sup> Perón's popularity and influence steadily grew; in February 1946 he won the presidency in a democratic election and began to return the government to a civilian footing.<sup>52</sup> Meanwhile, the Court was growing increasingly unpopular, both for its opposition to Perón's social and economic programs and for its perceived favoritism toward the Argentine oligarchy.<sup>53</sup>

45. See García-Mansilla, *supra* note 14, at 377-79.

46. ROBERT A. POTASH, *THE ARMY AND POLITICS IN ARGENTINA, 1928-1945* 74, 94, 283-85 (1969); DAVID ROCK, *ARGENTINA: 1516-1987 FROM SPANISH COLONIZATION TO ALFONSÍN* 214-17 (1987); Mugambi Jouet, *The Failed Invigoration of Argentina's Constitution: Presidential Omnipotence, Repression, Instability, and Lawlessness in Argentine History*, 39 U. MIAMI INTER-AM. L. REV. 409, 421-22 (2008).

47. See Dockery, *supra* note 19, at 1597-98; Jouet, *supra* note 46, at 421-22.

48. See Banks & Carrio, *supra* note 13, at 27-28, 28 n.138; Dockery, *supra* note 19, at 1598; Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 159-60; Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 774.

49. Compare decree of June 1943, 196 Fallos 5 (1943) with decree of Sept. 10, 1930, 158 Fallos 290-91 (Arg.).

50. See García-Mansilla, *supra* note 14, at 351.

51. POTASH, *supra* note 46, at 209-16, 227-28, 238-82; García-Mansilla, *supra* note 14, at 351-52; Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 153-62.

52. ROCK, *supra* note 46, at 262-63; Ramiro Salvochea, *Clientelism in Argentina: Piqueteros and Relief Payment Plans for the Unemployed – Misunderstanding the Role of Civil Society*, 43 TEX. INT'L L.J. 287, 293 (2008).

53. Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History*



The Court responded to these challenges by rolling back some of its earlier controls on de facto authority. Between 1945 and 1947, without overruling the underlying doctrine of *caducidad*, the Court altered its stance on the legislative powers of de facto regimes. The Court broadly held that de facto governments require certain powers to function, and may therefore legitimately exercise those powers if they also maintain a proper respect for the rights and guarantees provided by the constitution. Under the existing doctrine of *caducidad*, however, the Court held that de facto executives were barred from enacting laws on criminal matters; interfering with the courts; or repealing, suspending, or changing other laws that had been enacted constitutionally.<sup>54</sup> Yet neither the Court's new leniency toward de facto authority, nor Perón's efforts to return Argentina to civilian rule, alleviated the growing rift between Perón and the Court.

The Court suffered its most serious blow from 1946-47, when Perón and his supporters successfully sought to impeach and remove all but one of the Court's members.<sup>55</sup> An ultimate showdown between Perón and the Court was probably inevitable, as Perón and the Court had already found themselves at cross purposes in 1945 and early 1946, before Perón's election as president.<sup>56</sup> One of the essential elements of the Perónist movement, organized labor, had also been battling with the Court particularly since its decision in the *Dock Sud* case in early 1946, a ruling that Perón had openly attacked as part of his presidential campaign.<sup>57</sup> (In *Dock Sud*, the Court struck down one of the military regime's key programs, the Argentine version of the National Labor Relations Board.)<sup>58</sup> It was therefore unsurprising that Perón moved against the Court during the first months of his presidency.

While it was perhaps unavoidable that Perón would challenge the Court directly in some way, his decision to do so through the particular process of impeachment proceedings was not a foregone conclusion. He appears to have contemplated at least two other options. First, Perón considered and rejected the alternative of simply increasing the number of justices on the Court, thereby allowing his government to name additional members who were sympathetic with his political agenda – an Argentine version of Roosevelt's Court-packing plan in the United States. It has been suggested that Perón rejected this course

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*and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 870 (2003).

54. See Corte Suprema de Justicia [CSJN], 1945, "Municipalidad de la Ciudad de Buenos Aires v. Mayer," Fallos (1945-209-272) (Arg.); Dockery, *supra* note 19, at 1611; Irizarry y Puente, *supra* note 28, at 41-43.

55. See Dockery, *supra* note 19, at 1598-99; Becky L. Jacobs, *Pesification and Economic Crisis in Argentina: The Moral Hazard Posed by a Politicized Supreme Court*, 34 U. MIAMI INTER-AM. L. REV. 391, 407 (2003); Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 80, 166-72.

56. Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 157, 157 n.385.

57. Corte Suprema de Justicia [CSJN], 1946, "Cía. Dock Sud de Buenos Aires Ltda." Fallos(1946-204- 23) (Arg.); Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 157-58, 161-62.

58. See Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 775.

because he sought to provoke a national debate about the Court's role, a goal that was better served by the impeachment process.<sup>59</sup>

A second option was to ignore the constitution and to simply replace the justices themselves, without putting the nation through the ordeal of a formal impeachment.<sup>60</sup> Although such a step was unquestionably authoritarian, it would have been characteristic in light of actions Perón had already taken by this time. Again, he may have rejected this option and chosen impeachment instead to incite controversy over the Court's past actions.<sup>61</sup> Moreover, Perón did not operate in a political vacuum: surely he would have paid a price had he attempted simply to work outside the constitution in his confrontation with the Court.

Indeed, even the decision to formally impeach the Court – a step squarely within the constitution's letter, if not its spirit – drew vigorous opposition. Perón of course faced the ire of his traditional political adversaries, who included socialists, liberals, and some in the press. More interesting were the complex crosswinds within his own coalition, particularly from the Catholic Church. As Jonathan Miller has written, contemporary evidence suggests that Catholics, a key segment of Perón's base, were unenthusiastic about the decision to impeach. Perón might have settled on the formal impeachment route because replacing the justices informally, or extra-constitutionally, would have compounded his troubles with the organized church.<sup>62</sup>

On Monday, July 8, 1946, the head of the Perónist bloc, Rodolfo Decker, introduced in the House of Deputies a bill to impeach most of the members of the Argentine Supreme Court.<sup>63</sup> Broadly speaking, the charges against the Court fell into two categories.<sup>64</sup> First, the Court was accused of overstepping the limits of its judicial role and of acting instead in a political role.<sup>65</sup> Ironically, two of the incidents cited to show that the Court had improperly assumed a political role were its decisions to recognize the *de facto* regimes that had come to power as a result of the 1930 and 1943 coups.<sup>66</sup> The Court stood accused of "mixing into political issues through the Pronouncements of 1930 and 1943, legitimizing the *de facto* governments," and was specifically admonished for not enforcing the existing requirements for succession to the presidency.<sup>67</sup>

59. Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 159.

60. *Id.* Perón could have argued, for instance, that all constitutional appointments, including judicial appointments, take on *de facto* status when a *de facto* government takes over the executive and legislative branches – thus subjecting the justices to removal. *Id.* at 159 n.393.

61. *Id.* at 159.

62. *Id.*

63. *Id.* at 158.

64. See HELMKE, *supra* note 29, at 64.

65. *Id.*

66. Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 159-61.

67. *Id.* Augmenting the irony, in both instances it had been the Court's own chief justice who was constitutionally entitled to assume the presidency. *Id.*

Besides being improperly “political” in initially recognizing the de facto regimes of 1930 and 1943, the Court was also admonished for its efforts to limit the scope of those governments’ authority.<sup>68</sup> That is, in reviewing the constitutionality of the acts of the de facto governments, the Court had “assumed political powers outside of the judicial function by controlling and impeding fulfillment of the social goals of the revolution of 1943 and writing judgments with political designs.”<sup>69</sup> It had been overly political, for example, for the Court to adhere to the position that the authority of a de facto government was limited to necessary executive functions, and did not include the power to issue legislative enactments with lasting effect.

The second set of charges accused the Court of demonstrating unfair and improper prejudice against organized labor. Although the bill of impeachment does mention several specific rulings, the real complaint against the Court was not the inner workings of its jurisprudence; it was the Court’s overall approach to Perón’s social and economic agenda. The floor debates concerned mainly whether the justices were in step with the times, that is, whether it “had been sufficiently socially progressive during the 1930s and willing to reinterpret the constitution in light of new social needs,” in Miller’s words.<sup>70</sup>

Thus, on one hand, the Court was accused of having been improperly political when it recognized the de facto authority of the military governments in the first place; but on the other hand, it was also accused of being improperly political when it tried later to delineate the limits of what those governments could constitutionally do. Moreover, as Miller has noted, it is hard to reconcile the political charges with the labor charges: the Court was accused of being too political in recognizing and shaping de facto authority, but in a sense it was also accused of not being political enough, since it had neglected to consider social and economic needs in its reading of the constitution.<sup>71</sup> Put charitably, the charges against the Court seem to come from different directions.

The impeachment proceedings lasted for more than nine months and consumed the calendars of both houses of Congress. No less than thirty sessions of the Senate were devoted at least in part to hearing the charges and evidence against the Court, although the eventual outcome was beyond doubt.<sup>72</sup> Few were surprised when, on Wednesday, April 30, 1947, Congress took the unprecedented step of removing four of the five justices of the Argentine Supreme Court.<sup>73</sup>

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68. *Id.* at 161-62.

69. *Id.* at 160 (quoting Impeachment Proceedings, at 12 (House of Deputies accusation presented to the Senate)).

70. Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 161.

71. *Id.* at 162.

72. *Id.* at 156. Perónists controlled every seat in the Senate and two-thirds of the House of Deputies.

73. *Id.*

## II. UNITED STATES: ROOSEVELT AND THE COURT-PACKING PLAN

In the United States, although many observers had expected the New Deal regulatory agenda to run aground upon reaching the U.S. Supreme Court, the Court's decisions were more mixed and at times even encouraging for New Deal partisans until 1935.<sup>74</sup> Especially encouraging were two cases in 1934 involving state legislative decisions, *Home Building & Loan Association v. Blaisdell*<sup>75</sup> and *Nebbia v. New York*.<sup>76</sup> *Blaisdell*, *Nebbia*, and other early decisions suggested that the Court might be willing to afford the New Deal a wide berth in deference to dramatic changes in the economy and society.<sup>77</sup> Moreover, the Court's initial treatment of the New Deal programs themselves was either favorable or at least unalarming.<sup>78</sup>

But in May 1935, the Court appeared to start down a very different path. The first sign of trouble was the Court's invalidation of the Railroad Retirement Act on May 6, raising doubts about another program that was similar but far more consequential: Social Security.<sup>79</sup> The rail pension decision "sent shock waves through the White House and the New Deal agencies [and] . . . created deep fissures between the executive branch and the Supreme Court," in the words of a preeminent historian of the era, William Leuchtenburg.<sup>80</sup>

Any remaining hopes of avoiding a collision between Roosevelt's program and the Court were erased on May 27, 1935, a day that would be remembered as Black Monday.<sup>81</sup> In a series of decisions announced that day,

74. Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 988 (2000); Roger I. Roots, *Government by Permanent Emergency: The Forgotten History of the New Deal Constitution*, 33 SUFFOLK U. L. REV. 259, 280 (2000); see also DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1889* 26 (1985); ROBERT MCCLOSKEY, *THE AMERICAN SUPREME COURT 175-77* (1960).

75. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (upholding a Minnesota statute allowing foreclosure delays for debtors in distress).

76. *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding a state regulatory law regulating the price of milk).

77. See Friedman, *The History of the Counter-majoritarian Difficulty*, *supra* note 74, at 989; see also Charles M. Freeland, *The Political Process as Final Solution*, 68 IND. L.J. 525, 539-42, 569 (1993).

78. See generally *United States v. Bankers Trust Co.*, 294 U.S. 240 (1935) (permitting the government to repudiate "gold clauses" in private contracts, though not in public ones). In *Panama Refining v. Ryan*, 293 U.S. 388 (1935), although the Court struck down a portion of the National Industrial Recovery Act authorizing the president to prohibit the interstate transport of "hot oil," the Roosevelt administration thought the decision an anomaly, and was encouraged by language in the opinion reaffirming that executive agencies were entitled to flexibility and deference. See Stephen O. Kline, *Revisiting FDR's Court Packing Plan: Are the Current Attacks on Judicial Independence So Bad?* 30 MCGEORGE L. REV. 863, 875-76 (1999).

79. See *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 360 (1935); Kline, *supra* note 78, at 879.

80. WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 27 (1995).

81. See Alfred C. Aman, Jr., *Symposium: Bowsher v. Synar*, 72 CORNELL L. REV. 421, 421-36 (1987); Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237, 245-

the Court restricted the President's power to remove members of independent regulatory commissions;<sup>82</sup> struck down the Frazier-Lemke Farm Mortgage Act of 1934, which had placed a moratorium on farm mortgage payments;<sup>83</sup> and held a portion of the National Industrial Recovery Act unconstitutional for giving the President excessive discretion.<sup>84</sup> New Dealers were stunned by the Black Monday decisions: a few days later the President told reporters that the Court had relegated the nation to the "horse-and-buggy" definition of interstate commerce.<sup>85</sup> Organized labor was highly critical of the decisions, Congress temporarily stopped work on New Deal legislation, and numerous proposals were introduced in Congress to curb the power of the Court.<sup>86</sup>

The anti-Court animus that formed after Black Monday was aggravated further the following January when the Court's *Butler* decision struck down the crop-control provisions of the Agricultural Adjustment Act (AAA).<sup>87</sup> The AAA was a popular New Deal measure, and *Butler* became something of a rallying cry -- the beginning of more organized efforts to "do something" to fix whatever was the matter with the Court.<sup>88</sup> In Congress, more than a hundred bills were introduced that proposed in some fashion to contain the Court's power.<sup>89</sup> A flood of mail poured into the White House and the halls of Congress, castigating the Supreme Court; many of the denunciations proposed that the Court be brought into the twentieth century by requiring the justices to retire upon reaching 65 or 70.<sup>90</sup> Near Ames, Iowa, six of the justices were hanged in effigy by a group of Iowa State students.<sup>91</sup>

Any doubts about where the Court stood seemed to vanish completely in the spring of 1936. In a two-week period, the Court repudiated the administrative policies of the Securities and Exchange Commission;<sup>92</sup> struck down the Bituminous Coal Conservation Act of 1935, known as the Guffey-

46 (1996) (reviewing WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995)); Michael E. Parrish, *The Great Depression, the New Deal, and the American Legal Order*, 59 WASH. L. REV. 723, 731 (1984).

82. *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

83. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

84. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

85. LEUCHTENBURG, *supra* note 80, at 90; Devins, *supra* note 81, at 247 n.54; Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1932-33 (1994); William E. Leuchtenburg, *Charles Evans Hughes: The Center Holds*, 83 N.C. L. REV. 1187, 1193 (2005).

86. See Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 210 (1994); Friedman, *The History of the Counter-majoritarian Difficulty*, *supra* note 74, at 991-92; Kline, *supra* note 78, at 884.

87. *United States v. Butler*, 297 U.S. 1 (1936); see ARTHUR M. SCHLESINGER, *THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL* 488 (1960); Kline, *supra* note 78, at 886-89.

88. See Friedman, *The History of the Counter-majoritarian Difficulty*, *supra* note 74, at 993-94, 993 n.88; Kline, *supra* note 78, at 889; but see Cushman, *supra* note 86, at 242-43.

89. See Cushman, *supra* note 86, at 210.

90. See LEUCHTENBURG, *supra* note 80, at 96-98.

91. See SCHLESINGER, *supra* note 87, at 488; but see Cushman, *supra* note 86, at 274.

92. *Jones v. Sec. and Exch. Comm'n*, 298 U.S. 1 (1936). The Court, speaking through Justice Sutherland, compared the actions of the SEC with those of the Star Chamber in Stuart England. *Id.*

Snyder Act (the so-called "little NLRA" that aimed to stabilize the coal industry);<sup>93</sup> invalidated the Municipal Bankruptcy Act;<sup>94</sup> and struck down New York's state minimum wage for women.<sup>95</sup> Even conservative defenders of the Court were shocked by these decisions, which taken together looked like a massive assault on the New Deal; the combination of all of them, especially the minimum-wage case, galvanized popular resentment toward the Court.<sup>96</sup> "Never before had the Court so severely frustrated an Administration's political agenda during such a short time period," as William Ross has noted.<sup>97</sup> Roosevelt had his own reasons for protesting that the Court had fallen behind the times, but the American people agreed with his position.<sup>98</sup>

Roosevelt avoided attacking the Court as he campaigned for reelection in the summer of 1936 against his Republican opponent, Governor Alf Landon of Kansas.<sup>99</sup> By any measure, Roosevelt's victory at the polls that November was breathtaking: he received more than sixty percent of the popular vote and carried the Electoral College by a margin of 523 to 8, winning every state but Maine and Vermont.<sup>100</sup> The President's reelection mandate also seemed to embrace the new congressional majorities. In the House of Representatives, Democrats now outnumbered Republicans 328 to 127; in the Senate, 77 to 19.<sup>101</sup> The magnitude of these gains understandably led Roosevelt to conclude that most Americans favored his legislative program and would join him in now opposing any obstacles to its speedy enactment.<sup>102</sup>

Although his announcement of the Court-packing plan surprised almost everyone in the country, Roosevelt had in fact been pondering such action against the Court at least as early as 1935.<sup>103</sup> Early on, he had concluded that

93. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

94. *Ashton v. Cameron County Water Improvement Dist. No. 1*, 298 U.S. 513 (1936).

95. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

96. William G. Ross, *When Did the "Switch in Time" Actually Occur? Re-Discovering the Supreme Court's "Forgotten" Decisions of 1936-1937*, 37 ARIZ. ST. L.J. 1153, 1159-60 (2005).

97. *Id.* at 1159 (but adding that "no previous Administration had so quickly generated laws that so fundamentally altered the nation's social and economic system").

98. See Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 19 (1998). In 1936 Roosevelt was especially frustrated to be the only 20th-century president to complete his first four-year term without receiving a single opportunity to appoint a justice to the Supreme Court. *Id.* See Kline, *supra* note 78, at 950.

99. See William E. Leuchtenburg, *When the People Spoke, What Did They Say? The Election of 1936 and the Ackerman Thesis*, 108 YALE L.J. 2077, 2085-87 (1999); William G. Ross, *The Role of Judicial Issues in Presidential Campaigns*, 42 SANTA CLARA L. REV. 391, 419 (2002).

100. Geoffrey D. Berman, *A New Deal for Free Speech: Free Speech and the Labor Movement in the 1930s*, 80 VA. L. REV. 291, 310-11 (1994); Cushman, *supra* note 86, at 228-29.

101. Kline, *supra* note 78, at 897.

102. See Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 74, at 1023.

103. *Id.* at 1022-23; Richard K. Neumann Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161, 248-49 (2007) (citing JAMES MACGREGOR BURNS, ROOSEVELT: THE LION AND THE FOX (1956)); see also Drew D. Hansen, *The Sit-Down*

the problem had nothing to do with the Constitution, which Roosevelt maintained was capacious enough to accommodate modern exigencies. Roosevelt was convinced that the problem was the justices themselves and their reactionary, almost cramped view of the world.<sup>104</sup>

Roosevelt was also reminded of a constitutional crisis in Britain in 1911, a situation that the President thought was analogous. As Roosevelt recalled the case, the House of Lords had repeatedly refused to approve legislation that had been forwarded by the House of Commons. Lloyd George, seeking to pass the bill for Irish autonomy, broke the stalemate by announcing that if the Lords rejected the bill again, the King would create several hundred additional peers, enough to outvote the present House of Lords. Lloyd George's gambit had succeeded, and in Roosevelt's mind was a handy analogue that presaged his own eventual Court-packing plan.<sup>105</sup>

Several of Roosevelt's advisors, reflecting similar views in Congress and the country, favored bold action against the Court but disfavored taking such a step through statutory means; they thought a constitutional amendment more appropriate to the task, perhaps one that amended the Constitution to expand congressional authority in particular regulatory areas.<sup>106</sup> But Roosevelt and his attorney general, Homer Cummings, ultimately rejected such a course as impractical. The process of amending the Constitution was (and still is) complex, cumbersome, and time-consuming, and at any rate Roosevelt concluded that it would be difficult, if not impossible, to craft a single amendment that would anticipate all of the constitutional challenges that might be brought against New Deal programs.<sup>107</sup>

Practical considerations aside, Roosevelt, though bored by questions of theory, did have a more philosophical objection to the amendment route.

*Strikes and the Switch in Time*, 46 WAYNE L. REV. 49, 68 (2000).

104. See Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 74, at 978, 1022-23.

105. Kline, *supra* note 78, at 905. Roosevelt's secretary of the interior, Harold Ickes, recorded in his diary:

The President's mind went back to the difficulty in England, where the House of Lords repeatedly refused to adopt legislation sent up from the House of Commons. He recalled that when Lloyd George came into power some years ago under Edward VII, he went to the King and asked his consent to announce that if the Lords refused again to accept the bill for Irish autonomy, which had been pressed upon them several times since the days of Gladstone, he would create several hundred new peers, enough to out-vote the existing House of Lords.

With this threat confronting them, the bill passed the Lords.

*Id.* at 905 (quoting 1 HAROLD L. ICKES, *THE SECRET DIARY OF HAROLD L. ICKES, THE FIRST THOUSAND DAYS 1933-1936*, at 468 (1953)). Roosevelt repeated the analogy at a Cabinet meeting on December 27, and earlier in the year had recounted a similar story (this one involving Gladstone and Queen Victoria) over lunch with Paul Block, the publisher of the *Toledo Blade*. *Id.* at 905. Roosevelt's memory was inaccurate: he seems to have confused the fight over the Irish home rule bill with Asquith's attempt to force the Lords to accept Lloyd George's budget. LEUCHTENBURG, *supra* note 80, at 94-95.

106. See Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 74, at 1024-25.

107. *Id.*

Because he believed that the Constitution was already flexible enough to meet the complicated needs of a modern industrial society, Roosevelt thought it entirely unnecessary to change the Constitution in any way; he may even have resisted pursuing an amendment because doing so could be taken as a tacit acknowledgment that the Constitution was indeed inadequate to the present age.<sup>108</sup>

Moreover, as Roosevelt and his advisors knew well, the final word rested with the Court itself; even a well-crafted and swiftly enacted amendment would ultimately be at the mercy of the justices' own interpretation.<sup>109</sup> For all of these reasons, Roosevelt dismissed any proposal that depended on changing the Constitution itself. By the end of January, 1937, he had developed a radical alternative that he believed could preserve the New Deal not by rewriting the Constitution but by remaking the Court.<sup>110</sup>

Because Roosevelt had (uncharacteristically) consulted only a few close advisers before announcing his plan, he shocked almost everyone else when he did so in a message to Congress on February 5, 1937.<sup>111</sup> Specifically, Roosevelt proposed allowing the President to name an additional judge for each federal judge who declined to retire upon reaching the age of seventy. Applied to the Supreme Court, this would have let Roosevelt name up to six more justices.<sup>112</sup>

The President did not help the plan's cause when he disingenuously mischaracterized the motivations that had led him to propose it. One of Roosevelt's more sagacious advisors, Robert Jackson (who, like most, had been unaware of the plan before it was announced),<sup>113</sup> wrote later that the plan at first lacked "the simplicity and clarity which was the President's genius."<sup>114</sup>

108. *Id.* at 1025.

109. *Id.* at 1025-26. As Roosevelt told the nation in his March 9 Fireside Chat: Even if an amendment were passed, and even if in the years to come it were to be ratified, its meaning would depend upon the kind of Justices who would be sitting on the Supreme Court bench. An amendment, like the rest of the Constitution, is what the Justices say it is rather than what its framers or you might hope it is.

*Id.* (noting Robert Jackson's statements to Congress that "[j]udges who resort to a tortured construction of the Constitution may torture an amendment" and that "[e]xperience has shown that it is difficult to amend a constitution to make it say what it already says").

110. See Kline, *supra* note 78, at 908.

111. See Neumann, *supra* note 103, at 248-49.

112. See Devins, *supra* note 81, at 246; Daniel A. Farber, *Who Killed Lochner?* 90 GEO. L.J. 985, 990-91 (2002) (reviewing G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000)); G. Edward White, *Cabining the Constitutional History of the New Deal in Time*, 94 MICH. L. REV. 1392, 1400 (1996) (reviewing WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995)).

113. Jackson first learned of the plan when he read about it in the newspaper. Stephen R. Altou, *Loyal Lieutenant, Able Advocate: The Role of Robert H. Jackson in Franklin D. Roosevelt's Battle With the Supreme Court*, 5 WM. & MARY BILL RTS. J. 527, 543 (1997).

114. ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 189 (1941).



Some might say, less charitably, that it was too clever for its own good.

Earlier that year Roosevelt had sent Congress a proposal to reorganize and streamline the executive branch, and in his February 5, 1937 message he first tried to present the Court-packing plan as simply a judicial version of his executive streamlining proposal. Next, he claimed that it was primarily a measure to alleviate the heavy workload of the Court. He cited the increase in federal litigation and suggested that the Court was unable to keep pace with its present docket of cases, largely because of the justices' advanced age.<sup>115</sup> Because it was widely recognized that the President's true purpose had nothing to do with the Court's workload but was aimed instead to reduce or undo the damage being done to the New Deal, Roosevelt gave his proposal a needlessly poor launch.<sup>116</sup>

Roosevelt would later be more candid as to his real purpose, stating that the plan would "bring to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances."<sup>117</sup> The idea that the proposal had been motivated by the justices' advanced age was a misdirection suggested by the Attorney General, Homer Cummings; of the few others who knew of the plan, most urged candor about the plan's true aim.<sup>118</sup> Lawyers at the Department of Justice had uncovered a similar age-based proposal made a quarter-century earlier in 1913 by Woodrow Wilson's first Attorney General. That the current Attorney General was Justice James McReynolds – arguably the Court's most reactionary member – delighted Roosevelt to no end.<sup>119</sup>

Before judging the "age canard" too harshly, it is worth remembering that this rationale was entirely in line with popular sentiment. In Friedman's words, "no one expected the Justices to approve all [New Deal] legislation, but the popular perception was that the current occupants of the highest bench were particularly hostile to the needs of changing times, in no small part because of their age."<sup>120</sup> Within a month, however, Roosevelt admitted what everyone already knew: his real goal was to appoint new justices who would give a fair hearing to the social and economic regulatory programs at the center of the New

115. LEUCHTENBURG, *supra* note 80, at 133; Friedman, *The History of the Counter-majoritarian Difficulty*, *supra* note 74, at 1023-24.

116. LEUCHTENBURG, *supra* note 80, at 138; Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154, 1163-64 (2006).

117. Franklin D. Roosevelt, *Fireside Chat of March 9, 1937*, in PUBLIC PAPERS OF FRANKLIN D. ROOSEVELT 128 (1937). Among those offended by the administration's claims about the justices' age was the Court's oldest member, Louis Brandeis. See C. Herman Pritchett, *Book Review*, 130 U. PA. L. REV. 1281, 1285 (1982) (reviewing BRUCE ALLEN MURPHY, *THE BRANDEIS / FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES* (1982)).

118. See FRANK FREIDEL, *ROOSEVELT: A RENDEZVOUS WITH DESTINY* 227 (1990); Alton, *supra* note 113, at 540-41; Kline, *supra* note 78, at 909.

119. See Alton, *supra* note 113, at 541; Neumann, *supra* note 103, at 239-40.

120. See Friedman, *The History of the Counter-majoritarian Difficulty*, *supra* note 74, at 1022.

Deal.

Roosevelt's proposal immediately drew a wave of sharp attacks.<sup>121</sup> Many members of Congress quickly announced that they would oppose the plan: within a few days, every Republican in Congress, and more than a few conservative Democrats, had come out against the plan.<sup>122</sup> The press coverage was almost uniformly negative; editorial after editorial denounced the plan and the highhanded way in which it had been announced.<sup>123</sup> The plan was called a threat to civil liberties and judicial independence by civic groups, political groups, and religious groups – notably the Catholic Church.<sup>124</sup> Several state legislatures debated resolutions opposing the plan, and the plan was opposed by professional associations, including the American Bar Association.<sup>125</sup> Even the nation's law professors, who had historically avoided tangling openly in partisan controversies, came out in large numbers to oppose Court-packing.<sup>126</sup> Notwithstanding Roosevelt's huge mandate the previous November (the President repeatedly insisted that "the people are with me"), and despite Americans' continuing dissatisfaction with the Court's own direction, contemporary polls suggested that most opposed the President's plan.<sup>127</sup>

Hostility from Roosevelt's longstanding political foes was unsurprising, but the plan also drew unexpected fire from among the President's political friends; few New Dealers or old-fashioned progressives embraced the plan.<sup>128</sup> Some of Roosevelt's closest advisors and allies were genuinely angry that the President had neglected to consult them concerning such a monumental reform proposal.<sup>129</sup> Some in Congress proposed alternatives to the President's plan, many in the form of constitutional amendments.<sup>130</sup>

121. See Devins, *supra* note 81, at 246-47; John M. Lawlor, *Court Packing Revisited: A Proposal for Rationalizing the Timing of Appointments to the Supreme Court*, 134 U. PA. L. REV. 967, 974-75 (1986).

122. See Cushman, *supra* note 86, at 213.

123. *Id.* at 210-11; Devins, *supra* note 81, at 247.

124. See Cushman, *supra* note 86, at 210-11; Kline, *supra* note 78, at 917.

125. See Cushman, *supra* note 86, at 210-11.

126. See generally Kyle Graham, *A Moment in the Times: Law Professors and the Court-Packing Plan*, 52 J. LEGAL EDUC. 151 (2002).

127. See Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 194 (2003) ("Despite Roosevelt's popularity and the Supreme Court's unpopularity, the Court-packing plan lacked majority public approval, had the support of surprisingly few Court critics, and received a tepid welcome in Congress."). One exception was a special election in Texas occasioned by the death of Congressman James P. Buchanan (D-Brenham) in February 1937; the special election, held in April, was the only congressional election to take place during the Court-packing controversy. The surprising winner, an outspoken supporter both of Roosevelt and of Court-packing, was a 28-year-old named Lyndon Johnson. See generally ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER* 389-436 (1982).

128. See Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 74, at 1049.

129. See Cushman, *supra* note 86, at 213. Among those the President had left out were congressional leaders, Democratic Party officials, and almost everyone in his own Cabinet.

130. See Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 74, at

Among the many New Dealers who had openly criticized the Supreme Court but who nevertheless broke with the President over Court-packing, no voice was more surprising, or more effective, than that of Senator Burton Wheeler of Montana. Wheeler was a liberal Democrat who had been outspoken in his criticism of the Court. His decision to oppose the President placed him at the forefront of the anti-Court-packing forces in Congress.<sup>131</sup>

When Wheeler spoke forcefully against the plan in testimony before the House Judiciary Committee in March, he dealt the President an astonishing *coup de grace* by invoking the assistance of the Court itself: Wheeler released an open letter from Chief Justice Charles Evans Hughes, offering a detailed refutation of many of the claims the President had made in his February 5, 1937, message to Congress.<sup>132</sup> The Supreme Court was fully abreast of its work, the Chief Justice informed the committee: "There is no congestion of cases upon our calendar. . . . This gratifying condition has obtained for several years."<sup>133</sup> Adding new justices, moreover,

would not promote the efficiency of the Court. It is believed that it would impair that efficiency so long as the Court acts as a unit. There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide. The present number of justices is thought to be large enough so far as the prompt, adequate, and efficient conduct of the work of the Court is concerned.<sup>134</sup>

Wheeler's release of the Chief Justice's letter terribly damaged the Court-packing plan's prospects for passage; and those prospects grew even dimmer the following week, when the Court announced several decisions that seemed to make the plan unnecessary. On March 29, exactly one week after the release of the Hughes letter, the Court upheld Washington State's minimum-wage law;<sup>135</sup> unanimously overruled its 1935 decision invalidating the Frazier-Lemke Federal Farm Bankruptcy Act;<sup>136</sup> and upheld the 1934 Railway Labor Act, which gave Congress broad powers to regulate railroads in matters affecting interstate commerce.<sup>137</sup> The rationale for Court-packing then crumpled further on April 12, when the Court upheld one of the New Deal's legislative gems – the Wagner Act<sup>138</sup> – in several decisions, notably *National Labor Relations*

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1024.

131. See Cushman, *supra* note 86, at 216; Brian M. Feldman, *Evaluating Public Endorsement of the Weak and Strong Forms of Judicial Supremacy*, 89 VA. L. REV. 979, 1029-31 (2003).

132. See Cushman, *supra* note 86, at 218-21.

133. *Id.* at 219.

134. *Id.* at 219-20.

135. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

136. *Wright v. Vinton Branch of Mountain Trust Bank*, 300 U.S. 440 (1937).

137. *Va. R.R. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515 (1937).

138. *Wagner Act of 1935*, ch. 372, 49 Stat. 449 (1935).

*Board v. Jones & Laughlin Steel Corp.*<sup>139</sup>

When the Senate Judiciary Committee ended its hearings in late April, the President's proposal, at least in its present form, faced sure defeat. In its report, the committee minced no words in expressing the majority view of the bill: "This is far from the independence intended for the courts by the framers of the Constitution. This is an unwarranted influence accorded the appointing agency, contrary to the spirit of the Constitution":

Today it may be the Court which is charged with forgetting its constitutional duties. Tomorrow it may be the Congress. The next day it may be the Executive. If we yield to temptation now to lay the lash upon the Court, we are only teaching others how to apply it to ourselves and to the people when the occasion seems to warrant. Manifestly, if we may force the hand of the Court to secure our interpretation of the Constitution, then some succeeding Congress may repeat the process to secure another and a different interpretation and one which may not sound so pleasant in our ears as that for which we now contend.<sup>140</sup>

The committee ended its report with a rebuke that must rank among the starkest messages ever sent to a President by a Congress of his own party, calling the proposal:

a needless, futile and utterly dangerous abandonment of constitutional principle . . . without precedent or justification. . . . It would subjugate the courts to the will of Congress and the President and thereby destroy the independence of the judiciary, the only certain shield of individual rights. . . . It stands now before the country, acknowledged by its proponents as a plan to force judicial interpretation of the Constitution, a proposal that violates every sacred tradition of American democracy. Under the form of the Constitution it seeks to do that which is unconstitutional. Its ultimate operation would be to make this Government one of men rather than one of law, and its practical operation would be to make the Constitution what the executive or legislative branches of the Government choose to say it is[,] an interpretation to be changed with change of administration. It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free

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139. *Nat'l Labor Relations Bd. v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937).

140. *Kline*, *supra* note 78, at 943-44 (quoting S. Rep. No. 75-711, at 9-10, 15 (1937)).

representatives of the free people of America.<sup>141</sup>

In July came the sad end. After Justice Van Devanter announced his retirement in May, removing yet another argument that the plan was needed, the legislative leader of the pro-Court-packing forces, Senate Majority Leader Joe Robinson of Arkansas, began working toward a compromise.<sup>142</sup> In early July, Robinson was securing votes for a watered-down version of the Court-packing bill, a version that might actually have passed.<sup>143</sup> At first, Robinson's efforts seemed to be succeeding; his proposed compromise appeared that it might pass. But on July 14, after an especially heated legislative debate, and at the height of an especially hot summer, Joe Robinson went back to his Washington apartment and suffered a fatal heart attack.<sup>144</sup>

On July 20, returning to Washington from Robinson's funeral, Vice President Jack Garner, who had never liked the Court-packing plan, informed Roosevelt that the proposal was doomed. "You're licked, Cap'n," he told the President. "You haven't got the votes."<sup>145</sup> Roosevelt finally abandoned the plan. Two days later the Court-packing bill was sent back to committee to be buried forever.<sup>146</sup>

### III. THE WORD IS NOT ENOUGH

In less than twenty years, the constitutional realities in Argentina and the United States developed in two very different directions, directions not reflected in the written texts of those nations' constitutions. In Argentina, the Court that emerged from the impeachment fight – or, more accurately, the Court that supplanted the earlier one – was in every respect the Perón Court.<sup>147</sup>

From the impeachment proceedings of 1947 until the end of Perón's term in 1955, the Court did not invalidate a single act taken by the Perón government – despite Perón's increasingly authoritarian uses of executive decrees to punish political opponents and repress dissent.<sup>148</sup>

141. Kline, *supra* note 78, at 945 (quoting S. Rep. No. 75-711, at 23).

142. *Difficulty*, *supra* note 74, at 1053. Privately, Robinson thought Roosevelt should withdraw the proposal while declaring victory.

143. Kline, *supra* note 78, at 946. The compromise would have allowed the President to appoint no more than one additional justice per year.

144. *Id.*; but see Robert A. Schapiro, *Must Joe Robinson Die? Reflections on the "Success" of Court-Packing*, 16 CONST. COMMENT. 561 (1991).

145. Kline, *supra* note 78, at 948.

146. *Id.* at 948.

147. See Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 775 ("The Perón Court was exactly that; it did little to challenge Perón's use of power even when used to harass political opponents or to rule by presidential decree.").

148. See Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 150-51; see also Jouet, *supra* note 46, at 434-35; Salvochea, *supra* note 52, at 293-94 (citing DAVID ROCK, *AUTHORITARIAN ARGENTINA: THE NATIONALIST MOVEMENT, ITS HISTORY AND ITS IMPACT* (1993)).

Within a few months, moreover, the new Court rendered one of its most far-reaching decisions when it rolled back the remaining controls on the scope of the de facto doctrine. In *Ziella v. Smiriglio*, decided in October 1947, the Court announced a new "plenary authority" doctrine, holding that a de facto government enjoys all legislative powers that are necessary to govern.<sup>149</sup> In essence, the Court removed virtually all remaining limitations on a de facto government's legislative authority; the only surviving limitation was that de facto executives were prohibited from enacting laws that were unconstitutional.<sup>150</sup> In other words, the Court held that de facto laws passed by the executive had the same effect and legitimacy as laws passed by Congress, and could only be undone by future legislation.<sup>151</sup>

Perón's impeachment of the Court not only led to the pliant new approach to de facto authority, it set a precedent for "court-swapping" (and much shorter judicial tenures) that plagued the nation for decades to come.<sup>152</sup> After 1947, when a President found a particular judge unsatisfactory, the judge was simply replaced.<sup>153</sup> Virtually every incoming civilian President has exercised the informal authority to name the majority of Supreme Court justices, either by removing the justices that an earlier government had named, or by "packing" the Court, that is, increasing the Court's size to create additional seats for docile judges.<sup>154</sup> The new balance of power between President and Court also dramatically shortened the average judge's time on the bench: during the eighty-five years of Argentine history before the Court was impeached, only thirty-five men had served on the Court, averaging roughly eleven years in office. In contrast, during the fifty years following the impeachment, fifty-seven justices had served, and their average tenure was less than five years.<sup>155</sup>

The doctrinal shifts and informal power arrangements after 1947 transformed the Court into a subservient body, completely dependent upon (and deferential to) the executive branch. The Court became, in Christopher Walker's words, "at best, a dependent, weak institution that did little to challenge the ruler or uphold the rule of law; at worst, it was a servant and accomplice of an authoritarian regime that reinforced unconstitutional policies and practices."<sup>156</sup> Notwithstanding the written text of the constitution, after 1947 the Court barely resembled its former self and resembled the U.S.

149. "Ziella v. Smiriglio Hnos," Fallos (1947-209-27) (Arg.); see Dockery, *supra* note 19, at 1611-12; see also Irizarry y Puente, *supra* note 28, at 44-45.

150. See Dockery, *supra* note 19, at 1611-12.

151. *Id.*; García-Mansilla, *supra* note 14, at 351-52; Linares Quintana, *supra* note 16, at 664.

152. See HELMKE, *supra* note 29, at 65 n.4; García-Mansilla, *supra* note 14, at 352; Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 775.

153. See Walker, *Judicial Independence and the Rule of Law*, *supra* note 4, at 99-100.

154. *Id.* at 99-100; Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 783-84.

155. Walker, *Toward Democratic Consolidation?*, *supra* note 1 at 775 (citing Helmke, *supra* note 29, at 65-68, tbls. 4.1 & 4.2).

156. Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 775.

Supreme Court even less. Having ceded its autonomy and independence to the executive branch, the Court had stopped functioning as a genuine check on the power of other constitutional actors.<sup>157</sup> The Court's deterioration after 1947 also demolished the people's confidence in the judiciary and diminished respect for the rule of law.<sup>158</sup>

Not incidentally, after 1947 the President effectively controlled the Court in both procedural and substantive matters. The Court stopped blocking presidential efforts to regulate the economy.<sup>159</sup> Perón grew more authoritarian and his government took more drastic steps to repress or punish his political opponents.<sup>160</sup> The Constitution of 1949, initiated by the Perón-controlled Congress, permitted Perón to run for a second term; and Perón further expanded his power by declaring an emergency "state of siege" shortly before his overwhelming reelection victory in 1952 (amid charges of widespread fraud).<sup>161</sup> Perón maintained his unparalleled position until 1955, when he himself was brought down in a coup, but that is another story.<sup>162</sup>

In the United States, considering that Roosevelt was seeking a far more modest change than Perón's decision to impeach most of the Court, the Court-packing episode is puzzling. Roosevelt was a masterful politician, at the height of his political power to judge from the size of his own reelection margins and the level of support he enjoyed in Congress. Moreover, the public was genuinely angry at the Court's repeated obstruction of New Deal programs.<sup>163</sup> Why was the outcome of this constitutional crisis such a stinging defeat for such a strong executive?

Roosevelt badly misjudged how most people would see his plan, in part because he misjudged how most people saw the Supreme Court. From the outset the President was forced to defend the plan against charges that it would undermine the Court's ability to protect civil liberties.<sup>164</sup> Certainly the Court's

157. *Id.* at 804-05; see also García-Mansilla, *supra* note 14, at 389.

158. García-Mansilla, *supra* note 14, at 351; Jacobs, *supra* note 55, at 428-29; Walker, *Judicial Independence and the Rule of Law*, *supra* note 4, at 97-98.

159. See Miller, *Judicial Review and Constitutional Stability*, *supra* note 30, at 149-50 & 149 n.354.

160. See ARTHUR P. WHITAKER, ARGENTINA 139-43(1965); Dockery, *supra* note 19, at 1599-1600.

161. Const. Arg. (1949); see ROBERT A. POTASH, THE ARMY AND POLITICS IN ARGENTINA, 1945 -1962 (1980); ROCK, *supra* note 46, at 306; see generally JOSÉPH PAGE, PERÓN: A BIOGRAPHY 200-18 (1983).

162. See FELIX LUNA, A SHORT HISTORY OF THE ARGENTINIANS (Cynthia Mansfield & Ian Barnett trans., 2000); ROCK, *supra* note 46, at 306-18. Perón returned to power again briefly in 1973.

163. See Barry Friedman, *Attacks on Judges: Why They Fail*, 13 ME. B.J. 124, 127 (1998) ("FDR, elected in one of history's largest popular mandates, fell quickly to his lowest approval when he proposed the Court-packing plan."); see also Kline, *supra* note 78, at 865.

164. See Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 74, at 1038; Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 46 (1996); William G. Ross, *The Role of Religion in the Defeat of the 1937 Court-Packing Plan*, 23 J.L. & RELIGION 629, 633-34 (2007-08).

role as a defender of religious liberty was a concern for the religious organizations that contributed to the defeat of the Court-packing proposal.<sup>165</sup> Roosevelt also found himself defending the plan against charges that it would seriously threaten judicial independence.<sup>166</sup>

Besides overlooking how much the public valued both the Court's independence and its role as a protector of civil liberties, Roosevelt committed a more serious error: he failed to fathom the people's authentic fears of nascent dictatorship.<sup>167</sup> The chair of the Senate Judiciary Committee, Henry Fountain Ashurst, who supported the President's plan, confided to his diary that "[e]ven many persons who believe in President Roosevelt opposed his bill because they [are] haunted by the terrible fear that some future President might, by suddenly enlarging the Supreme Court, suppress free speech, free assembly and invade other Constitutional guarantees of citizens."<sup>168</sup> Such fears seemed reasonable in light of the rise of totalitarian governments abroad, even for those who had staunchly supported the Roosevelt program.<sup>169</sup> It was widely believed that any diminution of judicial independence could be the first step on a downward path to tyranny.<sup>170</sup> Concerns about executive power were the one common belief that united Roosevelt's traditional foes with his longtime allies.<sup>171</sup>

Finally, while I do not propose to take sides in the historical controversy over whether the Court did indeed "switch" in response to the Court-packing plan, it is worth mentioning the "switch in time" here for a simple reason: the public thought it happened, as did their elected representatives. Whether the Court's change in direction had actually been foreordained months earlier, or whether they were in any way influenced by the President's actions, is

165. For a fine discussion of the role of religion in defeating the plan, see generally Ross, *The Role of Religion in the Defeat of the 1937 Court-Packing Plan*, *supra* note 164.

166. See Friedman, *The History of the Countermajoritarian Difficulty*, note 74, at 1038-44; Ross, *The Role of Religion in the Defeat of the 1937 Court-Packing Plan*, *supra* note 164, at 670-71; see also JOSÉPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* 232, 262 (1938); JAMES T. PATTERSON, *CONGRESSIONAL CONSERVATISM AND THE NEW DEAL: THE GROWTH OF THE CONSERVATIVE COALITION IN CONGRESS, 1933-1939* 87 (1967); see generally Kline, *supra* note 78.

167. See LEUCHTENBURG, *supra* note 80, at 137; George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557, 1581 (1996).

168. LEONARD BAKER, *BACK TO BACK: THE DUEL BETWEEN FDR AND THE SUPREME COURT* 47-48 (1967).

169. See Ross, *The Role of Religion in the Defeat of the 1937 Court-Packing Plan*, *supra* note 164, at 663-64; see also Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1293 n.17 (1982); see generally Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 75-95 (2000).

170. See David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic*, 90 YALE L. J. 741, 746-52 (1981); Friedman, *The History of the Countermajoritarian Difficulty*, *supra* note 74, at 1037 n.302; Vermeule, *supra* note 116, at 1166; see also Matthew Perry, *Justice Stone and Footnote 4*, 6 GEO. MASON U. CIV. RTS. L.J. 35, 53-54 (1996).

171. See Devins, *supra* note 81, at 255; Feldman, *supra* note 131, at 1024-33.



immaterial to why the public responded as it did. Clearly, contemporary observers suspected a causal connection, and that suspicion did as much as anything else to sink the President's proposal.<sup>172</sup>

Roosevelt himself claimed that the "switch in time" was not one of his greatest political setbacks, but rather a great victory.<sup>173</sup> As a purely political matter, it is hard not to see the plan's defeat as an unmitigated disaster.<sup>174</sup> On the other hand, although Roosevelt's lost-the-battle/won-the-war version of history is unquestionably self-serving, it is nevertheless undeniable that virtually all of the plan's aims were realized within a few years of its defeat: the membership of the Court itself changed, Roosevelt ultimately appointed more Supreme Court justices than any other President except George Washington, and the Court's jurisprudence inexorably moved in far more Rooseveltian directions.<sup>175</sup>

### CONCLUDING THOUGHTS

On paper, Roosevelt and Perón operated under constitutions that formally were much the same; what differed dramatically were not the formal structures, but the informal practices and environment of informal institutions. The written word simply does not suffice to explain their true constitutions, because words insufficiently describe the gap between formal institutions and informal practices. As Avner Greif has written, "To study the impact of a legal system, we must therefore also examine the rules, belief, and norms that generate behavior among members of its constituting organizations and between them and others."<sup>176</sup>

The gap between formal and informal institutions is a gap not of structure but of culture, of constitutional culture. Simply put, a constitutional democracy

172. See LEUCHTENBURG, *supra* note 80, at 143.

173. See *id.* at 157-61; Michael Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 665 n.226 (1994).

174. See LEUCHTENBURG, *supra* note 80, at 157-61. Among other things, the struggle over the Court "helped blunt the most important drive for social reform in American history," squandering any advantage of Roosevelt's reelection triumph in 1936; deeply divided the Democratic Party, leading conservative Democrats to join with Republicans in opposing the New Deal; and alienated many middle-class voters who had been strong supporters of the President. *Id.* Henry Wallace, a leading New Dealer and Roosevelt's vice president from 1941 to 1945, thought "[t]he whole New Deal really went up in smoke as a result of the Supreme Court fight." *Id.*

175. See LEUCHTENBURG, *supra* note 80, at 156; David E. Kyvig, *The Road Not Taken: FDR, the Supreme Court, and Constitutional Amendment*, 104 POL. SCI. Q. 463, 466 (1989); William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 595 (2004). In his second term, Roosevelt named justices to succeed Van Devanter (Hugo Black); Sutherland (Stanley Reed); and Butler (Frank Murphy); he also named justices to succeed Cardozo (Felix Frankfurter) and Brandeis (William O. Douglas). In his third term, he named three more justices, and elevated Stone to chief justice.

176. AVNER GREIF, INSTITUTIONS AND THE PATH TO ECONOMIC MODERNITY: LESSONS FROM MEDIEVAL TRADE 31 (2006).

is in perpetual jeopardy in the absence of a supportive surrounding culture.<sup>177</sup> In Argentina, it seems clear in retrospect that the Supreme Court and its “U.S.-style” constitution was insufficiently rooted in Argentine society and history, and that unfortunate choices by judicial and political actors, in the face of growing presidential influence, placed the judiciary at the mercy of the executive branch.<sup>178</sup> Compare this history with that of the United States, where even the severe strains of the Great Depression and the Second World War did not persuade the Court to overlook constitutional limits on executive authority.<sup>179</sup>

Without a sense of a nation’s constitutional culture, it is impossible to fully understand the relationship between that nation’s judges and the choices they make as democratic actors. By what they say and do, or refrain from saying and doing, judges reflect the norms of the constitutional culture of which they are a part; at the same time, they are also those norms’ arbiters or enforcers. If the constitutions of nations are illuminated at all by Oliver Wendell Holmes’s view of law as “[t]he prophecies of what the courts will do in fact, and nothing more pretentious,”<sup>180</sup> then those constitutions’ full meaning will be forever beyond our grasp if we never reach beyond their mere words. A people’s true constitution can never be wholly committed to parchment.

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177. See *Chavez v. Martinez*, 538 U.S. 760, 794 (2003) (Kennedy, J., concurring in part and dissenting in part) (“A Constitution survives over time because the people share a common, historic commitment to certain simple but fundamental principles.”). On constitutionalism and constitutional culture generally, see Rett R. Ludwikowski, *Constitutional Culture of the New East-Central European Democracies*, 29 GA. J. INT’L & COMP. L. 1 (2000).

178. Walker, *Toward Democratic Consolidation?*, *supra* note 1, at 771.

179. Cass R. Sunstein, *An Eighteenth-Century Presidency in a Twenty-First Century World*, 48 ARK. L. REV. 1, 13-14 (1994).

180. OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 173 (1920); see also KARL N. LLEWELLYN, *THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY* 3 (1930) (“What these officials do about disputes is, to my mind, the law itself.”).