

7-1-2008

The Failed Invigoration of Argentina's Constitution: Presidential Omnipotence, Repression, Instability, and Lawlessness in Argentine History

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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 (2008)

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The Failed Invigoration of Argentina's Constitution: Presidential Omnipotence, Repression, Instability, and Lawlessness in Argentine History

Mugambi Jouet*

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I. INTRODUCTION

Argentina's constitution dates back to 1853 and has rarely been formally suspended. Constitutionalism has nevertheless almost never existed in Argentina, as virtually each government's power exceeded the strictures of the constitution. This article takes a holistic approach, combining historical, political, and legal analyses in examining the reasons why democracy, and especially constitutionalism and the rule of law, have failed in Argentina.

Argentina has an extremely centralized system where the president is nearly omnipotent. This article first posits that Argentine "hyperpresidentialism" is incompatible with genuine constitutionalism, which is defined as a system of fundamental laws, rights, and principles limiting governmental power in order to avoid the abuses stemming from unchecked authority. The article subsequently focuses closely on how constitutionalism and the rule of law fared during several historical periods in Argentine history, ranging from independence in 1816 until 2007. First, until the military coup of 1930, a gradual process of democratization was hampered by electoral fraud, corruption, and occasional repression. Second, from 1930 to 1983, Argentina was highly unstable due to a series of military coups. Successive governments drastically repressed political opponents and ignored legal limits on executive power. A fascist military junta eventually purged over 30,000 "subversives" between 1975 and 1981. But dissidents were also severely repressed by Juan Perón, a charismatic populist who governed Argentina, pursuant to three presidential elections, between 1946 and 1955 until the military overthrew him and forced him into exile, and between his return to Argentina in 1973 until his death in 1974. An analysis of Perón's populism will also demonstrate why the power of a democratic majority must be limited by constitutional minority rights. Third, after military rule ended in 1983, the return of democracy heralded the heyday of constitutionalism and the rule of law in Argentina. A consensus condemned the abuses of past authoritarian regimes and led moderate president Raúl Alfonsín, other politicians, and the general public to focus on the importance of basic democratic principles and human rights. The rule of law progressed with the prosecution of past human rights abuses committed by fascist military officers and their opponents in the radical leftist guerrilla movement. Fourth, following his presidential election in 1989, Peronist Carlos Menem undid many of the advances of the democratic transition by packing the courts with

loyalists and engaging in widespread corruption. Menem implemented sweeping neoliberal economic reforms in a radical and corrupt manner that contributed to a catastrophic economic crisis that pauperized millions of people. In 2001, mass protests caused by the economic crisis eventually led to the resignation of Fernando De la Rúa, who had succeeded Menem as president. Fifth, Nestor Kirchner, the first true populist president to rule the country since Perón, mastered the Peronists' ability to rally broad popular support while maximizing presidential power to the detriment of democracy, constitutionalism, and the rule of law during his tenure from 2003 until 2007.

The salient theme throughout these periods is that unchecked presidential power has facilitated gross abuses of authority, ranging from corruption to violent repression of political opponents. The volatile political situation and the rise of extremist authoritarian regimes were also not suitable to the development of constitutionalism. Moreover, hyperpresidentialism may have contributed to instability by inciting a president's opponents to overthrow him by military force or constrain him to resign under intense public pressure when he failed to resolve a political or economic crisis despite his quasi-unilateral control over government.

Populism is another abiding issue that has affected democracy and constitutionalism throughout Argentine history. Populism is a complex phenomenon that may be defined as a political movement seeking to defend the rights and interests of the common people, which may emerge from the grassroots but may also be spearheaded by politicians, partly for self-interest. Populism became wholly incarnated in Perón's pro-working class regimes (1946-55, 1973-74), which enjoyed majoritarian support despite being neither democratic nor constitutional. In the 1980s, elements of populism also materialized in the mass demonstrations pressuring the transitional democratic government to prosecute military officers' past human rights abuses. More recently, since the late 1990s, populism has animated mass protests against neoliberal economic reforms that have challenged the social contract of what was principally a socialist state, and whose failure contributed to the sharp economic crisis that significantly impoverished the Argentine working class.

II. ARGENTINE HYPERPRESIDENTIALISM VERSUS THE CONSTITUTIONAL IDEAL OF LIMITED GOVERNMENT POWER

In 1816, Spain's Argentine colonies declared their independence, although the various provinces soon clashed over whether the national government should centralize its power in Buenos Aires or grant greater autonomy to the interior provinces under a federal system.¹ After years of internal strife, fighting finally subsided in 1829 due to a military takeover by Juan Manuel de Rosas.² While Rosas is credited by some with stabilizing, uniting, and modernizing Argentina, his ruthless dictatorship ignored constitutionalism and the rule of law.³ In 1852, a rebellion finally deposed Rosas.⁴ After the dictatorship's abuses, the rebel leaders wanted a democratic government.⁵ In 1853, they promulgated a national constitution⁶ that was rarely amended and would survive several coups to remain in effect into the 21st Century and present-day Argentina.⁷

Argentina's constitutional framers created a civil law system⁸ that incorporated numerous elements from the United States Constitution and its common law system.⁹ The Federal Republic now encompasses 23 provinces and a capital district in Buenos Aires.¹⁰ Federal legislative powers are vested in a Congress consisting of a Senate and a House of Representatives.¹¹ The federal judiciary has a decentralized system of judicial review whereby a Supreme Court and lower courts hold the power to assess the con-

1. DANIEL K. LEWIS, *THE HISTORY OF ARGENTINA* 38-43 (Frank W. Thackeray & John E. Findling, eds., Greenwood Press 2001); *see also generally* DAVID ROCK, *ARGENTINA 1516-1987: FROM SPANISH COLONIZATION TO ALFONSÍN* 79-104 (University of California 1987) (1985).

2. *See* LEWIS, *supra* note 1, at 43-47.

3. *See id.* *See also* ROCK, *supra* note 1, at 104-06; CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* 47 (Yale University 1996) (hereinafter NINO, *TRIAL*); Juan Manuel de Rosas, *The Caudillo's Order*, in *THE ARGENTINA READER: POLITICS, CULTURE, AND SOCIETY* 75, 78 (Gabriela Nouzeilles & Graciela Montaldo eds., 2002).

4. *See* LEWIS, *supra* note 1, at 48-49.

5. *See id.* at 49.

6. CONST. ARG. (1853), *available at* <http://www.cervantesvirtual.com/servlet/SirveObras/06921841222858395209079/index.htm> (last visited June 15, 2008).

7. *See* LEWIS, *supra* note 1, at 48-49.

8. *See* REBECCA BILL CHAVÉZ, *THE RULE OF LAW IN NASCENT DEMOCRACIES: JUDICIAL POLITICS IN ARGENTINA* 13, 43 (Stanford University Press 2004).

9. *See id.* at 13, 30.

10. State of Argentina, Provinces, <http://www.argentina.gov.ar/argentina/portala/paginas.dhtml?pagina=425> (last visited June 15, 2008).

11. *See* CHAVÉZ, *supra* note 8, at 30, 42-43.

stitutionality of laws and decrees.¹²

The Argentine political system is extremely centralized. The federal government has always dominated provincial and municipal governments, and Buenos Aires has dominated the interior provinces.¹³ "Within the federal government itself, power has been concentrated in the presidency at the expense of the legislative and judicial branches. The result has been a *hyperpresidential* system."¹⁴ While the power of military dictatorships obviously rested almost entirely with the federal executive, executive hegemony has also been a characteristic of civilian regimes.

Hyperpresidentialism largely stems from the constitution itself, which was influenced by the writings of Juan Bautista Alberdi (1810-84).¹⁵ Alberdi wanted a constitution that would finally bring stability to Argentina, which had been torn apart by several civil wars since its independence in 1816.¹⁶ Lawlessness often prevailed since many regions were governed by *caudillos*, regional warlords or leaders.¹⁷ Prior attempts at constitutional rule had utterly failed.¹⁸ The fall of Rosas' dictatorship in 1852 had led to a resurgence of conflicts and skirmishes between the relatively isolated interior provinces and the far wealthier Buenos Aires province, as all of these provinces sought more power and autonomy, if not outright secession.¹⁹ Obsessed by the lack of a unitary government,²⁰ Alberdi thought that a strong presidential regime would finally stabilize the country.²¹

[Alberdi] believed that Argentine history demanded an elected king, a government democratic in its origin but not in its exercise. Accordingly, the constitution granted to the president the following powers which are absent in its American counterpart: appointment of cabinet members and other executive officials without Senate confirmation; unilateral enactment of state-of-siege legislation when Congress is in recess; the ability to detain and displace people during a state of siege; and, arguably, the ability to remove

12. *Id.* at 43.

13. NINO, TRIAL, *supra* note 3, at 48-49.

14. *Id.* at 49.

15. *Id.*; PABLO LUCAS VERDÚ, ALBERDI: SU VIGENCIA Y MODERNIDAD CONSTITUCIONAL 14, 48 (1998); *see also* NINO, TRIAL, *supra* note 3, at 49.

16. VERDÚ, *supra* note 15, at 12; *see also* LEWIS, *supra* note 1, at 41-49.

17. VERDÚ, *supra* note 15, at 12; ROCK, *supra* note 1, at 448.

18. *Id.*

19. *See* ROCK, *supra* note 1, at 116, 121-22.

20. VERDÚ, *supra* note 15, at 52.

21. *See* NINO, TRIAL, *supra* note 3, at 49.

elected provincial authorities during periods of internal or external strife.²²

In addition to these broad ordinary and emergency constitutional powers, presidents have assumed a host of powers not granted by the constitution itself.²³ For example, presidents assume many ordinary legislative duties.²⁴ They can also formally override laws passed by the legislature if the issues involve "necessity and urgency."²⁵ They can suspend constitutional rights by declaring a state of siege.²⁶ They have line-item veto power over congressional enactments.²⁷ They can pardon defendants who are on trial and not yet convicted.²⁸ When Congress is not in session, the president is empowered to conduct "federal interventions" by dissolving the provincial administrations and ruling over the provinces pending the election of new authorities,²⁹ a procedure frequently used for partisan reasons to oust provincial governments opposing the president.³⁰

Presidential omnipotence has failed to stabilize Argentina, which endured military coups in 1930, 1943, 1955, 1966, and 1976,³¹ and which saw two elected presidents, Alfonsín in 1989 and De la Rúa in 2001, resign before the end of their terms due to significant public pressure.³² Hyperpresidentialism may have contributed to certain political actors' belief that the only way to achieve change is to substitute the omnipotent president when he proves unable to resolve a political or economic crisis.³³ Paradoxically, Alberdi had sought to advance limited government power, the preeminence of the individual over the government, human rights guarantees, and liberty,³⁴ though hyperpresidentialism ulti-

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. ROCK, *supra* note 1, at 124.

27. NINO, TRIAL, *supra* note 3, at 49.

28. *Id.*

29. See ROCK, *supra* note 1, at 124.

30. See *id.* at 126-27, 155, 189, 199-200, 207, 250; see also LEWIS, *supra* note 1, at 67.

31. See *infra* Part IV.A. In addition, several coup attempts failed to topple incumbent regimes, such as those in September 1951, June 1955, June 1956, and December 1975. See ROCK, *supra* note 1, at 304-05, 315-17, 336, 366.

32. See *infra* Parts V.B, VI.C.

33. See CARLOS NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY 175-80 (Yale University Press 1996) [hereinafter "NINO, CONSTITUTION"].

34. VERDÚ, *supra* note 15, at 59, 62.

mately contributed to the gross violation of all these principles by facilitating autocratic rule, repression, and corruption.

Hyperpresidentialism is at odds with what I term the constitutional ideal of limited government power. A driving rationale for constitutionalism is that unlimited government power is a source of oppression and political instability. A system of fundamental constitutional laws is therefore needed to limit government power and establish orderly processes of governance. Naturally, constitutionalism is a complex concept with numerous other underlying and competing justifications. However, I focus on limited government power because the power of Argentine presidents has been mostly unchecked throughout history.

The constitutional ideal of limited government power is intertwined with the principle of the rule of law, which entails far more than a government merely ruling according to the law, as certain laws are inimical to the notion of a constitutional democracy. For instance, from Nazi Germany to Argentina, authoritarian regimes historically repressed political dissent through a host of laws. Authoritarian rule nonetheless differs from the rule of law, characterized by "the preservation of some fundamental legal rules which limit at any point what a particular government, be it democratic or not, can do."³⁵ Procedures must also be available for interested persons to test the legality of governmental action and have an appropriate remedy for a violation.³⁶ A democratic government is therefore never supposed to be omnipotent and above the law.

Limits can be achieved by diffusing the government's power among separate institutions. As noted by Montesquieu in *The Spirit of the Laws*, merging executive, legislative, and judicial powers into the presidency is a recipe for tyranny.³⁷ The legislature and judiciary must therefore have sufficient independence to serve as institutional counter-powers against the executive.

Further, the government must respect certain inalienable human rights. While listing each important individual right and the substantive justifications for its existence is beyond the scope of this article, fundamental rights include the freedom from imprisonment without due process of law, liberty of thought, expression, and protest. The Argentine Constitution provides

35. NINO, CONSTITUTION, *supra* note 33, at 3.

36. See CHAVÉZ, *supra* note 8, at 10.

37. NINO, CONSTITUTION, *supra* note 33, at 3.

these rights,³⁸ although they were grossly violated by political repression until the democratic transition of 1983. This article will subsequently examine constitutionalism and the rule of law since the constitution's promulgation in 1853, illustrating how Argentina has been a country ruled largely by omnipotent individuals rather than by laws.³⁹

III. 1860-1930: DEMOCRATIZATION DURING THE GOLDEN AGE

From 1860 to 1930, Argentina was mostly stable and one of the world's richest countries due to a prosperous economy that relied largely on exports of wool, wheat, and beef.⁴⁰ But the wealth of Argentina's "Golden Age" was concentrated in Buenos Aires while "[t]he interior, central to Argentina in the colonial period, became increasingly distant from Buenos Aires and the Pampa region in economic, social, and political terms."⁴¹ The benefits of economic development were mostly enjoyed by a small, wealthy elite that controlled the economy and governed the country while the working class remained poor and voiceless.⁴²

Meanwhile, the persecution of Argentina's original inhabitants continued. Spanish colonization already had ravaged the Indian population, which was depleted by at least 10% due to exposure to European diseases and the brutal and slavish conditions of forced labor.⁴³ After Argentina attained independence, both Rosas' dictatorship⁴⁴ and the succeeding democratic government conducted genocidal campaigns to massacre the few remaining recalcitrant Indian tribes.⁴⁵ The democratic government also coerced some Indians into signing grossly unfair treaties that waived rights to their land in exchange for material goods of comparatively derisory value that often were not even delivered to the

38. See, e.g., CONST. ARG. arts. 14, 19, 33.

39. CHAVÉZ, *supra* note 8, at 5.

40. See LEWIS, *supra* note 1, at 53-71.

41. *Id.* at 70-71.

42. See *id.* at 66-67, 70-71.

43. See *id.* at 20-23; Claudia Lozano, *Indigenous People, Rights, and the State in Argentina*, 17 FLA. J. INT'L L. 603, 610-11 (2005).

44. See Charles Darwin, *Wars of Extermination*, in THE ARGENTINA READER: POLITICS, CULTURE, AND SOCIETY 115 (Gabriela Nouzeilles & Graciela Montaldo eds., 2002).

45. See generally David Viñas, *The Foundation of the National State*, in THE ARGENTINA READER: POLITICS, CULTURE, AND SOCIETY 161 (Gabriela Nouzeilles & Graciela Montaldo eds., 2002).

Indians.⁴⁶ Much of the relatively small remaining Indian population gradually became assimilated into the mainstream Argentine population due to interracial mixing.⁴⁷

The enactment of the Constitution in 1853 had made Argentina a democracy in name only, as lawlessness, corruption, and repression persisted. While the Constitution instituted democratic elections, the ruling elite manipulated the electoral process to serve its interests.⁴⁸ Even though an independent Supreme Court technically prohibited political repression,⁴⁹ government agents commonly harassed opposition candidates.⁵⁰ The fear of reprisals dissuaded the electorate from backing the opposition since ballots were not confidential and voters often had to tell election monitors for whom they wanted to vote.⁵¹ Parties occasionally rigged the balloting, although the abysmal voter turnout usually made systematic fraud unnecessary.⁵² Most registered voters did not bother to vote.⁵³ The law also formally disenfranchised women and the rapidly growing European immigrant population despite the fact that these groups combined to form a substantial portion of the country's population.⁵⁴ In particular, Argentina's economic expansion had led to a surge in immigration.⁵⁵ Between 1871 and 1914, nearly 6 million immigrants had arrived in Argentina, 3 million of whom settled.⁵⁶ Half of them came from Italy and a quarter from Spain.⁵⁷ "Between 1850 and 1930, fewer than 5% of immigrants took Argentine citizenship," thereby remaining disenfranchised.⁵⁸ Immigrants generally had little interest in becoming Argentine citizens, partly to avoid compulsory military service⁵⁹ and partly because of the cumbersome naturalization procedures.⁶⁰

46. See Chief Manuel Namuncurá, *Letter to the President*, in THE ARGENTINA READER: POLITICS, CULTURE, AND SOCIETY 154 (Gabriela Nouzeilles & Graciela Montaldo eds., 2002).

47. See Lozano, *supra* note 43, at 610-16.

48. See LEWIS, *supra* note 1, at 66-67.

49. See CHAVÉZ, *supra* note 8, at 42-43.

50. See LEWIS, *supra* note 1, at 67.

51. See *id.* at 67; see generally ROCK, *supra* note 1, at 129.

52. LEWIS, *supra* note 1, at 67.

53. *Id.*

54. See *id.* at 67.

55. See *id.* at 53-55.

56. ROCK, *supra* note 1, at 141, 166-67.

57. See *id.* at 141.

58. *Id.* at 143.

59. *Id.* at 143, 188

60. See *id.* at 190.

All of these problems enabled political parties to merely cater to a politically active oligarchic elite.⁶¹ Nevertheless, by 1889, significant opposition to the government had mounted in the *Unión Civica Nacional*, known as the Radical Party, thereby forcing the *Partido Autonomista Nacional* (PAN), the ruling conservative party, to systematically rig and overturn elections to stay in power.⁶² The Radicals retaliated by withdrawing from the electoral process and urging their numerous adherents to vote "in blank" to protest electoral fraud while showing their principled support for the electoral system.⁶³ Meanwhile, anarchist and socialist opposition groups gained in popularity, although the Radical Party remained the main opposition group.⁶⁴

The rise of opposition forces contributed to the belief of many moderates within the oligarchy that democratizing the political system would be necessary to avoid social upheaval, as well as contain and control social change.⁶⁵ The moderates' amenability to reform was also inspired by the winds of change emanating from European countries moving towards popular democracy.⁶⁶

In 1911, the PAN finally conceded to major reforms in the electoral system by allowing universal male suffrage, secret balloting, and other measures to reduce fraud.⁶⁷ Voting became mandatory,⁶⁸ which led voter turnout to surge to approximately 70-80%.⁶⁹ Smaller parties and the opposition at large were relatively empowered, as parliamentary elections would now guarantee a third of the seats to the leading runner-ups in each jurisdiction.⁷⁰ Yet, "women remained disenfranchised"⁷¹ and no reforms were made to bring immigrants into the citizenry and the electorate.⁷²

In 1916, Hipólito Yrigoyen of the Radical Party was eventually voted president while the PAN's candidate finished a distant

61. See LEWIS, *supra* note 1, at 66-7.

62. See *id.* at 74-5. Argentina's Radical Party is not "radical" in the sense understood in American politics, as it distances itself from communism or Trotskyism. Rather, the party essentially has a social democrat and civil libertarian position.

63. *Id.* at 75.

64. See ROCK, *supra* note 1, at 186-88.

65. See *id.* at 184-85.

66. See *id.*

67. See LEWIS, *supra* note 1, at 76-77; ROCK, *supra* note 1, at 189.

68. See NINO, CONSTITUTION, *supra* note 33, at 156; ROCK, *supra* note 1, at 189.

69. See ROCK, *supra* note 1, at 190.

70. See *id.* at 189.

71. LEWIS, *supra* note 1, at 77; see also ROCK, *supra* note 1, at 189.

72. See ROCK, *supra* note 1, at 190.

second.⁷³ The PAN's ousting came to the surprise of its moderate faction since it had backed the electoral reforms with the expectation that the PAN would be able to remain in power by gathering popular support from the electorate.⁷⁴ The rule of law had progressed, as a relatively fair legal process had permitted the first legitimate democratic presidential election, which had important implications since the executive branch of government was virtually omnipotent.

However, the *de facto* dictatorship of a small elite was substituted by a democratic regime that remained corrupt, moderately authoritarian, and relatively oligarchic. The Radicals' political machine relied on patronage by using government funds for partisan ends.⁷⁵ For example, the Radicals significantly increased the number of bureaucratic and professional positions, which translated into numerous employment opportunities for middle class persons.⁷⁶ Many persons were also granted phantom positions that enabled them to get paid for work that they did not perform.⁷⁷ In exchange, those who had benefited from the government's expanded payroll were expected to mobilize the electorate into voting Radical.⁷⁸

The economy essentially remained under the control of the same economic elite.⁷⁹ The Radicals did not seek structural economic reforms partly because their leaders benefited from the status quo since they were themselves part of the economic elite, notably as prominent agrarian landowners.⁸⁰ Rather than outright structural reform, the Radicals favored redistributing wealth as a means of improving the welfare of the masses.⁸¹ For instance, they gained support among the voting working class by conceding to the demands of striking workers in 1916.⁸² Yet, the Radicals' interest in the working class might have been motivated by their desire to win over a sizeable part of the electorate.⁸³ After

73. LEWIS, *supra* note 1, at 77-78.

74. See ROCK, *supra* note 1, at 190.

75. See David Rock, *The Unión Cívica Radical*, in THE ARGENTINA READER: POLITICS, CULTURE, AND SOCIETY 231, 239-43 (Gabriela Nouzeilles & Graciela Montaldo eds., 2002).

76. See *id.* at 239.

77. See LEWIS, *supra* note 1, at 83.

78. See *id.*

79. See ROCK, *supra* note 75, at 231.

80. See *id.* at 232-34.

81. See *id.* at 234.

82. See ROCK, *supra* note 1, at 201; see also LEWIS, *supra* note 1, at 79.

83. See ROCK, *supra* note 75, at 245.

all, the Radicals' limited concessions to the working class amounted to only a feeble attempt at appeasement that hardly improved workers' living standards.⁸⁴ Insofar as the Radicals wanted to make more material concessions to the working class by improving wages and benefits, they refrained from doing so because this would have led them to lose the support of the elite, which opposed such measures due to its interest in keeping a supply of cheap labor.⁸⁵ The Radical government further demonstrated the limits of its support for workers in 1919, when the government directed the army to violently quell a massive strike by workers whose living standards had dramatically worsened due to an economic recession.⁸⁶ The Radicals' downright hostility towards communism and collectivism⁸⁷ may also explain why they tolerated the actions of the Patriotic League, a vigilante group that conducted terror campaigns against union members and suspected communists.⁸⁸

In sum, constitutionalism made little progress during Argentina's Golden Age. An elitist oligarchy fraudulently barred majority rule until the reforms of 1911 made the electoral process more transparent and led the Radicals to power. Although the Radicals enjoyed significant popular support,⁸⁹ they hardly fulfilled their promise to liberate Argentina from violence, fraud, unconstitutional practices, and oligarchy.⁹⁰ The Radicals also proved unable to meaningfully dissipate social tensions that ultimately escalated into class warfare between 1930 and 1983.⁹¹ Even though the Radicals had catered to the elite, the middle class, and the working class, they were unable to build consensus because of these groups' diverging demands and economic interests, especially in a period of serious inflation and recession.⁹²

Between 1928 and 1930, an economic recession compounded by the Great Depression caused government revenues to gradually decrease, thereby constraining the Radicals to limit government spending.⁹³ This inhibited the Radicals from continuing to use the government as a vast employment agency for their sup-

84. *See id.* at 249-50.

85. *See id.* at 250.

86. *Id.* at 201-02; *see also* LEWIS, *supra* note 1, at 79-80.

87. *See* ROCK, *supra* note 75, at 244.

88. LEWIS, *supra* note 1, at 80; ROCK, *supra* note 1, at 202.

89. *See* ROCK, *supra* note 1, at 203, 207-08.

90. *See* LEWIS, *supra* note 1, at 80-83.

91. *See infra* Part IV.A.

92. *See* ROCK, *supra* note 75, at 238; ROCK, *supra* note 1, at 215.

93. *See* ROCK, *supra* note 1, at 212-13; *see also* LEWIS, *supra* note 1, at 83

porters, which in turn destabilized the Radicals' system of political patronage and led to a loss of support among much of the middle class.⁹⁴ The Radical government ultimately failed to put an end to the economic recession, contributing to the military's decision to overthrow the government in 1930.⁹⁵

IV. 1930-1983: A SOCIETY AT WAR

Constitutionalism vastly regressed between 1930 and 1983. First, I recount how a social struggle between Peronist, leftist revolutionary, and fascist factions ultimately resulted in guerrilla warfare and massive purges. Successive governments made a priority of repressing or eliminating their adversaries while ignoring legal limits to their powers. Second, I suggest that this political instability may have been partly caused by, *inter alia*, Argentina's hyperpresidential system. The president has vast powers and the opposition has limited means of influencing his governance, which may have contributed to the military's decision to overthrow presidents who proved unable to resolve political or economic crises. Third, I examine how the populist governments of democratically-elected president Juan Perón (1946-55, 1973-74), managed to achieve a high degree of popularity regardless of Perón's contempt for constitutionalism, the rule of law, and the rights of his political opponents, whom he thoroughly repressed. An analysis of Perón's populism demonstrates why the power of a democratic majority must be limited by constitutional minority rights.

A. *Violence and Instability*

Between 1930 and 1983, Argentina was entangled in a vicious cycle of violence and political instability. After overthrowing the Radical government in 1930, the military soon allowed elections but barred the Radical Party from participating despite its popularity.⁹⁶ As a result of the military intervention, the political system became far less democratic than it had previously been under the Radical administrations.⁹⁷ During the 1930s, when fascism was rising in Europe, Argentina likewise developed an authoritarian civilian government that systematically rigged elections to stay in power.⁹⁸ Newspapers critical of the government were

94. See ROCK, *supra* note 1, at 212-13.

95. See NINO, TRIAL, *supra* note 3, at 42; LEWIS, *supra* note 1, at 83-84.

96. See LEWIS, *supra* note 1, at 84.

97. See ROCK, *supra* note 1, at 214, 217.

98. See *id.*

closed.⁹⁹ Opponents were forced out of politics or into exile.¹⁰⁰ For instance, a senator who had denounced government corruption was assassinated on the Senate floor in 1935.¹⁰¹

In 1943, the military decided to reassert its authority by overthrowing the government.¹⁰² The coup was led by a pro-fascist junta that suspected the government was about to abandon neutrality and join the Allies in World War II.¹⁰³ While the Radical Party endorsed the coup in the hope that the military would reauthorize the party to participate in elections,¹⁰⁴ the military banned all political parties, increased censorship, and repressed dissidents.¹⁰⁵ As a result of increasing pressure, however, the military eventually acquiesced to new elections in 1946, leading to the election of populist military officer Juan Perón, who thoroughly repressed opponents of his "revolution" uplifting the working class.¹⁰⁶ Perón was overthrown by the military in 1955,¹⁰⁷ partly because the military leadership believed that Perón's populism was upsetting Argentina's social hierarchy and conservative values.¹⁰⁸ (Peronism will be analyzed in detail in Part IV.C due to its importance in Argentine politics.) The military sought to rid Argentina of Peronist, Marxist, and liberal influences in order to build a reactionary society.¹⁰⁹ It consequently accentuated repression against labor union members, intellectuals, and academics.¹¹⁰

In 1958, after the military failed to rally public support and improve the economic situation, it conceded to step down and organize elections, although it maintained its ban on the widely

99. LEWIS, *supra* note 1, at 88.

100. *See id.*

101. *Id.*

102. *See* NINO, TRIAL, *supra* note 3, at 42; *see generally* ROCK, *supra* note 1, at 249-51.

103. *See* NINO, TRIAL, *supra* note 3, at 42. For a host of complex reasons outside the scope of this article, Argentina kept an ambivalent neutral posture throughout most of World War II. *See generally* ROCK, *supra* note 1, at 238-47, 259. Notably, Argentina traded with Allied countries, maintained good relations with Britain, clashed with the United States, and offered some measure of diplomatic collaboration to Nazi Germany, thereby reflecting the Argentine government's reservations about democracy. *See id.* at 245-47, 259. Argentina finally broke diplomatic relations with Axis countries in January of 1944 after years of American pressure. *See id.* at 251.

104. *See generally* ROCK, *supra* note 1, at 247.

105. *See id.* at 250.

106. *See generally* LEWIS, *supra* note 1, at 99-111.

107. *See id.* at 110-11.

108. *See* ROCK, *supra* note 1, at 314-18; LEWIS, *supra* note 1, at 108.

109. *See* LEWIS, *supra* note 1, at 128.

110. *Id.* at 128-131.

popular Peronist Party.¹¹¹ Argentina returned to pseudo-democratic civilian rule that continued to be marred by repression.¹¹² Matters worsened when a hard-line military junta took over in 1966.¹¹³ It “dissolved Congress, suspended the constitution, banned all political parties, forced all sitting politicians in the capital and the provinces to resign, and closed the Supreme Court.”¹¹⁴ In March 1969, heightened repression, worsening living standards, and the closing of factories fueled a massive student uprising in Cordoba, followed by popular protests and violent clashes with authorities throughout the country.¹¹⁵ In addition, state repression led to armed resistance by revolutionary leftist and Peronist rebel groups inspired by the success of the Cuban Revolution and the guerrilla tactics of Ernesto “Che” Guevara, a native of Argentina.¹¹⁶ Notably, in 1970 a rebel faction kidnapped and executed former military president Pedro Aramburu.¹¹⁷

The military eventually permitted a return to civilian rule after concluding that Perón was the only power figure who could restore order by unifying Argentina¹¹⁸ and keeping the far-left at bay.¹¹⁹ In 1973, Perón returned from his eighteen-year exile and ultimately won the presidency with a substantial 62% of the vote.¹²⁰ Yet, he had moved further to the right over the years, alienating many supporters.¹²¹ For instance, he ordered the police to raid the offices of the Peronist Youth, which had served as a bridge between Peronism and the leftist guerrilla movement.¹²² After Perón suddenly died of a heart attack on July 1, 1974, terrorism, kidnappings, and assassinations by both guerrillas and their right-wing opponents escalated.¹²³

In 1976, the military overthrew the Peronist government.¹²⁴ After even Perón had proved incapable of halting the country's fall into violent anarchy, the most radical fascist military faction

111. ROCK, *supra* note 1, at 336-37; *see also* LEWIS, *supra* note 1, at 115.

112. *See* ROCK, *supra* note 1, at 337-46.

113. *See* LEWIS, *supra* note 1, at 127-28; ROCK, *supra* note 1, at 346-47.

114. LEWIS, *supra* note 1, at 127-28.

115. *See id.* at 128-31; ROCK, *supra* note 1, at 349-51.

116. *See* LEWIS, *supra* note 1, at 138-39; *see also* ROCK, *supra* note 1, at 352-56.

117. ROCK, *supra* note 1, at 352-53.

118. LEWIS, *supra* note 1, at 132.

119. *See* ROCK, *supra* note 1, at 360.

120. *See* LEWIS, *supra* note 1, at 136.

121. *See id.* at 137-40; *see also* ROCK, *supra* note 1, at 362.

122. LEWIS, *supra* note 1, at 140.

123. *See id.* at 138-42; ROCK, *supra* note 1, at 362-63.

124. LEWIS, *supra* note 1, at 143-44; *see also* NINO, TRIAL, *supra* note 3, at 54.

unleashed a campaign of repression, torture, assassination, and intimidation to finally eliminate communists, leftists, and “subversives.”¹²⁵ An estimated 30,000 people “disappeared”¹²⁶ during the Dirty War (1975-81).¹²⁷ Many were tortured in secret prisons or killed by being thrown out of airplanes over the sea.¹²⁸ The purges and intimidation tactics targeted anyone suspected of dissent.¹²⁹ Rebel groups retaliated with periodic assassinations and bombings, yet their ranks were rapidly decimated.¹³⁰ In private conversations, top military officers argued that the purges would be justified if only 5% of all victims were actual rebels.¹³¹ Indeed, the vast majority of victims were not guerillas or violent seditionists.¹³² The junta’s brutish purges even targeted community activists for the disabled, and teenagers who had campaigned for better school facilities.¹³³ A third of all victims were women.¹³⁴ Among them were pregnant women who were kidnapped and killed after giving birth, as part of a plot whereby infants were forcibly taken from their parents and secretly adopted by families connected to the junta.¹³⁵

The junta nonetheless ultimately tolerated certain peaceful protests. In particular, *Las Madres de la Plaza de Mayo* (Mothers of the Plaza de Mayo) started conducting weekly silent marches in April 1977 to denounce their loved ones’ disappearances.¹³⁶ Due to the group’s international exposure, peaceful approach, and female membership, a massive crackdown would have only further eroded the junta’s dismal image.¹³⁷ Instead, the junta resigned itself to attacking the group in the press, as well as intimidating, assaulting, and assassinating certain members.¹³⁸ But the

125. See LEWIS, *supra* note 1, at 143-46; see generally NINO, TRIAL, *supra* note 3, at 45.

126. *Spain’s Uncharted Foray Into World Justice*, EL PAÍS (English version), Dec. 22, 2005.

127. See generally LEWIS, *supra* note 1, at 143-50.

128. NINO, TRIAL, *supra* note 3, at 54.

129. See LEWIS, *supra* note 1, at 143-44; see also ROCK, *supra* note 1, at 395.

130. See NINO, TRIAL, *supra* note 3, at 57.

131. *Id.* at 56.

132. See ROCK, *supra* note 1, at 368.

133. *Id.* at 395.

134. *Id.*

135. See LEWIS, *supra* note 1, at 176-77; ROCK, *supra* note 1, at 386; see also Roger Cohen, *Lost Children, Lost Truth*, N.Y. TIMES, Jan. 13, 2008, at (PLEASE INSERT PAGE NUMBER AND, IF NECESSARY, MENTION THAT IT IS AN OP-ED); Jorge Marirrodriaga, *Un Torturador En Madrid*, EL PAÍS, Dec. 27, 2006, at 64

136. See LEWIS, *supra* note 1, at 148-49.

137. See *id.*

138. See *id.*; NINO, TRIAL, *supra* note 3, at 59.

Mothers resolutely continued their compelling demonstrations.¹³⁹ Moreover, international pressure led the junta to allow the Inter-American Commission on Human Rights to do an inspection in 1979.¹⁴⁰ The Commission's ensuing report condemned the junta's abuses.¹⁴¹

In 1982, the junta sought to rally the country around the flag by invading the Falkland Islands, which had been forcefully seized from Argentina by Great Britain in 1833.¹⁴² While the invasion initially proved vastly popular, public support withered as a British counter-attack forced Argentine troops to surrender within two months.¹⁴³ The Falklands fiasco gave impetus to the opposition, and anarchized Argentina's armed forces, which were already split into rival factions.¹⁴⁴ The military finally conceded to organize competitive elections in 1983.¹⁴⁵

Accordingly, Argentina was a society at war between 1930 and 1983. To dominate or eliminate their adversaries, successive governments placed themselves far above the law. Democracy, constitutionalism, and the rule of law could only regress under these circumstances, although it is probable that Argentina's hyperpresidential system contributed to this instability.

B. Hyperpresidentialism as a Contributing Cause to Political Instability

The political instability that plagued Argentina between 1930 and 1983 was unequivocally the product of the aforementioned social and ideological conflict. However, hyperpresidentialism likely contributed to this instability. According to Carlos Nino, Argentina's political instability is the product of its rigid presidential system.¹⁴⁶ The president is directly elected by the people.¹⁴⁷ Even though the president heads the government, the legislative branch cannot remove him from office, except through an extremely difficult impeachment procedure.¹⁴⁸ This allows the

139. See LEWIS, *supra* note 1, at 148-49.

140. NINO, TRIAL, *supra* note 3, at 60.

141. See *id.*

142. See LEWIS, *supra* note 1, at 146-47.

143. *Id.* at 147-50; MARCOS NOVARO & VICENTE PALERMO, LA HISTORIA RECIENTE: ARGENTINA EN DEMOCRACIA 37-38 (2004); see generally ROCK, *supra* note 1, at 377-83.

144. See LEWIS, *supra* note 1, at 147-50; see also NOVARO & PALERMO, *supra* note 143, at 37-38.

145. See LEWIS, *supra* note 1, at 150.

146. See NINO, CONSTITUTION, *supra* note 33, at 175-80.

147. See *id.*

148. *Id.*

president to continue to govern until his term ends even after he has lost popular support, although the president seriously risks being toppled by a coup if the opposition considers him to be inept in governing the country or resolving a crisis.¹⁴⁹ Thus, Nino argues for a parliamentary system where the government would be headed by a prime minister who would be directly accountable to the legislative branch, which could demote him if his performance was deemed unsatisfactory.¹⁵⁰ However, Argentina's Constitution does not permit such adaptation.¹⁵¹ The president's expansive powers allow him to govern nearly unilaterally.¹⁵² The opposition has little ability to influence his governance and may therefore believe that overthrowing the president is the only meaningful way to effect change.¹⁵³

While political instability is not necessarily inherent to presidential systems in general,¹⁵⁴ hyperpresidentialism in Argentina may have contributed to the military's decision to overthrow presidents who proved unable to resolve political or economic crises despite their expansive executive powers.¹⁵⁵ Indeed, military intervention became a significant part of political life, and was sometimes supported by the public as a necessary measure.¹⁵⁶ For instance, Radical President Yrigoyen's inability to resolve a dire

149. *See id.*

150. *See generally id.* at 175-86.

151. *Id.*

152. *See id.*

153. *See id.*

154. For instance, the United States has a relatively strong presidential system, although the government has never been toppled by a coup and the country's lone civil war was in the Nineteenth Century. Yet, Argentine presidents have historically had far greater power than American presidents, who are often checked by the legislative and judiciary branches. Whereas the parliamentarism demanded by Nino would not be a panacea, a stronger Congress could increase the separation of powers in Argentina. A noteworthy study by Professor Fred W. Riggs suggests that Latin American and Third World countries that have adopted parliamentary constitutions have been far more stable and less prone to military coups than Latin American and Third World countries that have adopted presidential constitutions. Carlos Nino, *Transition to Democracy, Corporatism and Presidentialism with Special Reference to Latin America*, in *COMPARATIVE CONSTITUTIONAL LAW* 240 (VICKI C. JACKSON & MARK TUSHNET, eds., 1999). However, other studies suggest that parliamentary regimes have been equally as unstable as presidential regimes, if not more so. *See* Manuel Jose Garcia-Mansilla, *Separation of Powers Crisis: The Case of Argentina*, 32 *GA. J. INT'L & COMP. L.* 307, 362-75 (2004). Further, the notion that a parliamentary system would have reduced instability in Argentina has been disputed by Garcia-Mansilla, who argued that Argentina's presidential system would have been far more functional if politicians had at least respected the balance of powers and judicial independence. *See id.* at 359-62, 375-91.

155. *See generally* NINO, *CONSTITUTION*, *supra* note 33, at 175-80.

156. *See, e.g.*, LEWIS, *supra* note 1, at 93.

recession caused by the Great Depression led the military to overthrow his government in 1930.¹⁵⁷ Perón was toppled by the military in 1955, partly due to his inability to end a recession.¹⁵⁸ The military installed a puppet civilian government, which it then overthrew in 1966 due to its failure to end inflation and yet another recession.¹⁵⁹ Thus, these coups were partly caused by the military's desire to resolve economic crises, in addition to the military leadership's obvious desire to assert its own authority.¹⁶⁰

Military intervention did not signify a complete end to the democratic process. On one hand, moderate officers preferred civilian rule and saw military intervention as a temporary means of ousting troublesome or incompetent leaders and parties.¹⁶¹ On the other hand, hard-liners wanted the military firmly in charge.¹⁶² As outlined above, moderates prevailed in 1930, 1943, and 1955, as these coups were relatively quickly followed by elections and a return to civilian rule, unlike the coups of 1966 and 1976.

Even though a coup is a forceful seizure of power outside the strictures of any legal and democratic process, civilians were not necessarily averse to a military takeover, especially if it was followed by a return to democracy.¹⁶³ Perón's three presidential elections were perhaps the strongest proof that many Argentines were fairly amenable to military intervention, as Perón was tremendously popular despite the fact that he had himself participated in the pro-fascist coups of 1930 and 1943.¹⁶⁴ The 1943 coup might have been the most popular, as many observers expected a moderate government that would soon return power to civilian hands.¹⁶⁵

157. See LEWIS, *supra* note 1, at 83-4; see also NINO, TRIAL, *supra* note 3, at 42;

158. See LEWIS, *supra* note 1, at 109-111.

159. See *id.* at 127-128.

160. Naturally, the civilian governments' failures to end economic recessions were not the only reasons for the military takeovers, as Argentina had a reactionary military that had little patience for democracy and was eager to assert its own authority. Further, the 1930 coup was partly caused by the military's fear of a revolution by rising anarchist and socialist groups. See LEWIS, *supra* note 1, at 83-84. The 1943 coup was led by a pro-fascist junta that suspected the government was about to abandon neutrality and join the Allies in World War II. See generally NINO, TRIAL, *supra* note 3, at 42. Finally, the 1955 coup was largely spurred by the military's belief that the Peronists were upsetting Argentina's social hierarchy and conservative values by championing the common people. See LEWIS, *supra* note 1, at 108.

161. See ROCK, *supra* note 1, at 344, 371; see generally LEWIS, *supra* note 1, at 115.

162. See ROCK, *supra* note 1, at 344, 371.

163. See, e.g., LEWIS, *supra* note 1, at 93.

164. See *id.* at 194.

165. See *id.* at 93.

Unlike the elections following the coups of 1930 and 1955 when the military respectively banned the widely popular Radical Party¹⁶⁶ and Peronist Party,¹⁶⁷ the 1943 coup ultimately led to open and fair elections three years later that resulted in Perón's presidential election.¹⁶⁸

C. Democracy, Constitutionalism, and the Peronist Revolution

In the aftermath of the 1943 coup, army colonel Juan Perón emerged as a charismatic populist who managed to rally the support of most of Argentina, and especially its large working class. Perón became the most prominent politician in Argentine history despite the fact that his rule was short-lived. In 1946, in a fair election, he was elected president with 54% of the vote.¹⁶⁹ He was reelected under dubious circumstances in 1951 and then overthrown by the military in 1955.¹⁷⁰ He was popularly reelected in 1973 following an eighteen-year exile — spent mostly in General Francisco Franco's fascist Spain¹⁷¹ — but died of a heart attack within a year.¹⁷²

Perón was a mix of sharp contrasts. He was vastly popular even though he was a repressive dictator.¹⁷³ He was elected thrice but his regimes were undemocratic. He combined the progressive ideas of a welfare state, labor rights, and socio-economic equality with an obscurantist aversion to human rights, constitutionalism, and the rule of law.

Perón's rule was characterized by the rewards he bestowed on his supporters and the repression he meted to his opponents. After Argentina's Golden Age (1860-1930) had enriched the elite while failing to benefit the struggling working class,¹⁷⁴ Perón's "corporatism" bettered the living standards of the poorest Argentines "by nationalizing most public enterprises, commencing a concerted industrialization process, shielded by high tariff barri-

166. *See id.* at 84.

167. *Id.* at 115.

168. *See id.* at 99.

169. *See id.* at 98-99.

170. *See generally id.* at 107-111.

171. *See* ROCK, *supra* note 1, at 358.

172. *See* LEWIS, *supra* note 1, at 136-38.

173. *See generally* Daniel James, *Perón and the People*, in *THE ARGENTINA READER: POLITICS, CULTURE, AND SOCIETY*, 273-295 (Gabriela Nouzeilles & Graciela Montaldo eds., 2002).

174. LEWIS, *supra* note 1, at 71; *see generally* ROCK, *supra* note 1, at 140-41, 160.

ers, and institutionalizing a welfare state.¹⁷⁵ He set minimum wages, limited the length of workdays, mandated rest for workers on Sundays, and created new benefits, including pensions, paid vacations, holiday resorts, medical services, accident compensation, subsidized housing and legal services, and bonuses.¹⁷⁶ Perón demonstrated his responsiveness to workers' concerns by often siding with them when they went on strike, such as by significantly increasing workers' wages.¹⁷⁷ Comparably, Perón's equally charismatic wife, Eva or "Evita", became highly popular with the working class and underclass because she operated a variety of charitable organizations.¹⁷⁸ She also spearheaded a campaign leading to the enfranchisement of women in 1947, thereby winning over many women to the Peronist camp.¹⁷⁹

Because the Peronist Party was strongly represented in Congress, it managed to garner the two-thirds of the vote required to convene a constitutional convention.¹⁸⁰ In 1949, the Constitution of 1853 was significantly amended in the face of heated protests from the Radicals and other opposition parties.¹⁸¹ The Peronist constitution made the president even more omnipotent by: i) enabling an incumbent president to seek reelection to an unlimited number of six-year terms,¹⁸² as opposed to the prior constitution that prohibited consecutive presidential terms by requiring an interval of one term of ineligibility before an outgoing president could seek re-election for another six-year term;¹⁸³ ii) expanding presidential authority to "intervene" in the provinces by effectively sacking regional governments opposing the president;¹⁸⁴ and iii) licensing the president to declare a state of emergency, which would officiously allow for political repression.¹⁸⁵ On the other hand, the constitution was also amended with progressive labor

175. NINO, TRIAL, *supra* note 3, at 42-43.

176. LEWIS, *supra* note 1, at 100; *see also* ROCK, *supra* note 1, at 262.

177. *See* ROCK, *supra* note 1, at 284, 303.

178. *See id.* at 287; LEWIS, *supra* note 1, at 101.

179. *See* ROCK, *supra* note 1, at 287; LEWIS, *supra* note 1, at 101.

180. ROCK, *supra* note 1, at 288.

181. *See id.*

182. *See id.*; *see also* CONST. ARG. art. 78 (1949), available at <http://www.cervantesvirtual.com/servlet/SirveObras/57973844438460617422202/index.htm> (last visited June 15, 2008).

183. CONST. ARG. art. 77 (1853, amended 1860), available at <http://www.cervantesvirtual.com/servlet/SirveObras/01371529455614825210035/index.htm> (last visited June 15, 2008).

184. ROCK, *supra* note 1, at 289; CONST. ARG. art. 6 (1949)); *see also supra* notes 29-30 and accompanying text.

185. *See* ROCK, *supra* note 1, at 289; *see also* CONST. ARG. art. 34 (1949).

rights designed to improve the lot of the working class, such as the right to work,¹⁸⁶ just remuneration,¹⁸⁷ safe and decent labor conditions,¹⁸⁸ social security for the unemployed and incapacitated,¹⁸⁹ as well as the right to upward social mobility.¹⁹⁰

However, Perón's corporatism involved sheer political clientelism – defined here as an exchange of favors between politicians and the electorate that is frequently the product of backdoor agreements – as he made clear that he expected workers' support in exchange for these reforms. Following the 1943 coup, Perón headed the Argentine government's labor department under the military government.¹⁹¹ After several strikes, he arbitrated settlements very favorable to unions but with the clear understanding that the unions should accept government leadership over their affairs, thereby causing unions to lose much of their independence.¹⁹² Perón was thereafter elected president by using unions as his base.¹⁹³ Under Perón, union membership grew from 530,000 in 1945 to almost 2 million by 1949.¹⁹⁴ Yet, independent unions withered because their members lost on wage increases and other benefits bestowed on government-approved unions.¹⁹⁵ The few union leaders who refused to be co-opted were forcibly replaced by Peronist leaders under the pretext that it was necessary to reorganize their unions in order to avoid internal conflicts.¹⁹⁶ The Peronist Party's political machine was typified by a *quid pro quo*: the government was responsive to the demands of workers, who were expected to systematically vote Peronist, thus enabling the party to win virtually all elections nationwide.¹⁹⁷ Perón also gained support from the business community, unethically rewarding industrialists who supported his government by giving them a near

186. *Id.* at art. 37, § I.1.

187. *Id.* at art. 37, § I.2.

188. *Id.* at art. 37, § I.4.

189. *Id.* at art. 37, § I.7.

190. *Id.* at art. 37, § I.9.

191. See LEWIS, *supra* note 1, at 96-97.

192. *Id.* at 97; see also ROCK, *supra* note 1, at 254.

193. ROCK, *supra* note 1, at 283-84.

194. *Id.*

195. *Id.* at 254, 282-85, 315.

196. *Id.* at 284.

197. In addition to his self-interested political clientelism, Perón sought to rein in the working class to avoid a communist or socialist uprising, as he declared: "If we fail to carry out the Peace Revolution, the People will accomplish the Violent Revolution [and the way to avoid this] is to carry forward Social Justice for the masses." ROCK, *supra* note 1, at 258.

monopoly over key markets and lucrative government contracts.¹⁹⁸ His administration was also accused of outright corruption and bribery.¹⁹⁹

Concomitantly, Perón had no qualms about repressing his opponents. The regime described Peronism as a revolutionary ideology.²⁰⁰ Perón's police state "detained, or forced into exile, legislators in opposition parties. Some opponents were killed, while many others were tortured."²⁰¹ Academics identified as political enemies lost their jobs.²⁰² Critical newspapers were closed.²⁰³ Opposition parties in Congress, already limited by their minority status, faced censure if they protested state actions.²⁰⁴ Perón impeached four of the five justices on the Supreme Court and replaced them with loyalists, thereby becoming the first president to remove justices for political reasons since 1862.²⁰⁵ While Perón repressed his opponents, he used propaganda, mass rallies, and the cult of his personality in order to foster the allegiance of his followers.²⁰⁶ Schools also had to indoctrinate students with courses on Peronist philosophy.²⁰⁷

Nevertheless, Perón did not institute a fully totalitarian one-party state.²⁰⁸ Opposition groups operated, albeit within the bounds permitted by his government.²⁰⁹ For instance, Perón was reelected in 1952 with "only" sixty-four percent of the ballot.²¹⁰ But Perón had eliminated his most dangerous adversaries while tolerating an opposition emasculated by his repression and corruption. Moreover, political clientelism enabled him to astutely win over people from nearly all ideologies, ranging from "the semi-fascist and nationalist extreme right, to nationalist leftists with socialist discourses. . . . Because Peronism was a mass movement, it is possible to affirm that it represented, up to a certain point, all

198. LEWIS, *supra* note 1, at 102.

199. See ROCK, *supra* note 1, at 305.

200. See LEWIS, *supra* note 1, at 104-05.

201. NINO, TRIAL, *supra* note 3, at 43.

202. LEWIS, *supra* note 1, at 104.

203. *Id.*; see also ROCK, *supra* note 1, at 280-81, 303.

204. See LEWIS, *supra* note 1, at 104.

205. CHAVÉZ, *supra* note 8, at 31; ROCK, *supra* note 1, at 280-81; see also LEWIS, *supra* note 1, at 104.

206. See ROCK, *supra* note 1, at 285, 304, 307, 314.

207. *Id.* at 304, 314; LEWIS, *supra* note 1, at 108.

208. ROCK, *supra* note 1, at 285-86.

209. ANGEL JOZAMI, ARGENTINA: LA DESTRUCCIÓN DE UNA NACIÓN 253 (2003).

210. LEWIS, *supra* note 1, at 107-08.

of Argentina.²¹¹ In this sense, Peronism was highly populist.²¹²

Perón's popularity begs the question of whether his regime was democratic. This was only the case insofar as we reduce our notion of democracy to simple majoritarian rule; however, I will argue below that a constitutional democracy entails limits on the majority's power. Besides, it is necessary to analyze Perón's popularity within its societal context, as many people may not have voted for Perón if they had lived in a society characterized by a free exchange of ideas. Even though Perón's electoral dominance cannot be overlooked, especially since turnout was very high because voting was mandatory,²¹³ the democratic process had been wholly corrupted by the censure, harassment, imprisonment, and murder of dissidents by the time Perón stood for reelection in 1951 and 1973. All of these improprieties made Perón's electoral successes seem more impressive than they really were. This repression inhibited the opposition's ability to rally support for alternatives to Peronism.²¹⁴ In sum, while democracy is always a work in progress, Perón's rule cannot be reasonably considered democratic given how far his regimes were from the democratic ideal.

Perón's rule additionally lacked constitutional legitimacy. Of course, one may argue that the legitimacy of a constitutional order is derived from the people's consent, and that Perón's electoral victories made his rule constitutionally legitimate. Yet, even if we assume that the electoral process is fair and transparent, voting is insufficient to create constitutional legitimacy. This is especially true in Argentina where voting is mandatory, as no act expressing voluntary consent can be forced.²¹⁵ Hence, voting is not everything and majority rule is insufficient to establish constitutional legitimacy.

Majority rule can actually be the archetype of *unconstitution-*

211. JOZAMI, *supra* note 209, at 255. Quotations from Spanish language publications were translated by the author.

212. See ROCK, *supra* note 1, at 263-64, 267, 277-79. Peron's ideology was also deeply nationalistic. For example, he nationalized numerous companies and largely rid Argentina of foreign investment in the name of sovereignty, economic independence, and the end of colonialism. *Id.* Propaganda lauding Perón's uncompromising nationalism contributed to his popularity. *Id.* at 280.

213. See NINO, CONSTITUTION, *supra* note 33, at 86-93.

214. ROCK, *supra* note 1, at 305.

215. See NINO, CONSTITUTION, *supra* note 33, at 86-93. Besides, the average voter is more likely to vote according to how a politician will satisfy his personal interests and moral values rather than according to whether the government is constitutionally legitimate from a theoretical and scholarly standpoint.

alism. The union of democracy and constitutionalism is not easy since the expansion of majoritarian rule may lead to a weakening of constitutionalism.²¹⁶ “First, there is the ideal of a participatory political process in which everyone affected by political decisions has an equal say in the formation of those decisions. Second, there is the *ideal of a limited government* in which even the majority cannot encroach upon entrenched individual [rights].”²¹⁷ Both of these ideals existed in Argentina since the founding of the constitution in 1853. A democratic participatory process, albeit corrupt, was created for people to elect their government; and the Argentine Constitution created various individual rights. But elected governments routinely violated these rights. In particular, Perón enjoyed popular support when he repressed opponents of the “Peronist revolution.”²¹⁸ Thus, the will of the majority prevailed over the constitutional rights of the minority. But the constitution should have prevailed because it is the primary law of the land.²¹⁹

The will of the people as enshrined in the constitution should trump the will of the instant democratic majority. Individual rights can typically be protected through government self-restraint or counter-majoritarian judicial review. First, countries can sometimes attain a degree of maturity where politicians self-regulate their behavior to avoid violating individual rights, including those of their political opponents.²²⁰ But pre-1983 Argentine regimes direly failed to exercise self-restraint in repressing opponents. Second, minority rights may also be protected by judicial review if the judiciary has the power to enjoin the government from violating individual rights. This can lead to the famous “counter-majoritarian difficulty,” where a judicial body, unelected by the people, asserts that the will of the elected president and/or legislature is incompatible with the fundamental aspirations of the people in the constitution.²²¹ Judicial review can only protect individual rights when the judiciary is willing and able to chal-

216. *Id.* at 1-2.

217. *Id.* at 6 (emphasis added); see also TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 2 (2003).

218. ROCK, *supra* note 1 at 305.

219. See CONST. ARG. art. 31 (1972), available at <http://www.cervantesvirtual.com/portal/Constituciones/pais.formato?pais=Argentina&indice=constituciones>.

220. See GINSBURG, *supra* note 217, at 21-33. Respecting individual rights can obviously be a self-interested decision. A politician who is in the majority today often realizes that he may be in the minority tomorrow, and that unfairly treating the minority would invite retaliation when positions of power have shifted. See *id.*

221. See NINO, CONSTITUTION, *supra* note 33, at 2.

lenge the other branches. But Argentina's courts have been significantly subjugated to the executive (the only exception being the presidency of Raúl Alfonsín (1983-1989), as will be discussed in Part V). When presidents routinely sack non-pliant judges and pack the courts with sympathizers, the judiciary cannot possess the degree of independence needed to serve as a freewheeling check on government power. There is an inherent conflict of interest between a judge's duty to be impartial to the rule of law and his inclination to be partial to the executive if he wants to keep his job.²²²

Consequently, due to the lack of self-restraint of successive governments and the emasculation of judicial review, individual rights were often violated with impunity. In particular, the power of Perón's majoritarian regime was effectively unlimited since he hardly guaranteed anyone's rights and could unreservedly repress opponents. Naturally, this was incompatible with the previously articulated concept of the rule of law, entailing "the preservation of some fundamental legal rules which limit at any point what a particular government, be it democratic or not, can do."²²³

Perón eventually sought to license his hegemony through constitutional means. As discussed above, in 1949, the Peronist Party used its omnipotence to arrange a constitutional convention that replaced the 1853 Constitution with a new Peronist constitution that enhanced presidential power.²²⁴ But the Peronist constitution did not last, as the military reestablished the 1853 Constitution after overthrowing Perón in 1955.²²⁵ The military, nonetheless, incorporated into the constitution the expanded labor rights that Perón's regime had created.²²⁶ These labor rights have also been preserved in Argentina's present constitution.²²⁷ But the Peronist constitution should not have been invalidated by the military pursuant to a coup; rather, the Argentine Supreme Court should have stood up against Perón and invalidated the Peronist constitution for violating the separation of powers principle by maximizing presidential authority.²²⁸

222. CHAVÉZ, *supra* note 8, at 25.

223. NINO, CONSTITUTION, *supra* note 33, at 3.

224. *See, e.g.*, LEWIS, *supra* note 1, at 105; ROCK, *supra* note 1, at 288-89; *see also supra* notes 180-90 and accompanying text.

225. LEWIS, *supra* note 1, at 115.

226. CONST. ARG. art. 14 (1956), available at http://www.cervantesvirtual.com/servlet/SirveObras/02461698658135618754491/p0000001.htm#I_1_.

227. CONST. ARG. art. 14 bis. (1994), available at <http://www.senado.gov.ar/web/interes/constitucion/diputados.php>.

228. For example, the Indian Supreme Court has advanced a "basic structure"

Hence, Perón's rule epitomized contempt for constitutionalism. In 1955, the military forced Perón into exile, outlawed all Peronist activities, and ultimately installed a puppet civilian regime.²²⁹ Even though Perón was a dictator, his government seemed relatively benign and progressive in comparison to the governments that succeeded him. These governments were generally far more repressive and violent, as exemplified by the purge of 30,000 so-called "subversives" by an extremist military junta during the Dirty War (1975-81).²³⁰

V. 1983-89: THE INVIGORATION OF THE ARGENTINE CONSTITUTION

In 1983, after the Dirty War and the Falklands debacle, the ruling military junta stepped down,²³¹ thereby putting an end to the most repressive regime in Argentine history and marking the lasting return of democracy, as the Argentine military has not overthrown the government since then.

Raúl Alfonsín of the Radical Party won the presidency with fifty-two percent of the ballot, defeating the Peronist candidate, Italo Luder, who only obtained forty percent of the votes.²³² Alfonsín's victory was remarkable since it marked the first defeat for a Peronist candidate in a competitive presidential election.²³³ The Peronists had lost public legitimacy because many of their leaders had collaborated with the outgoing junta²³⁴—Luder even signed a 1975 decree authorizing the military to "annihilate" subversives.²³⁵ Much of the electorate perceived Alfonsín as the only candidate untainted by the abuses of the past.²³⁶ Public opinion was also influenced by other incidents, such as the Peronist Youth's assaults on *Las Madres de la Plaza de Mayo* in 1983.²³⁷

Alfonsín's presidential campaign had focused on "severely

doctrine holding that no constitutional amendments may challenge the independence of the judiciary, which is a cornerstone of the Indian constitution. See M.P. Singh, *Securing the Independence of the Judiciary: The Indian Experience*, 10 *IND. INT'L & COMP. L. REV.* 245, 257 (2000).

229. LEWIS, *supra* note 1, at 111, 114-18.

230. See *Spain's Uncharted Foray Into World Justice*, *supra* note 126.

231. See LEWIS, *supra* note 1, at 146-50.

232. JOZAMI, *supra* note 209, at 225.

233. *Id.*

234. See LEWIS, *supra* note 1, at 150-51; NOVARO & PALERMO, *supra* note 143, at 39-40.

235. ALISON BRYSK, *THE POLITICS OF HUMAN RIGHTS IN ARGENTINA* 142-43 (1994).

236. LEWIS, *supra* note 1, at 151.

237. BRYSK, *supra* note 234, at 143.

criticizing state terrorism and human rights violations, promising that the junta's crimes would not go unpunished, condemning Peronists for endorsing militarism, and promising that union leaders would now be elected democratically [instead of being appointed by Peronist politicians].²³⁸ As president, Alfonsín sought to *invigorate* a constitution that had hardly ever been respected. First, he tried to end Argentina's "political culture of hegemony," which he identified as the primary cause of instability. Second, he advanced the cause of human rights and the rule of law, primarily by prosecuting the abuses of the Dirty War. Even though Alfonsín and the Radicals lost the presidency in the subsequent election of 1989, their transitional regime was the heyday of constitutionalism in Argentina.²³⁹

A. *Tackling the Political Culture of Hegemony*

After decades of lawlessness, contempt for the rule of law became profoundly engrained in Argentine political culture due to the recurrence of electoral fraud, corruption, repression, state terrorism, and military takeovers.²⁴⁰ The judiciary wholly contributed to this lawlessness by holding that the coups were legitimate and endorsing the unconstitutional laws promulgated by the new regimes.²⁴¹ Lawlessness favored the development of a *political culture of hegemony*. Due to both constitutional hyperpresidentialism and unconstitutional abuses of power, whoever held the presidency assumed near totalitarian control over other government institutions, the media, and, in the case of the Peronists, labor unions. Hegemonic power made compromise and moderation unnecessary. It also enabled the government to repress troublesome opponents and violate the law with absolute impunity.²⁴²

Naturally, this political culture of hegemony is wholly inimical to constitutionalism and its emphasis on limited state power. The separation of powers is non-existent because all government agents are subjugated to the federal executive. The courts cannot stand up to the executive to uphold the constitution and the law. Human rights cannot be guaranteed because there is no sphere where an individual can be safe from the government.

238. NOVARO & PALERMO, *supra* note 143, at 39-40.

239. *Id.* at 40-42.

240. NINO, TRIAL, *supra* note 3, at 47.

241. *Id.*

242. *Id.*

However, unlike previous military and civilian regimes, Alfonsín and the Radicals never had hegemony between 1983 and 1989. Alfonsín faced significant opposition from the Peronist Party, which “virtually controlled the Senate, held a formidable minority in the House of Deputies, controlled political power in the provinces, and forged strong relationships with trade unions and with many promilitary groups.”²⁴³ Thus, the executive and legislative branches were not controlled by the same hands and therefore could, in some measure, serve as counter-powers against each other. Similarly, Alfonsín did not control the courts since the judiciary retained a high degree of independence under his tenure.²⁴⁴ While certain judges whom Alfonsín appointed to the Supreme Court were close friends of his administration, they had diverse political views and were actually confirmed by the Peronist-controlled Senate.²⁴⁵ The Supreme Court was able to exercise judicial review, as it ruled against Alfonsín’s policies thirty-seven percent of the time between 1983 and 1987.²⁴⁶ Unlike most of his predecessors, Alfonsín did not seek to retaliate by replacing recalcitrant judges with docile partisans.²⁴⁷

While Alfonsín’s presidential authority was constrained by the rather unprecedented balance of powers between the legislative and judicial branches of government, Alfonsín was also challenged by other forces. He faced a backlash from human rights groups who felt that too few military officers were being prosecuted for the atrocities of the Dirty War.²⁴⁸ Concomitantly, he faced the threat of a coup by military leaders who felt that the prosecutions had gone much too far.²⁴⁹ After trying to maneuver through these challenges,²⁵⁰ Alfonsín was doomed by the failure of his economic plan. Alfonsín had been handed perhaps the worst economic situation bequeathed to a transitional democratic government in Latin America: astronomical inflation, a national debt surpassing \$45 billion, and the loss of foreign investments, among other problems.²⁵¹ He nonetheless improved the economy with

243. *Id.* at 111.

244. *Id.* at 71-72; see also CHAVÉZ, *supra* note 8, at 30-40.

245. NINO, TRIAL, *supra* note 3, at 71-72; see also CHAVÉZ, *supra* note 8, at 30-40.

246. Christopher Walker, *Democratic Consolidation? The Argentine Supreme Court, Judicial Independence, and the Rule of Law*, 18 FLA. J. INT’L L. 745, 780-81 (2006).

247. *Id.* at 781-82.

248. LEWIS, *supra* note 1, at 157-59.

249. *Id.*

250. See *infra* Part V.B.

251. ROCK, *supra* note 1, at 391; see also *infra* Part V.B.

firm price and wage controls, reduced state expenses, and created a new currency whose value was pegged to the dollar.²⁵² Yet, he eventually faced a volley of massive strikes by the Peronist-controlled unions, which demanded a higher economic standing.²⁵³ He conceded to raise public workers' wages, although this contributed to extreme inflation and an economic crisis.²⁵⁴

By the 1989 presidential elections Alfonsín had lost public support.²⁵⁵ Unable to run for reelection due to the constitution's ban on successive presidential terms,²⁵⁶ he became a complete lame duck facing absolute resistance from the public and the Peronist-controlled Congress.²⁵⁷ Alfonsín stepped down five months before his term ended so Peronist president-elect Carlos Menem could take office after winning by a comfortable margin over Eduardo Angeloz, who had represented the Radical Party in the presidential election.²⁵⁸ Thus, the circumstances underlying Alfonsín's tenure had precluded him from asserting hegemonic authority.

Nevertheless, Alfonsín never sought to dominate Argentine society. As president during the transition from military rule, he played a positive role in shaping the evolution of democracy, constitutionalism, and the rule of law. During his presidential campaign, Alfonsín had roused public enthusiasm by frequently reading aloud the preamble of the constitution²⁵⁹ and by criticizing the political culture of hegemony.²⁶⁰ In particular, he accused the Peronists of having reduced politics to warfare and paving the way for the fascist methods of the last elected Peronist government (1973-76).²⁶¹ He also denounced the violent and undemocratic methods of Peronist union leaders.²⁶² On December 1, 1985, Alfonsín made his famous speech of Parque Norte, where he identified the political culture of hegemony as the cause of Argentina's

252. LEWIS, *supra* note 1, at 152-54.

253. *Id.* at 161.

254. *Id.* at 161-62.

255. *Id.* at 165.

256. CONST. ARG. art. 77 (1989), available at http://www.cervantesvirtual.com/servlet/SirveObras/01476288877136539754480/p0000001.htm#I_1_.

257. LEWIS, *supra* note 1, at 164-65.

258. *Id.*; See also NINO, CONSTITUTION, *supra* note 33, at 178.

259. JOZAMI, *supra* note 209, at 226.

260. Raúl Alfonsín, Address at the National Committee of the U.C.R. in Parque Norte (Dec. 1, 1985), available at <http://jrprogre.com.ar/docus/Alfonsin%20-%20Parque%20Norte.pdf> (last visited June 21, 2008).

261. NOVARO & PALERMO, *supra* note 143, at 39-40.

262. *Id.*

political instability.²⁶³ First, he blasted both the far-right and the far-left for having extremist views incompatible with a stable democracy.²⁶⁴ Second, he insisted that Argentina must necessarily have a cultural reform to remove the toll of misconceptions instilled in the collective mentality by authoritarianism, intolerance, violence, Manichaeism, social fragmentation, and the refusal of dialogue, negotiation, agreement or compromise.²⁶⁵ Third, he identified tolerance, rationality, mutual respect, and the search for peaceful solutions to conflict as the new values of the Argentine community.²⁶⁶

Even though Alfonsín did not talk about the constitution itself, he was calling for the type of political culture necessary for its invigoration.²⁶⁷ Constitutionalism may be "the governmental component of a democratic culture" where people have agreed to disagree and accepted legal and political processes as legitimate means of non-violent dispute resolution.²⁶⁸ But such a culture obviously cannot be spontaneously created. Rather, it develops over time with democracy. Despite Alfonsín's efforts, his presidency failed to impress a lasting "constitutional moment" that would mark a clear break with the political culture of hegemony.²⁶⁹ His speech did not draw much interest from the general public,²⁷⁰ perhaps because it was remarkably long and more akin to a scholarly political science dissertation than an ordinary political discourse.

In addition, Alfonsín may have had trouble altering the political culture of hegemony, insofar as it was the product of constitutional hyperpresidentialism. As noted above, the Argentine political system's incapacity for adaptation in times of crisis contributed to the belief of certain government opponents that the only way to achieve change was to overthrow the president.²⁷¹ By the same token, the system's rigidity made it unlikely that opposition parties would express support for Alfonsín's exhortations at Parque Norte. Indeed, Argentina's hyperpresidential system is

263. *Id.* at 51.

264. Alfonsín, *supra* note 260.

265. *Id.*

266. *Id.*

267. NOVARO & PALERMO, *supra* note 143, at 45-46, 51.

268. See Daniel P. Franklin & Michael J. Baun, *Introduction & Conclusion to POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH* 1, 1-7, 219-32 (Daniel P. Franklin & Michael J. Baun eds., M.E. Sharpe, Inc. 1995) (1994).

269. See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

270. NOVARO & PALERMO, *supra* note 143, at 52.

271. See NINO, *CONSTITUTION*, *supra* note 33, at 175-80; see also *supra* Part IV.B.

dysfunctional partly because the central seat of power is indivisible between rival parties.²⁷² This system leads to a zero-sum game turning politics into an "all-or-nothing" competition²⁷³ where the president holds almost all the power and the parties losing a presidential election are basically left with nothing.²⁷⁴ Opposition parties, therefore, try to undermine as much as possible the credibility of the president to diminish the reelection prospects of the reigning party.²⁷⁵ Legislators from opposition parties rarely dare to support the president because their party leaders will immediately shun them, as the opposition feels that any concessions will undermine its chances in the next presidential election.²⁷⁶ The result is a highly antagonistic system stifling inter-party dialogue and cooperation. Therefore, when Alfonsín encouraged opponents to foster democracy through "dialogue, negotiation, agreement, [and] compromise,"²⁷⁷ he did not receive support from the Peronists, who were closely eyeing the presidency.²⁷⁸

Nevertheless, the Peronist Party's reformist wing seemed to agree with Alfonsín that democracy entailed some compromise, tolerance for opposition, and respect of minority rights.²⁷⁹ The Peronists' defeat in the 1983 presidential elections had led to an internal party struggle, as reformists pushed for democratization.²⁸⁰ Antonio Cafiero, a leading reformist, argued that modern Peronism "is democratic and not authoritarian."²⁸¹ For instance, reformists helped create a democratic primary where Peronist party members could freely elect their party and labor union leaders.²⁸²

Concurrently, the reformist Peronists criticized Alfonsín's Parque Norte speech for advancing a "theoretical" and "procedural" conception of democracy.²⁸³ They accused Alfonsín of analogizing the democratic process to the free market.²⁸⁴ Instead of the

272. NINO, CONSTITUTION, *supra* note 33, at 178.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. Alfonsín, *supra* note 260.

278. NOVARO & PALERMO, *supra* note 143, at 53.

279. *Id.* at 44, 62.

280. *Id.* at 65.

281. *Id.*

282. *Id.* at 62-63.

283. *Id.* at 47.

284. *Id.* at 67.

Radicals' social, democratic, and civil libertarian position, the Peronists appealed to populism by arguing that individual freedom could not be dissociated from social and economic rights.²⁸⁵ The Peronists would ultimately recover their popularity, and regain the presidency in 1989.²⁸⁶

B. Developing Constitutionalism and the Rule of Law Through Human Rights

In addition to tackling the political culture of hegemony, Alfonsín significantly advanced human rights in Argentina. As discussed above, constitutionalism requires respect for individual rights, although no Argentine president put these rights high on his agenda before Alfonsín. While Perón advanced socio-economic rights, he did not fundamentally articulate his populism in human rights terms. Conversely, on October 26, 1983, approximately one million people gathered to hear Alfonsín speak about the importance of human rights.²⁸⁷ The Alfonsín administration prosecuted persons suspected of gross human rights violations during the Dirty War, repealed the junta's draconian laws against subversion, reformed the ultra-repressive penal code, enacted a law prohibiting public and private discrimination, and ratified several international treaties, including the American Convention on Human Rights, the United Nations' Covenant on Civil and Political Rights, and the Covenant on Economic and Social Rights.²⁸⁸ These reforms sharply contrasted with the wild repression of the last military junta, which purged approximately 30,000 alleged "subversives," amid other atrocities.²⁸⁹

The rising importance of human rights was greatly attributable to the militancy of ordinary Argentines organized in civic organizations. *Las Madres de la Plaza de Mayo* remained the most influential group after the return of democracy.²⁹⁰ Citizens also formed other important organizations, such as the Permanent Assembly for Human Rights, which recorded information on almost 6,000 "disappearances" during the Dirty War.²⁹¹ Several

285. BRYSK, *supra* note 235, at 143.

286. LEWIS, *supra* note 1, at 164-65.

287. NINO, TRIAL, *supra* note 3, at 66.

288. *Id.* at 69.

289. *Spain's Uncharted Foray into World Justice*, *supra* note 126; see also *supra* notes 125-35 and accompanying text.

290. LEWIS, *supra* note 1, at 148-49; NINO, *supra* note 33, at 59.

291. BRYSK, *supra* note 235, at 45-47, 139.

trade unions created their own human rights committees.²⁹² During the unsuccessful military uprising that occurred in 1987, leaders of the *Confederación General de Trabajo*, one of the strongest unions, refused to meet with military leaders.²⁹³ The labor movement supported democracy to an unprecedented degree.²⁹⁴

Human rights became almost entirely associated with the necessity to prosecute the abuses of the Dirty War. The focus on legal accountability signified that the rule of law would grow concurrently with human rights. However, before stepping down, the last ruling military junta had promulgated an amnesty law for all military and police personnel involved in the "war against subversion."²⁹⁵ Presidential candidates had nonetheless vowed to repeal the decree, especially since tens of thousands of protestors had demanded that abusers be prosecuted.²⁹⁶ After Alfonsín was elected, he kept his promise to bring both military and guerrilla leaders to trial.²⁹⁷ But Alfonsín declined to summarily nullify the military's self-amnesty law without providing a legal basis. He recruited the late Carlos Nino, a famous scholar who taught at the University of Buenos Aires at the time, and other academics to advise him on the democratization process.²⁹⁸ Nino played a significant role in articulating the government's prosecutorial strategy.²⁹⁹ For example, he explained that because the junta's self-amnesty law prevented the judiciary from investigating the decisions of an executive that had already absorbed legislative functions, the amnesty was invalid under Article 29 of the constitution, which prohibits granting extraordinary powers to the executive.³⁰⁰

The Supreme Court eventually invalidated the amnesty law and held that military decrees were lawful only if they were explicitly or implicitly ratified through constitutionally mandated procedures.³⁰¹ This was a clear sign of progress, as the judiciary had historically sided with the military.³⁰² For instance, in 1947 the Supreme Court declared that military decrees promulgated

292. *Id.* at 146-48.

293. *Id.*

294. *Id.*

295. LEWIS, *supra* note 1, at 154-55.

296. *Id.* at 155.

297. *Id.* at 155-58.

298. NINO, TRIAL, *supra* note 3, at 61.

299. *See id.*

300. *Id.* at 65-66; *see also* CONST. ARG. art. 29.

301. NINO, TRIAL, *supra* note 3, at 48.

302. *Id.* at 47-48.

remained valid even after the military left power so long as civilian authorities did not explicitly abrogate the law.³⁰³ In addition, in 1976 the Supreme Court held that the military had the authority to modify and suspend the constitution.³⁰⁴

Several defendants were eventually convicted, including two top generals who received life sentences.³⁰⁵ But these convictions led to the threat of a coup by the high number of military officers fearing prosecution, as the government's investigations had implicated over 1,000 suspects.³⁰⁶ In 1987, uprisings occurred at military bases in Buenos Aires and Cordoba, which led Alfonsín to sponsor a law barring the prosecution of soldiers who had committed human rights violations due to orders from their superiors.³⁰⁷ Whereas the law's enactment by Congress averted the coup, Alfonsín's compromise undermined his popularity.³⁰⁸

Even before the military uprisings, the threat of a putsch had probably influenced Alfonsín's preference for prosecuting a limited number of persons with command responsibility. Throughout his presidency, Alfonsín was under attack by protestors like *Las Madres de la Plaza de Mayo*, who regularly demanded far more prosecutions, especially because investigations had yielded considerable incriminating evidence.³⁰⁹ Popular pressure led Alfonsín to take steps that he otherwise might not have taken, such as increasing the number of prosecutions, creating a national investigatory commission on the disappeared, and seeking the extradition of several defendants who had fled abroad.³¹⁰ Thus, the progress of human rights was largely the product of a grassroots process where common people had organized themselves to persuade the government to broaden its human rights agenda.

The prosecutions led the rule of law to progress in Argentina. First, there was a general social consensus that the way to address the abuses of the Dirty War was through the courts. Whereas past governments and opposition groups had commonly organized violent punitive expeditions against each other; Argentina had abandoned vigilantism to become the first Latin American country where mass human rights violators were

303. *Id.* at 47.

304. *Id.* at 48.

305. LEWIS, *supra* note 1, at 157.

306. *Id.* at 157-58.

307. *Id.* at 159.

308. *Id.*

309. *Id.* at 156-57, 159.

310. BRYSK, *supra* note 235, at 155.

prosecuted.³¹¹ Second, the Alfonsín administration defended its position with logical constitutional arguments, unlike past regimes that hardly tried to find legal justifications for their actions.³¹² Third, the public's adamant support for the prosecutions reflected a growing popular consciousness that a government's power is limited by people's fundamental rights, and that a government is legally accountable to its people.³¹³ Argentines had a sense that the junta had violated its legal duty to respect basic human rights and that the Alfonsín administration had a duty to prosecute these abuses.

In sum, constitutionalism and the rule of law came to life during the democratic transition of 1983 to 1989. These developments were followed by lawful shift in power when Alfonsín stepped down in 1989 in order to allow Menem to assume the presidency after his election.³¹⁴ This marked the first time since 1916 that rival political parties had peacefully exchanged control of the government,³¹⁵ and the first time since 1930 that a democratic government had completed its term without being overthrown.³¹⁶ In 1989, democracy had survived three failed military uprisings and inflation skyrocketing at five thousand percent.³¹⁷ However, insofar as the constitution had been invigorated under Alfonsín, it would be largely devitalized by Menem.

VI. 1989-2003: THE RETURN OF PRESIDENTIAL OMNIPOTENCE

Hyperpresidentialism, contempt for the rule of law, and the political culture of hegemony returned with a vengeance during the presidency of Carlos Menem (1989-99). The Peronists controlled the executive, held a majority in Congress, and packed the courts with supporters.³¹⁸ This made Menem omnipotent, especially given that the Radical Party's opposition had weakened considerably. First, Menem's agenda differed vastly from that of the far more moderate Raúl Alfonsín, the outgoing president, as Menem had no qualms about resorting to electoral fraud and

311. NINO, TRIAL, *supra* note 3, at 186.

312. *Id.* at 65-66.

313. *Id.*

314. LEWIS, *supra* note 1, at 165.

315. *Id.*

316. NINO, TRIAL, *supra* note 3, at 66.

317. BRYSK, *supra* note 235, at 165.

318. *See generally* CHAVÉZ, *supra* note 8, at 33-34.

court-packing in order to maximize his power.³¹⁹ Second, Menem used his expansive powers to implement a series of radical neoliberal economic reforms, which ultimately proved unsuccessful and contributed to an acute economic recession that pauperized millions of Argentines, especially among the working class.³²⁰ Third, the economic crisis substantially worsened between 1999 and 2001, which led to mass public protests.³²¹ Many workers protested against their pauperization and the neoliberals' dismantlement of the welfare state, which the workers denigrated as an assault on the social contract of a formerly relatively egalitarian socialist society.³²²

A. *Electoral Fraud and Court-Packing*

Menem's rule was largely marked by a series of events that illustrated his desire to maximize his presidential power at the expense of democracy, constitutionalism, and the rule of law. In 1994, Menem managed to amend the constitution to be eligible for reelection,³²³ thereby eliminating one of the few effective constitutional restraints on presidential power (the constitution had long barred successive presidential terms by requiring an interval of one term of ineligibility for office before a re-election).³²⁴ The amendment allowing a president to be reelected was the product of negotiation, as Menem and the Peronists lacked the two-thirds of both congressional chambers needed for an amendment.³²⁵ Paradoxically, Alfonsín and the Radicals agreed to support the reelection amendment so long as a rider was included to allow new controls on executive power.³²⁶ While the amendments led to Menem's reelection in 1995, Menem ignored the new constitutional checks on his power.³²⁷ For instance, the amendments had raised the Senate confirmation of presidential Supreme Court nominees from a majority vote to a two-thirds vote.³²⁸ But the Per-

319. See Walker, *supra* note 246, at 783-84.

320. See JOZAMI, *supra* note 209, at 21-22.

321. See MAURICIO ROJAS, *HISTORIA DE LA CRISIS ARGENTINA* 106-10 (2004).

322. See *id.*

323. See, e.g., CHAVÉZ, *supra* note 8, at 30; JOZAMI, *supra* note 209, at 237.

324. See CONST. ARG. art. 77 (1993), available at http://www.cervantesvirtual.com/servlet/SirveObras/01476288877136539754480/p0000001.htm#I_1_; CONST. ARG. art. 74 (1853), available at http://www.cervantesvirtual.com/servlet/SirveObras/06921841222858395209079/p0000001.htm#I_1_.

325. See, e.g., CHAVÉZ, *supra* note 8, at 30; JOZAMI, *supra* note 209, at 237.

326. CHAVÉZ, *supra* note 8, at 30.

327. *Id.*

328. *Id.*

onists rushed a vote to confirm Menem's nominees before newly-elected Radical senators could take office.³²⁹ This act was a violation of a statute requiring that judicial nominations be open to citizen consideration for seven days.³³⁰

In addition, because Menem did not want his policies to be disallowed by the independent Supreme Court that he had inherited from Alfonsín,³³¹ Menem decided to pack the court with cronies, which he accomplished primarily through improper and fraudulent means.³³² Menem initially forced the Chief Justice to resign by threatening him with impeachment.³³³ When the other judges refused to resign, Menem decided to pack the Supreme Court with partisans by increasing its membership from five to nine judges (similar to what Franklin Roosevelt had tried to do in the United States in the 1930s).³³⁴ The law expanding the size of the Supreme Court was enacted in a secret vote, which the Peronist legislators had staged before dawn in the absence of opposing legislators, while impostors attended the session to fulfill quorum requirements.³³⁵ Some nominees were also hurriedly confirmed by the Senate during secret sessions where Radical senators were absent.³³⁶

Menem's Supreme Court appointees were virtually all cronies with dubious qualifications.³³⁷ Nine of the ten justices Menem appointed had close ties to him or the Peronist Party.³³⁸ Forgetting the sovereign constitution and the people of Argentina, one appointee stated: "My only bosses are Perón and Menem."³³⁹ Another declared: "When there is a case against the government, I do not rule against the administration."³⁴⁰ The Supreme Court gave Menem *carte blanche* to govern through the use of Decrees of Necessity and Urgency (DNU) to an unprecedented degree of

329. *Id.* at 35-36.

330. *Id.*

331. Walker, *supra* note 246, at 784-85.

332. See, e.g., CHAVÉZ, *supra* note 8, at 33-34; Walker, *supra* note 246, at 784-85.

333. Walker, *supra* note 246, at 784.

334. *Id.* at 784-85.

335. CHAVÉZ, *supra* note 8, at 42.

336. *Id.* at 34.

337. See *id.* at 33.

338. See *id.* at 37 tbl.2.1.

339. *Id.* (quoting Rodolfo Barra, former Justice Minister of Argentina, in a 1993 radio interview).

340. *Id.* at 36 (quoting Adolfo Vazquez, former Argentine Supreme Court Justice, in a September 1997 television appearance on *Hora Clave*, an Argentine television program).

excessiveness.³⁴¹ While only twenty DNUs were issued by democratic governments between 1853 and 1983, and ten were issued by Alfonsín between 1983 and 1988, Menem issued 401 DNUs between 1989 and 1993 alone.³⁴²

The Supreme Court's subservience to the Menem administration was exemplified in 1993 by the "stolen decision" scandal.³⁴³ After the Supreme Court ordered the Central Bank to pay \$100,000 in attorneys' fees to a firm that had helped liquidate a bank, the Minister of the Economy found the fee excessive and told the Chief Justice to fix the problem.³⁴⁴ A law clerk subsequently removed the old decision and replaced it with a separate decision more favorable to the Menem administration.³⁴⁵ Even though the "stolen decision" was ultimately reinstated after the Court's minority publicly objected, this episode greatly undermined public trust in the Supreme Court.³⁴⁶ Overall, polls suggested that Menem's schemes severely decreased the Argentine public's confidence in the judiciary, and consequently decreased the public's confidence in the import of the law.³⁴⁷ While forty-five to fifty-five percent of Argentines had confidence in the judiciary under Alfonsín, public distrust in this institution sharply increased under Menem, as a stark ninety-two percent of Argentines had little to no confidence in the judiciary by 1997.³⁴⁸

B. The Failure of Neoliberal Economic Reforms and the Pauperization of the Working Class

Menem's court-packing scheme had important implications in light of his far-reaching neoliberal economic reforms. Neoliberal economists believed that the Argentine government's excessive intervention in the national economy was the main cause of the country's economic woes, and that deregulating the economy and slashing public spending were necessary.³⁴⁹ Menem effectively tested the validity of this theory by instituting radical neoliberal

341. Walker, *supra* note 246, at 786-87.

342. *Id.* at 787.

343. *Id.* at 785-86.

344. *Id.*

345. *Id.*

346. *Id.* at 786.

347. Jonathan M. Miller, *Evaluating the Argentine Supreme Court Under Presidents Alfonsín and Menem (1983-1999)*, 7 SW. J.L. & TRADE AM. 369, 372-73 (2000).

348. *Id.*

349. *See, e.g.,* ROJAS, *supra* note 321, at 115.

reforms that quickly privatized nearly all government monopolies, including oil companies, telecommunication firms, power plants, airlines, and postal services.³⁵⁰ Menem also slashed public spending, notably for social assistance programs.³⁵¹ While Menem belonged to the Peronist Party, he actually sought to dismantle the welfare state and state-run economy originally created by Perón. By packing the Supreme Court with supporters, Menem guaranteed that the judiciary would acquiesce to his radical economic reforms.³⁵² For instance, Raúl Granillo Ocampo, Menem's Justice Minister, openly acknowledged this ploy, stating: "If the Court were to have a vision completely different from ours and to declare our laws unconstitutional, we could not implement our political and economic plans."³⁵³

Investigations revealed that Menem's privatization scheme was rife with widespread corruption, as tycoons had bribed politicians to purchase national companies far below market value.³⁵⁴ Regardless of the economic merits of privatization, corruption delegitimized the process in the eyes of numerous Argentines.³⁵⁵ Other scandals aggravated Menem's image, such as the discovery that Argentina was unlawfully involved in the international arms traffic.³⁵⁶ But Menem packed the lower criminal courts with pliant judges who would absolve functionaries and fail to aggressively investigate corruption allegations.³⁵⁷

Menem similarly managed to tone down protests against his reforms by bribing and co-opting union leaders.³⁵⁸ Menem also took an uncompromising attitude against unions' demands, reminiscent of the stances that Ronald Reagan and Margaret Thatcher had respectively assumed against air traffic controllers and miners.³⁵⁹ Within two years, Menem rendered Argentina's historically strong labor movement almost powerless, as strikes plummeted.³⁶⁰

Menem's economic plan initially led to economic prosperity by

350. *See id.* at 97-99, 102-03.

351. LEWIS, *supra* note 1, at 171-72, 175-76.

352. CHAVÉZ, *supra* note 8, at 33-34.

353. *Id.* at 33 (quoting Raul Granillo Ocampo, former Justice Minister of Argentina).

354. ROJAS, *supra* note 321, at 104.

355. *Id.* at 104.

356. *Id.*

357. CHAVÉZ, *supra* note 8, at 42.

358. JOZAMI, *supra* note 209, at 257.

359. ROJAS, *supra* note 321, at 99.

360. *Id.*

boosting the economy's growth rate³⁶¹ and by controlling inflation through the convertibility of the dollar and the peso.³⁶² However, the reforms had significant social costs. Between 1989 and 1993, privatization led to the elimination of over 302,000 public sector jobs nationwide.³⁶³ Private companies were also constrained to lay off workers because tariff reductions caused them to lose market shares to foreign imports.³⁶⁴ The unemployment rate rose from 6.9% in 1991 to an alarming 18.6% in 1995.³⁶⁵ Additionally, eleven percent of the workforce was underemployed in precarious part-time jobs.³⁶⁶ Meanwhile, Menem slashed funding for government assistance programs.³⁶⁷ The gap between the rich and the poor substantially increased and the poverty rate eventually escalated to thirty-five percent by 2001.³⁶⁸

In the end, Menem's neoliberal economic reforms failed catastrophically. An acute economic recession started in 1998, partly because the peso to dollar convertibility policy had led the peso to be overvalued.³⁶⁹ The dismal economic situation gradually worsened, becoming insufferable to most Argentines, thereby leading to mass protests against the government.³⁷⁰

C. *Mass Protests and the Changing Social Contract*

In 1999, Fernando De la Rúa was elected president after vowing to help those harmed by the recession and the state's budget cuts.³⁷¹ De la Rúa ran on the ticket of the Alliance for Jobs, Justice, and Education, a coalition of the Radical Party and the Frepaso Party (*Frente por un País Solidario* or Front for a Solidary Country).³⁷² Despite De la Rúa's campaign promises, unrelenting fiscal problems and pressure from the International Monetary Fund (IMF) led the government to institute an austerity program and cut government spending.³⁷³ By the end of 2001, the recession had only worsened and an additional 700,000 persons

361. *Id.* at 99-100.

362. *See id.* at 96, 98, 106-10.

363. LEWIS, *supra* note 1, at 171.

364. JOZAMI, *supra* note 209, at 21-22.

365. *Id.*

366. *Id.*

367. *Id.*

368. ROJAS, *supra* note 321, at 115.

369. *Id.* at 109.

370. *Id.*

371. LEWIS, *supra* note 1, at 180-81.

372. *Id.* at 179-80.

373. *Id.* at 182.

were unemployed.³⁷⁴ The national census determined that fifteen million out of Argentina's thirty-seven million inhabitants lived in poverty.³⁷⁵ Further, after the economic collapse and mistrust in the state financial system led Argentines to withdraw fifteen million dollars from bank accounts between July and November 2001, De la Rúa decided to limit such withdrawals to one thousand dollars per month, which proved to be an immensely unpopular measure.³⁷⁶

By December 2001, the Argentine public was exasperated by the lasting economic crisis and the persistent pauperization of the masses, which led to mass protests against the government that eventually spiraled into wide scale riots and fights with the police.³⁷⁷ Numerous supermarkets were ransacked by mobs of hungry people.³⁷⁸ On December 18, 2001, De la Rúa announced a state of emergency.³⁷⁹ But minutes after the discourse ended, the streets of Buenos Aires were filled by the pandemonium of thousands of people from all social classes banging pot pans and demanding an end to his government.³⁸⁰ De la Rúa dispatched the police to charge demonstrators, thereby exacerbating his unpopularity.³⁸¹ On December 20, militants from left-wing political parties, human rights groups, and trade unions fought with the police.³⁸² Even college and high school students participated.³⁸³ Although the police mainly used tear gas and rubber bullets, they occasionally fired live rounds.³⁸⁴ On December 21, De la Rúa was forced to resign.³⁸⁵ The week of fighting caused thirty-three deaths, over one thousand injured, and thousands of arrests.³⁸⁶

De la Rúa's downfall before the end of his term may support the aforesaid theory that hyperpresidentialism leads many Argentines to believe that changing the omnipotent president is the key to changing government policy if he fails to resolve a severe eco-

374. JOZAMI, *supra* note 209, at 21-22.

375. *Id.*

376. Walker, *supra* note 246, at 796-97.

377. *See, e.g.*, JOZAMI, *supra* note 209, at 34-46; Walker, *supra* note 246, at 796-97.

378. JOZAMI, *supra* note 209, at 40.

379. *Id.* at 46.

380. *Id.*

381. *Id.* at 47.

382. *Id.*

383. *Id.* at 48.

384. *Id.*

385. *Id.*

386. *Id.*

conomic crisis.³⁸⁷ Alfonsín also stepped down before his term ended because he wholly lost public support due to his inability to resolve an economic crisis.³⁸⁸ The forced resignations of Alfonsín and De la Rúa demonstrated Argentina's persistent political instability. Even though military intervention has not reoccurred since the return of democracy in 1983, instability may persist if the public believes that forcing unpopular presidents to step down before the end of their terms is the only meaningful way to achieve change in Argentina's rigid hyperpresidential system.

Nevertheless, Alfonsín and De la Rúa's resignations also differed from the military takeovers of past years. While the military coups had interrupted democracy altogether, the willingness of these two presidents to step down might be interpreted as a sign of progress and democratization. After all, Alfonsín and De la Rúa were not forcibly removed from office. They voluntarily stepped down, albeit reluctantly, under intense public pressure, as they technically could have held onto power until the ends of their terms. Alfonsín and De la Rúa realized the public's desire for a change of government and the need for them to let a candidate from the opposition assume the presidency.

Moreover, the mass public protests that led to De la Rúa's resignation in December 2001 stemmed from rising tensions over Argentina's social contract. The gradual worsening of the Argentine economy since the 1970s marked the decline of what formerly had been a predominantly middle-class society.³⁸⁹ Whereas approximately ten percent of Argentines lived below the poverty line in 1950, the number had risen dramatically to forty-five percent in 2005.³⁹⁰ This author's impression is that, in the eyes of numerous Argentine workers,³⁹¹ the legitimacy of the new social order was measured against the legitimacy of the social contract

387. See *supra* Part IV.B.

388. See LEWIS, *supra* note 1, at 164-65; NINO, CONSTITUTION, *supra* note 33, at 178.

389. Sao Bernardo do Campo, *Latin America's Middle Class: Adiós to Poverty, Hola to Consumption*, ECONOMIST, August 18, 2007, at 31.

390. Carlos Escudé, *From Captive to Failed State: Argentina Under Systemic Populism: 1975-2006*, 30 FLETCHER F. WORLD AFF. 125, 125 (Summer 2006).

391. These observations are based on an in-depth research project on the Argentine working class and the "piquetero movement," which this author participated in while attending law school. See *infra* notes 412-15 and accompanying text. The research included a trip to Argentina, where the author personally interviewed Argentine lawyers, scholars, workers, and piqueteros. See Amy Boyd, Timothy Gallagher, Mugambi Jouet & Jennifer Lee, *The Piquetero Movement: A Grassroots Response to the Argentine Social and Economic Crisis* (2006) (unpublished manuscript, on file with author).

of traditional Peronism. After Perón's social and economic reforms had uplifted the working class, many workers resisted neoliberal economic reforms that they perceived as a regression towards less social equality and the pauperization of the working class, which was one of the reasons behind the mass protests of December 2001.

While the working class was drastically impoverished as a result of the recession brought about by the economic crisis under Menem and De la Rúa, the impoverishment of the common man in Argentina also happened gradually over previous decades due to the relentless looting of the nation's wealth by an elite of private creditors, contractors, and industrialists.³⁹² This elite collaborated with politicians to control the Argentine economy and embezzle millions of dollars through a host of schemes, including fraudulent contracts, lopsided deals that were very favorable to private firms but disadvantageous to the state, and the government's sale of its assets to private firms at prices far below market value.³⁹³ The economy continued to rely on such practices under Menem, who arranged transactions that were extremely favorable to the economic elite in order to persuade the latter to support his radical privatization reforms.³⁹⁴ As a result of this corruption, as well as the acute economic crisis that occurred under Menem and De la Rúa, the economic elite became richer and the working class became poorer.³⁹⁵ Accordingly, it was relatively predictable that mass protests would arise once the working class's living conditions deteriorated to an unsustainable level, as was the case in December 2001.

The mass protests of December 2001 were also caused by dissatisfaction with democracy itself, which had ultimately failed to deliver greater social justice to the masses in nearly two decades since the democratic transition of 1983.³⁹⁶ Frustration with democracy is not unique to Argentina, as every country in Latin America had an elected government by 1990,³⁹⁷ although the masses still suffer due to persistent poverty and stark social ine-

392. See generally Escudé, *supra* note 390, at 125-41.

393. *Id.*

394. See, e.g., *id.* at 135-37; ROJAS, *supra* note 321, at 102-05.

395. See generally Escudé, *supra* note 390, at 125-41.

396. NOVARO & PALERMO, *supra* note 143, at 14-15.

397. Scott Mainwaring, Guillermo O'Donnell & J. Samuel Valenzuela, *Introduction to ISSUES IN DEMOCRATIC CONSOLIDATION: THE NEW SOUTH AMERICAN DEMOCRACIES IN COMPARATIVE PERSPECTIVE* 6 (1992).

qualities.³⁹⁸ As noted by Guillermo O'Donnell, "[i]n a sense, the authoritarian period was easier than the current situation. We knew then why and against whom we were fighting. . . . Now we must find an answer to the question of how to make a democratic critique of democracy—particularly when this democracy is so incomplete."³⁹⁹ The reality is that elections alone have not improved the harsh socio-economic situation of millions of people. In Argentina, the disastrous failure of Menem and De la Rúa's economic policies reinvigorated popular support for a return to traditional populism.

VII. 2003-07: THE RECRUDESCENCE OF POPULISM

President De la Rúa's forced resignation in December 2001 was the beginning of a phase of heightened instability that lasted until May 2003. "Protests and public pressure removed three interim presidents from office in less than a month—Federico Ramón Puerta, Adolfo Rodríguez Saá, and Eduardo Oscar Camaño. In January 2002, Congress followed constitutional procedures and chose Eduardo Duhalde, the runner-up in the 1999 presidential election from the Peronist Party, as the interim president."⁴⁰⁰ Duhalde failed to improve the economy and stop the pauperization of the working class, which caused more public protests.⁴⁰¹ In June 2002, public pressure led Duhalde to announce that he would step down in May 2003, before the end of his term, following the conclusion of the next presidential election.⁴⁰²

Nestor Kirchner became president by default in May 2003 after winning a run-off election against Menem, who withdrew because a Kirchner landslide was expected.⁴⁰³ Both candidates were nominally members of the Peronist Party, although their political views and objectives were very different.⁴⁰⁴ While Menem was the leader of the party's reformist neoliberal wing, Kirchner is generally considered as the first true populist to rule the country

398. *Id.* at 8-9.

399. *Id.* at 18.

400. Walker, *supra* note 246, at 797.

401. *Id.*

402. *Id.* at 797-98.

403. *Kirchner: President by Default, Stiff Test*, B.B.C. NEWS, May 15, 2003, <http://news.bbc.co.uk/2/hi/americas/2981797.stm> (last visited June 21, 2008).

404. Peronism is hard to categorize along the left-right political spectrum, thereby explaining why ideological adversaries like Menem and Kirchner both identify themselves as Peronists. See, e.g., Larry Rohter, *Peronist Party Losing Its Grip on Argentine Politics*, N.Y. TIMES, Feb. 9, 2003, at A12.

since Perón.⁴⁰⁵ After taking office, Kirchner mastered the Peronists' knack for rallying broad popular support and riding high approval ratings,⁴⁰⁶ while maximizing presidential power at the expense of the rule of law.⁴⁰⁷

Kirchner's popularity has been largely attributable to the improving economy, as the economic crisis abated in 2003.⁴⁰⁸ Proving neoliberal economists wrong, at least in part, the economy prospered under Kirchner, even though he increased the government's role in the economy and spending for social assistance programs.⁴⁰⁹ By 2007, approximately forty percent of Argentine families had a monthly income of one thousand dollars, which is necessary for a middle-class lifestyle, up from twenty percent in 2003.⁴¹⁰ On the other hand, the gap between the rich and the poor had increased, and numerous underprivileged persons continued

405. See, e.g., Jorge G. Castaneda, *Good Neighbor Policy*, N.Y. TIMES, May 4, 2006, at A31. The perceived failure of neoliberal economic policies to uplift the poor has also favored the election of socialist or leftist populist governments in Bolivia, Brazil, Chile, Ecuador, Uruguay, and Venezuela. *Ecuador: Latest Leftist President Takes Office*, N.Y. TIMES, Jan. 16, 2007, at A4; Larry Rohter, *Brazil's President Roars Back to Win Vote*, N.Y. TIMES, October 30, 2006, at A6; Juan Forero, *Populist Movements Wrest Much of Latin America from Old Parties*, N.Y. TIMES, April 20, 2006, at A8; Larry Rohter, *Chile Inaugurates First Woman to Serve as Its President*, N.Y. TIMES, March 12, 2006, A16; Larry Rohter, *With New Chief, Uruguay Veers Left, in a Latin Pattern*, N.Y. TIMES, Mar. 1, 2005, at A3. Further, in the highly contentious Mexican presidential election of July 2006, populist candidate Andrés Manuel López Obrador narrowly lost to conservative candidate Felipe Calderón. James C. McKinley, Jr., *Election Ruling in Mexico Goes to Conservative*, N.Y. TIMES, Sep. 6, 2006, at A1.

In addition, Hugo Chavez, the Venezuelan president, has tried to rally other Latin American countries to join Venezuela in forming a political block with an anti-United States, "anti-imperialist," and leftist agenda. See, e.g., *Hugo Chávez Moves Into Banking*, ECONOMIST, May 10, 2007, at 39. Following his presidential election, Kirchner favored Argentina's rapprochement with Venezuela and Chávez, and distanced Argentina from the United States. Larry Rohter, *As Argentina's Debt Swindles, President's Power Steadily Grows*, N.Y. TIMES, Jan. 3, 2006, at A1.

406. See, e.g., Alexei Barrionuevo, *Cash-Stuffed Suitcase Splits Argentina and Venezuela*, N.Y. TIMES, Aug. 14, 2007, at A3; Monte Reel, *In Argentina, They've Got a Beef*, WASH. POST, Mar. 20, 2006, available at 2006 WLNR 4606147.

407. Rohter, *supra* note 405.

408. Alberto Souviron, *Fresh Hope After Argentine Crisis*, B.B.C. NEWS, Dec. 20, 2004, <http://news.bbc.co.uk/1/hi/business/4084779.stm> (last visited June 21, 2008).

409. *Id.*; Larry Rohter, *For Argentina's Sizzling Economy, a Cap on Steak Prices*, N.Y. TIMES, Apr. 3, 2006, at A3. Kirchner adopted a confrontational approach in dealing with the International Monetary Fund, which many Argentines perceived as largely responsible for the economic crisis, as the IMF had supported neoliberal economic reforms and cuts on public spending. Larry Rohter, *Argentina Announces Deal on Its Debt Default*, N.Y. TIMES, Mar. 4, 2005, at C3.

410. Campo, *supra* note 389.

to live in marginalized slums.⁴¹¹

Many workers have sought to resist their pauperization and marginalization by becoming involved in what is known as the *piquetero* (picketeer) grassroots movement, which grew out of Argentina's history of working class militancy and activism.⁴¹² The movement is principally made up of workers, who became utterly indigent after the economic crisis caused them to lose their jobs, and Menem's dismantlement of the welfare state left them without a viable safety net.⁴¹³ Workers protest by demanding jobs, an increase in public spending for social welfare, and social justice.⁴¹⁴ Their most effective and controversial means of protest is to peacefully blockade roads nationwide to prevent companies from trading merchandise and people from commuting, thereby hampering the economy and the everyday lives of their fellow citizens in an effort to press the government into acceding to their demands.⁴¹⁵

The *piqueteros'* protests escalated as the economic crisis intensified. While only fifty blockades were recorded between 1989 and 1996, 104 blockades occurred in 1997.⁴¹⁶ In 1998, an average of four blockades occurred every month.⁴¹⁷ In 1999, blockades increased to twenty-one per month.⁴¹⁸ In 2000, there was at least one blockade per day.⁴¹⁹ In 2001, the overall number of blockades tripled.⁴²⁰

Pickets technically are illegal, as Argentine penal law prohibits road blockades.⁴²¹ State repression of the *piqueteros'* blockades was relatively intense under the Menem and De la Rúa administrations, which arrested and prosecuted several hundreds of

411. Larry Rohter, *A Widening Gap Erodes Argentina's Egalitarian Image*, N.Y. TIMES, Dec. 25, 2006, at A3.

412. Observations on the "piquetero movement" are based largely on an in-depth study conducted by the author. See *supra* note 391.

413. See Jouet et al., *supra* note 391, at 3 (citing Interview with Astor Massetti, Researcher and Ph.D. candidate, Instituto de Investigaciones Grino Germani, Universidad de Buenos Aires, in Buenos Aires, Arg. (Mar. 13, 2006)). See generally CENTRO DE ESTUDIOS LEGALES Y SOCIALES, *EL ESTADO FRENTE A LA PROTESTA SOCIAL: 1996-2002* (2003); ASTOR MASSETTI, *PIQUETEROS: PROTESTA SOCIAL E IDENTIDAD COLECTIVA* (2004); ARTURO EMILIO SALA, *LA RESISTENCIA SEMINAL: DE LAS REBELIONES NATIVAS Y EL MALÓN DE LA PAZ A LOS MOVIMIENTOS PIQUETEROS* (2005).

414. See Jouet et al., *supra* note 391.

415. See *id.*

416. CENTRO DE ESTUDIOS LEGALES Y SOCIALES, *supra* note 413, at 23.

417. *Id.* at 24.

418. *Id.*

419. *Id.*

420. *Id.*

421. See ARG. CÓD. PEN art. 194.

piqueteros.⁴²² Due to their excessive use of force, the police killed dozens of protestors and injured many more.⁴²³ Nevertheless, only a small proportion of all picketers were arrested, as the authorities did not significantly inhibit the blockades, which substantially increased between 1996 and 2002.⁴²⁴

A possible reason why the state refrained from a wholesale crackdown on the piquetero movement may be that, after decades of repression culminated in the rampant atrocities of the Dirty War, Argentines no longer tolerate gratuitous state violence. For instance, on June 26, 2002, police officers killed two young piqueteros in an apparently premeditated manner.⁴²⁵ This incident was relatively minor next to the widespread state violence of years past, yet it led to a backlash against the government, as all sectors of society, including the middle class, participated in mass protests condemning the killings of these two piqueteros.⁴²⁶ Modern-day Argentines' lack of tolerance for state violence is also evidenced by President De la Rúa's forced resignation in December 2001 after he violently repressed peaceful demonstrators.⁴²⁷

State repression of the piqueteros eventually gave way to negotiation and cooption. The piquetero movement emerged from the grassroots and without any political party affiliation.⁴²⁸ But politicians eventually realized that they could win many votes by catering to the piqueteros and the millions of people who suffered due to the economic crisis.⁴²⁹ In particular, President Kirchner mostly abandoned repression in favor of restoring the welfare state in exchange for political support.⁴³⁰ Blockades significantly decreased after Kirchner was elected, largely because Kirchner was able to add many piqueteros to his political base by resorting to political clientelism reminiscent of Perón's days – the government does favors for loyal piqueteros, who are in turn expected to support Kirchner.⁴³¹ Indeed, numerous piquetero groups have drastically decreased the frequency of their blockades after Kirch-

422. See CENTRO DE ESTUDIOS LEGALES Y SOCIALES, *supra* note 413, at 48-50, 120-72.

423. See *id.* at 120-72; JOZAMI, *supra* note 209, at 49.

424. CENTRO DE ESTUDIOS LEGALES Y SOCIALES, *supra* note 413, at 23-25.

425. JOZAMI, *supra* note 209, at 81.

426. *Id.*

427. See *supra* notes 377-86 and accompanying text.

428. Jouet et al., *supra* note 391, at 27.

429. *Id.*

430. *Id.*

431. *Id.* at 28 (citing Interview with Laura Cibelli, Coordinator, Movimiento de Unidad Popular (prominent piquetero organization), in Buenos Aires, Arg. (Mar. 16,

ner conceded to increase public subsidies like unemployment benefits, housing vouchers, food, and clothes for the poor.⁴³² In turn, piqueteros have toned down their blockades and generally agreed to back Kirchner and vote Peronist in all elections.⁴³³ The most loyal piquetero groups also stage pro-Kirchner political demonstrations.⁴³⁴

As piquetero groups have divided into pro-Kirchner and independent camps,⁴³⁵ Kirchner has condoned the blockades conducted by supportive piquetero groups while criticizing the blockades of non-subservient groups.⁴³⁶ Kirchner has further relied on a notorious spoils system where loyal piqueteros are rewarded while opponents are punished. In 2004, he fulfilled his promise to appoint supportive piquetero leaders to government posts.⁴³⁷ Notably, in February 2006, Luis D'Elía, a former congressman and pro-Kirchner piquetero militant, was appointed to a senior post in the Ministry of Planning.⁴³⁸ D'Elía is a controversial character who notoriously led a group of piqueteros who stormed and occupied a police station in Buenos Aires.⁴³⁹ Kirchner assigned D'Elía to the creation of programs to facilitate the access of poor people to housing.⁴⁴⁰ Kirchner also appointed other loyal piquetero leaders to government posts.⁴⁴¹ Conversely, Kirchner sought to repress Raúl Castells, a political adversary who leads the recalcitrant piquetero group known as the Independent Movement for Pensioners and the Unemployed.⁴⁴² In an apparent case of politically-motivated selective prosecution, Castells was charged with extortion for leading a mob of allegedly hungry peo-

2006); Interview with Astor Massetti, *supra* note 413; Interview with Manuela Parra, Sociologist, University of Buenos Aires, in Buenos Aires, Arg. (Mar. 15, 2006)).

432. *Id.* at 28 (citing Interview with Luciano Alvarez, Coordinator of Los Pibes Community Group (prominent piquetero organization), in Buenos Aires, Arg. (Mar. 15, 2006); Interview with Laura Cibelli, *supra* note 431).

433. *Id.*

434. *Id.*

435. See, e.g., *Pickets Angry at Kirchner's Criticism*, BUENOS AIRES HERALD, May 25, 2005; Jouet et al., *supra* note 391, at 33 (citing Interview with Astor Massetti, *supra* note 413).

436. *Pickets Angry at Kirchner's Criticism*, *supra* note 435.

437. *Id.*; see also *Finalmente Designaron a D'Elía y Hoy Asume como Subsecretario de Tierras*, CLARIN, Feb. 22, 2006, <http://www.clarin.com/diario/2006/02/22/elpais/p-00901.htm> [hereinafter *Finalmente*] (last visited June 21, 2008).

438. *Finalmente*, *supra* note 437.

439. *Id.*

440. *Id.*

441. *Id.*

442. PROSECUTOR DROPS CHARGES AGAINST CASTELLS, BUENOS AIRES HERALD, Apr. 5, 2006.

ple into a McDonald's in order to demand food.⁴⁴³ The prosecution was nonetheless forced to drop the charges midway through trial after witnesses changed their stories.⁴⁴⁴

Kirchner may have further undermined the independence of the piquetero movement by administering government assistance programs through piquetero community centers. These centers are the hub of piquetero social activism, where piqueteros plan their protests and agendas, and stage a host of activities, including job training, academic tutoring for children, political seminars, movie screenings, and art shows.⁴⁴⁵ All of these activities aim to foster the growth and unity of the piquetero movement, as well as instill a social and political consciousness of a radical leftist bent, which demands a socialist welfare state and virulently opposes neoliberal economic policies.⁴⁴⁶ The piquetero community centers are also responsible for distributing food, clothes, and other public subsidies on the government's behalf.⁴⁴⁷ This arrangement enabled the Kirchner administration to sanction independent piquetero groups by depriving them of these subsidies, diminishing the influence of these groups due to the loss of their adherents, some of whom only frequent piquetero community centers in order to receive food and other important subsidies.⁴⁴⁸ Perón had used a similar scheme to drastically weaken independent labor unions, whose members defected to government-approved unions that were uniquely eligible for wage increases and other public benefits.⁴⁴⁹

Whereas the piquetero movement started as an anti-government and anti-establishment grassroots opposition movement, it was largely co-opted into Kirchner's political machine. Even though Kirchner is not the repressive autocrat that Perón was, he hindered the progress of democratic transparency in Argentina by continuing to rely on political clientelism to consolidate presidential power.

Overall, hyperpresidentialism did not abate under Kirchner.

443. *Id.*

444. *Id.*

445. On March 15, 2006, the author visited the Pibes Community Center, a piquetero organization located in the working class area of La Boca in Buenos Aires, as part of a research project on the piquetero movement. *See supra* note 391.

446. *Id.*

447. *Id.*

448. Jouet et al., *supra* note 391, at 34 (*citing* Interview with Manuela Parra, *supra* note 431).

449. LEWIS, *supra* note 1, at 100-01.

Aside from the expansive presidential powers granted by the constitution formerly amended by Menem, Kirchner's popularity gave him leeway to govern with a strong hand, and his patronage of many piquetero organizations co-opted much of the political opposition. The other branches of government could hardly serve as counter-powers because pro-Kirchner legislators held a majority in Congress⁴⁵⁰ and Kirchner and the Peronists yet again hindered judicial independence, this time by placing a partisan majority on the Council of the Magistrature, the organ responsible for selecting and demoting Supreme Court judges.⁴⁵¹

Several corruption scandals also suggest that the Kirchner administration did not refrain from bribery in order to solidify its grip on Argentine society and enrich itself. For instance, a Swedish company involved in an Argentine gas pipeline project found evidence of improper payments by executives to Argentine officials.⁴⁵² Further, inspectors discovered \$64,000 in cash in the bathroom of the Minister of the Economy, which the opposition alleged must have been illegally acquired.⁴⁵³

Kirchner's sole contribution to advancing the rule of law in Argentina may have been his decision to support the resumption of the prosecution of the Dirty War's abuses.⁴⁵⁴ Since 1998, at least 175 repressors of the Dirty War have been charged in Argentina with gross human rights violations.⁴⁵⁵ Further, in 2003, the Argentine Congress repealed two amnesty laws promulgated in the 1980s.⁴⁵⁶ In 2007, the Supreme Court also unanimously invalidated presidential pardons that Menem had previously granted to two former military chiefs who had been convicted and received

450. Larry Rohter, *Vote Strengthens Kirchner's Hold on Congress*, N.Y. TIMES, Oct. 25, 2005, at A14.

451. Jorge Marirrodiga, *El Gobierno Argentino Refuerza El Control Sobre El Poder Judicial*, EL PAÍS, Feb. 22, 2006, at 8.

452. *Id.*

453. *Id.*

454. See, e.g., Larry Rohter, *On Coup's Anniversary, Argentines Vow 'Never Again'*, N.Y. TIMES, Mar. 25, 2006, at A3; Larry Rohter, *Argentine Ex-President Charged with Human Rights Abuses*, N.Y. TIMES, Jan. 13, 2007, at A3.

455. *Spain's Uncharted Foray into World Justice*, *supra* note 126; see also *Slaking a Thirst for Justice*, ECONOMIST, Apr. 14, 2007, at 40. The resumption of the prosecutions in Argentina was partly spurred by Spain's efforts to prosecute Argentine repressors in Spain under the principle of universal jurisdiction to prosecute gross human rights abuses. See generally Mugambi Jouet, *Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond*, 35 GA. J. INT'L & COMP. L. 495 (2007).

456. Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1127 (2004).

life sentences.⁴⁵⁷ This decision was partly based on the ground that gross human rights violations are ineligible for a presidential pardon.⁴⁵⁸ Unlike Menem, who used his presidential powers to favor impunity by pardoning individuals convicted of serious human rights violations,⁴⁵⁹ Kirchner supported the prosecutions and the public remembrance of the Dirty War's abuses, although this partly may have been in self-interest to increase his popularity,⁴⁶⁰ especially after witnessing how Menem's pardons proved highly unpopular.⁴⁶¹

Finally, Kirchner made a dubious arrangement that enabled him to effectively govern Argentina for over a decade by circumventing term limits. With presidential elections scheduled for October 2007, Kirchner decided not to seek reelection and instead have his wife, Cristina Fernández de Kirchner, run in his place.⁴⁶² Kirchner could have sought reelection since Menem's 1994 reforms to the Argentine Constitution permitted presidents to seek consecutive reelection at the end of their term without having to sit out a term.⁴⁶³ However, given his popularity, Kirchner expected that, after his wife's first term, he could be reelected to another term of his own, which would in turn enable her to ultimately seek reelection for another non-consecutive term of her own, thereby creating a "Kirchner dynasty" with four presidential terms totaling twelve years.⁴⁶⁴ This arrangement would enable Nestor Kirchner to maintain direct influence over the presidency during his wife's tenure. No one has yet achieved this feat,⁴⁶⁵ which would technically be lawful under the election laws. Yet, such a ploy would defeat the purpose behind term limits that aim to limit the influence a particular individual may have over the government, an especially wise safeguard in a hyper-presidential society like Argentina.

This ploy is likely to become reality, as Cristina Kirchner won

457. Jorge Marirrodiga, *Un Tribunal Argentino Declara Ilegal El Indulto a Dos Militares de La Dictadura*, EL PAÍS, Apr. 26, 2007, at 13.

458. *Id.*

459. LEWIS, *supra* note 1, at 180.

460. See sources cited *supra* note 456.

461. LEWIS, *supra* note 1, at 180.

462. *Mrs. Kirchner Steps Forward*, ECONOMIST, July 5, 2007, at 4.

463. See CONST. ARG. art. 90; see also *supra* Part VI.A. para. 1.

464. Larry Rohter, *Argentina Contemplates Shared Custody of Its Top Job*, N.Y. TIMES, Mar. 3, 2007, at A6.

465. *Id.*

the October 2007 presidential election by a wide margin.⁴⁶⁶ To be sure, "Cristina Kirchner is a powerful politician in her own right," as "she has long held national office, being a well-known senator when her husband was the governor of the remote Patagonian province of Santa Cruz."⁴⁶⁷ Nonetheless, like her husband, Cristina Kirchner has relied on political clientelism in order to enhance her popularity. For example, in the legislative elections of October 2005, Ms. Kirchner and her campaign opponent "gave out appliances such as refrigerators and washing machines, as well as checks for as much as 500 pesos, to buy the support of petty chieftains in the impoverished neighborhoods of greater Buenos Aires."⁴⁶⁸ Moreover, in August 2007, a businessman with dual Venezuelan and American citizenship, was caught by airport customs officials while trying to smuggle nearly \$800,000 in cash into Argentina just a week after the Argentine and Venezuelan governments signed debt and energy deals.⁴⁶⁹ The \$800,000 supposedly were an illegal contribution to the presidential campaign of Cristina Kirchner from the Venezuelan government and its president Hugo Chávez.⁴⁷⁰ While it is still too early to comprehensively evaluate Cristina Kirchner's presidency, it appears unlikely that it will change the status quo of pseudo-democracy in Argentina.

VIII. CONCLUSION

Since its promulgation in 1853, Argentina's Constitution has mostly been a dead letter. The constitution failed to advance the constitutional ideal of limited government power. This may chiefly be because the constitution was never given a chance to do so, as Argentina was essentially governed by corrupt and repressive leaders who did not accept checks and balances on their power. Coups became recurrent, occurring in 1930, 1943, 1955, 1966, and 1976. While military intervention interrupted demo-

466. Alexei Barrionuevo, *Economic Balancing Act for Argentina's Next Leader*, N.Y. TIMES, Nov. 1, 2007, at A8.

467. *Mrs. Kirchner Steps Forward*, *supra* note 463.

468. Escudé, *supra* note 390, at 142-43.

469. (extra space here to be deleted) Barrionuevo, *supra* note 406.

470. Simon Romero & Alexei Barrionuevo, *Suitcase of Cash Tangles U.S. and 2 Latin Nations in Intrigue*, N.Y. TIMES, Jan. 12, 2008, at A1. This incident ultimately led to an F.B.I. investigation and the conviction of several individuals residing in the United States on the ground that they had failed to register as foreign agents of the Venezuelan government. *Man Pleads Guilty in Smuggling Case*, N.Y. TIMES, Apr. 24, 2008, at A12; Alexei Barrionuevo, *Venezuelan Pleads Guilty in Cash Delivery*, N.Y. TIMES, Mar. 4, 2008, at A6.

cratic rule for vast stretches of time, even elected civilian governments were not democratic in practice and wholly lacked constitutional legitimacy. Indeed, save for Raúl Alfonsín's transitional government (1983-89), all regimes made a priority of achieving their political goals over respecting the legal limits on their power. In addition, Argentina's rigid hyper-presidential system may have contributed to instability and military coups due to its lack of capacity for adaptation in times of crisis.

Nevertheless, a return to military rule and authoritarianism is unlikely in the foreseeable future. Since the purges of the last military dictatorship, human rights rose in importance and a social consensus recognizes that sheer state violence and repression are unacceptable. But it remains to be seen whether Argentines will eventually hold their leaders more accountable for their customary corruption, fraud, and abuses of power.⁴⁷¹ Even though Argentina would benefit from formal constitutional reforms curtailing presidential power, hyperpresidentialism might gradually erode through the development of another social consensus recognizing that executive power must have reasonable limits. If so, Argentina might evolve from its current state of moderate populism into a social democracy akin to those of European welfare states, where constitutionalism and the rule of law are more substantive. In the alternative, Argentina might remain a pseudo-democracy where constitutionalism and the rule of law are virtually nonexistent.

471. Noteworthy, a backlash against the corruption of the Menem era has led most Argentines to condemn Menem as a corrupt "mafioso." JOZAMI, *supra* note 209, at 256. A poll also suggested that sixty percent of Argentines would never vote for Menem under any circumstances. *Carlos Menem*, B.B.C. NEWS, Apr. 28 2003, <http://news.bbc.co.uk/2/hi/americas/1376100.stm>.