

**A Spatial Theory of the Politically Independent Judiciary:
A Comparative Study of the United States and Argentina**

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Abstract:

This chapter specifies the institutional conditions for an autonomous judiciary. It seeks to address the question: When will judges act independently of elected officials? We argue that when the executive and legislative branches are united against the courts, the courts have few resources with which to defend an independent course. In contrast, when significant and sustained disagreements arise among elected officials – such as take place under divided government – judges have the ability to challenge the state and sustain an independent course, with little fear of political retribution. We provide evidence for our thesis by examining the course of the independent judiciary in two cases – the United States from 1800 through 2005 and Argentina from 1862 through 1999. In both cases, our approach provides insights into the waxing and waning of judicial autonomy.

The Political Role of Supreme Court in Argentina (matrix provided by Julio and Gretchen)

Our paper focuses on the question: How and when has the Argentine Supreme Court limited other political actors? Our paper highlights that a particular country can move from cell to cell during different periods of time.

| | | Activism in Rights Protection | |
|-------------------------------------|-----|--|---|
| | | Yes | No |
| Regulation of Political Competition | Yes | Arbiters, Activists Argentina (1862-1946) Argentina (1983-1989) Argentina (1997-1999) | Arbitres |
| | No | Activists | Captured Courts Argentina (1946-1983) Argentina (1989-1997) |

I. Introduction

When will judges act independently of elected officials? Although scholars agree that judicial autonomy is an essential condition for the rule of law in presidential systems, there is no consensus about the circumstances under which it occurs. In this article, we use positive political theory (PPT) to specify the institutional conditions for an independent judiciary.¹ In brief, we argue that when the executive and legislative branches are united against the courts, the courts have few resources with which to defend an independent course. In contrast, when significant and sustained disagreements arise among elected officials – such as take place under divided government – judges have the ability to challenge the state and sustain an independent course, with little fear of political retribution.²

We seek to demonstrate that a country’s position on the judicial autonomy continuum depends on more than “parchment barrier” guarantees of life tenure (or some other long term length), or protections against salary reduction. Informal practices that allow elected officials to control the courts often overshadow formal (constitutional) guarantees of judicial independence. Institutionalized subconstitutional practices can shape the incentive structure facing judges in such a way that make them less likely to oppose government policies. These subconstitutional practices can include withholding funds from the judiciary, imposing limitations on the jurisdiction of the courts, or more drastic measures such as removing judges and court packing. Unified government permits the president and Congress to employ these practices or to threaten to do so in order to subordinate the courts.³

For simplicity, we use the term “unified” government when the political branches have largely similar policy preferences and the term “divided” when this condition does not exist. Unified government can occur whenever the legislative and executive branches are controlled by a single relatively

1 Major works in positive political theory and the law include: Cohen and Spitzer 1994; Eskridge and Ferejohn 1992; Gely and Spiller 1990; Helmke 2005; McCubbins, Noll, and Weingast 1995; Iaryczower, Spiller, Tommasi 2002; Ríos-Figueroa 2007; and Staton 2006.

2 Bednar, Eskridge, and Ferejohn 2001 presents a related theory of the conditions for stable federal arrangements. Because judges often play a role in preserving federalism, it should not be surprising that similar factors underlie the stability of federal arrangements and an independent judiciary.

³ See Chavez 2004 for an in depth discussion of the relationship between informal practices and judicial autonomy.

homogeneous majority party, which is the typical case but is by no means a necessary condition for unified control. Instances of divided government or, perhaps more descriptively, political fragmentation, can arise in distinct ways. One way is the standard division of control over the executive and legislative branches by ideologically distinct parties or coalitions. Another way occurs when a majority party controls the political branches but that majority is ideologically heterogeneous. Fragmentation can also be maintained constitutionally, through the requirement of special majorities for certain kinds of legislation, such as constitutional amendments. In this chapter, because we consider only two empirical cases, we do not analyze these alternative modes of political fragmentation in a systematic way.

This chapter proceeds as follows. Section II develops our theory of the independent judiciary. In the following two sections, we provide evidence for our thesis by examining the course of the independent judiciary in two cases – the United States from 1800 through 2005 and Argentina from 1862 through 1999. In both cases, our approach provides insights into the waxing and waning of judicial autonomy. Our conclusions follow in the final section.

II. A Spatial Model of Supreme Court Independence and the Underlying Sequential Games

The spatial theory of Supreme Court independence sheds light on why particular presidents are able to subordinate the judiciary. The spatial theory indicates that unified party control of the executive and legislative branches hinders judicial independence in presidential systems. Unified government under a single dominant party can denude the judiciary of its autonomy and therefore of its capacity to act as a check on the other branches of government. When the president's party controls a majority in Congress, the executive and legislative branches together can overrule court decisions or punish judges. Divided government, on the other hand, facilitates judicial autonomy. It permits the legislature to check the president and vice versa, creating a climate in which an independent judiciary can emerge.

Spatial models similar to those that help explain U.S. judicial doctrine and statutory interpretation are valuable in explaining the presence or absence of Supreme Court independence.⁴ This paper employs a spatial model that assumes a one-dimensional policy space and identifies the ideal point of the President as P, of Congress as C, and of the Supreme Court as SC.⁵ The model assumes that the President, Congress, and the Supreme Court all have coherent and consistent policy preferences. Movement from left to right along the axis represents a shift in preferences, for instance, from state intervention in the economy to more laissez faire economic policies. As illustrated graphically in Figure 1, when the preferences of the President and Congress are close together for a sustained period of time, the Court is unable sustain policies that depart from the preferred position of the elected officials.⁶

[Figure 1 here]

On the other hand, if the gap between the President's preferences and those of Congress is large, the Court can more easily challenge state policies. The interval between P and C during divided government gives the Court the freedom to issue rulings that challenge the other branches. In this scenario, depicted in Figure 2, the Court can issue a ruling anywhere within the space between P and C.

[Figure 2 here]

In ruling on government initiatives of dubious constitutionality, the judge makes a strategic choice: assert autonomy by challenging the policy or uphold the government's constitutionally weak position.⁷ The judge's choice depends upon how the other two branches would respond to a challenge. If

4 For examples of spatial models, see McCubbins, Noll, and Weingast 1995; Ferejohn and Weingast 1992; and Ferejohn and Weingast 1992.

5 C represents the position of the median member of Congress, and it does not reflect bicameralism; C combines the House and the Senate.

6 For the purpose of this article, the important observation is the distance that separates the ideal points of P and C rather than that P is left of C. What is crucial is that their ideal points are close to one another.

7 A growing body of literature on the courts in Latin America argues that independent courts arise from the strategic choices of relevant actors. For instance, see Iaryczower, Spiller, and Tommasi 2002; Helmke 2005 on Argentina; Scribner 2004; Hilbink 2007; Couso 2003; Barros 2003 on Chile; and Taylor 2008 on Brazil. Increasingly, scholars are finding that party competition can foster independent courts. In those countries where a ruling party foresees that it will remain in power indefinitely, the development of judicial autonomy is unlikely. In contrast, where two or more parties compete aggressively with one another, a ruling party is likely to accept and even promote autonomous courts. In-depth single case studies and comparative studies from different regions, including Asia, Eastern Europe, Latin America, the Middle East, and the United States, support the claim that the degree of party competition

a judge foresees that the government will be able to “overrule” or circumvent the decision rather than accept the Court’s ruling, she is less likely to oppose the government. By overrule, we mean a variety of actions, such as packing the Supreme Court with new members, forcing justices to resign, or simply ignoring judicial rulings. In contrast, a judge who foresees that the government will accept her decision is more likely to issue an adversarial ruling.

To investigate judicial incentives, we develop a game that illustrates the strategic dilemma facing the Court. In T1, we assume that the government has taken an action of questionable constitutionality. The Court has two options: “cave in” to the administration or challenge it. When making a choice, the Court considers what is likely to happen after its decision. In T2, the President and Congress are the players. In order to overrule the Court, both the President and Congress must agree. If the Court foresees that both the president and Congress will agree to overrule its decision, the Court is unlikely to challenge that position. This outcome is more likely under unified government than divided government. Unified government permits members of the same party to coordinate their actions against the Court. Divided government, or political fragmentation, allows members of the opposition to prevent the typical strategies for overruling the court. A Senate dominated by the opposition, for example, can frustrate presidential plans to expand the Court or to use the impeachment process to remove justices for political reasons. If the Court predicts that the President will overrule but Congress will accept the decision or vice versa, it can challenge the government. Acting on its own, neither the President nor Congress has the power to overrule a decision.

[Figure 3 here]

III. Application of the Theoretical Framework to the United States

Our approach sheds light on the evolution of judicial independence over the course of United States history. The thesis is this: when a homogeneous majority party has controlled the presidency and

provides a persuasive explanation for changing levels of judicial autonomy (Ramseyer 1994; Finkel 2005, 2008; Domingo 2000; Ginsburg 2003; Smithey-Ishiyama and Ishiyama 2002; Hirschl 2004; and Ríos-Figueroa 2007).

Congress, the Supreme Court has tended to reflect the partisan preferences of that majority. In contrast, when Congress and the President have been divided ideologically, there has been much more scope for the Court to act independently.⁸ The spatial model outlined above therefore posits a causal relationship between political fragmentation and the possibility of independent judicial action. We expect the Court to observe the level of fragmentation and then issue independent opinions only when the external conditions will permit those decisions to stand. The literature on American political history suggests that patterns of partisan control of the elected branches tend to be relatively stable over long electoral “eras” and that the internal heterogeneity of the parties will tend to produce a moderate level of ideological fragmentation. So, we expect that the Court is normally able to exercise some independence. However, when there is a sudden downward shift in fragmentation – perhaps following a landslide election that changes partisan control of government – the Court may be unable to adjust its rulings to reflect the shift. This inability may be due to simple error; or because the change is not as apparent while it is occurring as it becomes after the fact, as was the case during the early New Deal; or the Court may be unable to alter decisions without forfeiting a sense of legality.

In this section, we examine four electoral eras: the period from the 1800 election to the Civil War; the period from the Civil War to the New Deal; the period from the New Deal to 1980; and the period since 1980. This list of eras is provisional, but we believe that there is enough intra-era homogeneity to make it usable for our purposes. Of course, students of American politics do not need to be reminded that control of government by an ideologically unified majority party is a fairly rare event in U.S. history. U.S. political parties are typically relatively heterogeneous internally, and they tend to reflect regional as well as ideological differences. Thus, one would suppose that circumstances are normally favorable for a politically independent federal judiciary.

⁸ American political parties have never been very homogeneous, at least not until recently, so our characterization has to be understood as relative. That is, we are asserting that in certain periods there was a relatively high degree of agreement among the elected officials and that under these conditions the Court would have been under more pressure to accede to pressures emanating from the elected branches.

When those normal conditions break down and the political branches are controlled by a determined and unified majority, however, the conditions for political independence are less favorable. We expect that under these circumstances the Supreme Court would tend to refrain from pursuing an agenda that is out of step with that of the unified majority, and that the Supreme Court would try to prevent the lower federal courts from political confrontation as well (Ferejohn and Kramer 2002). Moreover, when the Court has tried to pursue its own policy agenda in the face of unified political branches, it has often been forced to back down from the resulting confrontation.⁹ It bears emphasis, however, that an impasse of this kind is not necessary for the Court to distinguish the political circumstances in which it may develop legal doctrine free from political interference from those circumstances in which it must defer to the political branches.

The Ante Bellum Court

We support our claims with two kinds of evidence. First, we examine periods during which a single party controlled the political branches. The period from 1800 to 1856 represents one such period. Following the decisive defeat of the Federalist Party in the 1800 elections, the Democratic Party was able to establish itself as the dominant governmental party, controlling one or both branches during nearly all of the period. Because the Democrats dominated both the Senate and the presidency, the makeup of the Court evolved from being unanimously Federalist to solidly Democratic. In order to maintain control for such a long time period, during which issues and personalities changed significantly, the Democratic Party had to become a broad based party that was open to diverse ideological currents. Nevertheless, Democrats generally shared a commitment to small national government, low tariffs, and state-based policymaking. Thus, it is not surprising that for much of this period the Court rarely challenged national legislation. While the Court was led by John Marshall, Democratic leaders were rarely proposing to

⁹ The notion of a Court having a policy agenda does not exclude the possibility that the justices may be motivated to pursue legal values. Indeed, some of the confrontations between the Court and Congress discussed here may be due to the fact that some judges believed that they were in some sense obliged to enforce what they saw as legal values, even at the risk of jeopardizing the political situation of the Court.

increase federal authority and, even if they had, the Court would likely have supported such expansion. The Marshall Court occupied itself by upholding rare national projects such as the Bank of the United States (in *McCulloch v. Maryland*) and keeping the states from trespassing on federal jurisdiction (once again in *McCulloch v. Maryland*, and in *Gibbons v. Ogden* where the Court used the occasion to develop the idea of an implicit or dormant Commerce Clause limitation on the states). The circumstances did not change in these respects later in this period when the Democrats secured complete control of the Court under Chief Justice Roger Taney.¹⁰ In fact, the Court struck down parts of congressional laws only twice during this period: once at the beginning of the era of Democratic hegemony in *Marbury v. Madison* (1803), and again at the end of the period with the *Dred Scott* decision (1857).¹¹

Indeed, *Marbury* illustrates the second kind of evidence that is useful in supporting our claims: when the Court is forced to make a decision in unfavorable political circumstances, it may be forced to tailor its actions to fit those circumstances. As we noted, at the beginning of this long period of Democratic rule, the Jeffersonian Democrats confronted a solidly Federalist Court that had a much broader conception of the authority of the national government than that espoused by Jefferson and Madison during the 1790s. The justices had not only supported expansions in federal jurisdiction but had also enthusiastically enforced the Alien and Sedition Acts against Democrat opponents of the Adams administration. Worse, as a parting shot, the Federalist Congress had enacted a Judiciary Bill (which Democrats called the “Midnight Judges Bill”) during the lame duck 1801 session just before Jefferson took office, that created a number of new federal judgeships and then acted expeditiously to fill those new positions with loyal Federalists.

¹⁰ Though, ironically, the Democrats did begin to advocate an expansion of federal jurisdiction in fugitive slave legislation which was, of course, supported by the Taney Court.

¹¹ We do not discuss *Dred Scott* in detail. We see *Dred Scott* as a case in which the Court handed down a decision of great moral controversy but in the face of a divided governmental system. Thus, there was no real chance that the political branches as they were constituted in 1857 could have agreed to overrule the decision. What was probably not contemplated by the *Dred Scott* Court was the possibility of a popular or electoral reaction. While this kind of possibility could well fit with the theoretical framework of this article, it would take us too far into controversial historiographical territory to consider it carefully.

When John Marshall, the outgoing Secretary of State, omitted to deliver a commission for one of the new judgeships to William Marbury, James Madison, the new Secretary of State, was not disposed to fix his oversight. Marbury had to sue for his job by asking the Supreme Court to issue a writ to require Madison to issue his commission. He might have been encouraged by the fact that Marshall himself was to be the new Chief Justice and apparently Marshall saw no reason to recuse himself from the case.

At the same time, the newly Democratic Congress enacted a new “judges” act (1802) that, among other things, abolished sixteen of the judgeships that had been created by the outgoing Federalist Congress in 1801.¹² As mentioned above, Federalist judges already occupied these positions, so their abolition amounted to firing the new judges. Because this appeared to violate the constitutional guarantee of life tenure, a suit was brought to invalidate the 1802 Judiciary Act. The Marshall Court was to decide these two cases at essentially the same time and in the shadow of unified Democratic control of the political branches.

If this combination of issues was not difficult enough for the Marshall Court, the Democrats had begun to clamor for the impeachment of a number of federal judges. They started proceedings against Judge Thomas Pickering who, in addition to his Federalist bona fides, was an alcoholic and possibly mentally ill. After Pickering was duly impeached and convicted, the administration and its supporters began to hunt for bigger game. Ultimately, Justice Samuel Chase was impeached, and he only narrowly escaped conviction in the Senate. In the case of Chase, there was no claim that he was either incompetent or erratic on the bench. Indeed, the Democrats probably thought that his decisions and opinions were, if anything, too predictably related to his Federalist convictions. There could have been little doubt that Chase’s impeachment was due to his enthusiastic prosecution of the Alien and Sedition Acts and was ideologically motivated: to remove an ardent Federalist from the Court on account of his political beliefs and actions.

¹² In addition to abolishing the judgeships, the 1802 act restored circuit riding duties to Supreme Court justices. The justices were forced to leave the Court for a period each year in order to sit as ordinary circuit judges in the states. There is little doubt that the Democrats regarded this onerous duty as a punishment for the egregious political jurisprudence of the Federalist justices.

In view of these circumstances, Marshall and his colleagues had every reason to approach the cases before them with great care. Marshall could not have doubted that Jefferson may well have ignored a judicial order to commission Marbury (which is precisely what Marbury had sued to obtain). The Chief Justice would also have foreseen a strong congressional reaction if his Court had overruled the 1802 Judiciary Act. Thus, he took neither of these steps. Instead, Marshall argued that Marbury had no basis to bring suit to the Supreme Court because he had brought his suit erroneously to the Court as a matter of its original rather than appellate jurisdiction. The Constitution did not give the Court authority to hear such a case; that was provided instead in a section of the 1789 Judiciary Act. And, as Marshall pointed out, Congress was powerless to alter the original jurisdiction of the Supreme Court from what was fixed in the Constitution. While Marshall made it clear that the Court would have been prepared to award Marbury his commission, he was in no position to grant the requested relief because the statute conferring jurisdiction was unconstitutional. In effect, Marshall had lectured the Jefferson administration that it was wrong to deny poor Marbury his office, and had also had asserted the Court's authority to review and possibly strike down federal legislation.

It is clear on this telling that *Marbury* (and the accompanying *Laird v. Stuart* which upheld the 1802 Judiciary Act on technical grounds) represented a substantive retreat for the Federalist Court. It permitted the Jefferson government to fire federal judges, and it refused to enforce the clear right to appointment claimed by Marbury. This evidence suggests that *Marbury* and *Laird v. Stuart* represent a set of decisions in which the Court responded according to the incentives revealed by the spatial model. Indeed, the narrow margin by which Justice Chase escaped conviction in the Senate suggests that the Court's retreat was likely just sufficient to prevent a deeper erosion of judicial authority. Had Marshall pursued his Federalist inclinations in either of these two cases, the ensuing confrontation with Jefferson would likely have led to a very different history.

Reconstruction and Republican Hegemony

The second period of extended single party dominance of government was between 1860 and 1932, a time during which the Republican Party dominated national politics. Government was united under the Republicans for over half of the 36 congressional sessions, whereas it was united under the Democrats for only four sessions. During these 72 years – a rapidly industrializing period characterized by massive immigration, labor unrest, and repeated dislocations in the agrarian and industrial sectors – the Supreme Court issued decisions largely in line with emerging Republican policy preferences. In what came to be called *Lochner* era jurisprudence,¹³ the Court repeatedly struck down state and local, and sometimes national, attempts to impose regulatory restraints on the emerging industrial economy, imputing to the Constitution a fundamental role in protecting liberty of contract and regarded any restrictions on labor contracts, even child labor, as inconsistent with this constitutional purpose.¹⁴

As a historical matter, it is difficult to say which came first: the Republican opposition to regulatory restrictions on industry or the Court's development of economic liberty as a fundamental (if unarticulated) constitutional right. However, it is clear that Republican policy and judicial doctrine fit together well during this period. Of course, part of this congruence was due to the fact that the makeup of the Court drifted in a Republican direction, but it was in part due to the unwillingness of the justices to strike down national legislation in such a political climate. In those cases in which Republican Congresses were willing to impose regulatory restrictions (as in the 1906 Hepburn Act), the Court did not interpose itself. Figure 4 represents the typical policy configuration during this period.

[Figure 4 here]

¹³ *Lochner* itself was not decided until 1905; it concerned a New York statute that purported to regulate employment conditions for bakers. It is epigrammatic of a broader class of judicial restrictions on regulatory laws in that it contains a concise pattern of opinions articulating the Court's constitutional theory and opposition to it.

¹⁴ We are not saying that the development of the *Lochner* principles was due the desire of the justices to permit industrial development. It is much more likely that the justices were not able to distinguish labor laws from special interest legislation that violated their idea of due process which confined legitimate exercises of public power to general rather than special laws. See Gillman 1993.

Although some congressional legislation was struck down during this period, most important Supreme Court decision-making focused on state and local legislation rather than on acts of Congress. Moreover, it is important to note that Republican Party homogeneity declined for a period after 1900 with the rise of the progressive wing of the party. This renewed political fragmentation permitted the Court to act more independently in pursuit of doctrinal policies that were out of step with the majority party. In addition, this majority disunity was followed by a brief Democratic interregnum under President Woodrow Wilson, which also permitted somewhat more independent Supreme Court decision-making.

Although the period from the Civil War to the New Deal was marked by rough harmony between Court decisions and the preferences of the political branches, the majority party was not ideologically very homogeneous for much of this era, and there were also periods of divided government and even brief periods of Democratic rule. Therefore, we believe that for most of the period, the harmony of judicial policy and Republican Party preferences is probably better explained by the increasingly Republican composition of the Court – driven mainly by Republican control of Supreme Court appointments – than by any judicial fear of political retribution. However, as in the ante bellum era, circumstances in the early years of the era permit a sharper test to be posed for the spatial theory.

After the Civil War, the radical Republicans secured control of both houses of Congress. Their control was sufficiently secure to permit the imposition of a military regime in the southern states and to impeach President Andrew Johnson when he attempted to interfere with this action. The Court at that point was dominated by Democrats and by Republicans who were moderate in comparison with the radical Republicans who controlled Congress, and it found itself in opposition to congressional reconstruction policies. In the terms of our model, these circumstances were unfavorable for independent judicial action.

The military governments in the southern states after the war and especially the use of military tribunals to try civilians produced a number of serious confrontations between the branches. The important cases involved the availability of habeas corpus to persons tried by military courts. In *Ex Parte Vallandigham*, which was decided during the war, the Court had refused to interfere with the military

courts. But in *Ex Parte Milligan*, decided in 1866, the Court seemed to change its stance and reversed a death sentence imposed by a military tribunal on the ground that the civil courts in Indiana, the state where Milligan was tried, were open for business and competent to try him. This decision provoked outrage in the Republican Congress. *Milligan* was quickly followed by two other cases in which the Court struck down the Federal Test Act of 1865, which imposed loyalty oaths on candidates for office in the southern states. It was in this setting that the Court heard *Ex Parte McCardle*.

The circumstances of *Ex Parte McCardle* were simple enough: McCardle was a Mississippi newspaper editor who had been brought before a military court for publishing articles critical of Reconstruction. He sued for habeas relief in a federal circuit court on the basis of the 1867 Habeas Act, which not only authorized federal courts to hear habeas petitions but provided for appeals to the Supreme Court. After the circuit court denied relief, McCardle appealed to the Supreme Court, which heard the case.

Rumors spread throughout Washington that the Court had decided in favor of McCardle and was prepared to order his release. Such an action would have amounted to a judicial repudiation of military Reconstruction. The Republicans in Congress were sufficiently concerned that the Court would reverse the circuit court decision that they immediately repealed the portions of the 1867 Habeas Act that authorized habeas appeals to the Supreme Court (in the so-called “McCardle Repealer” Bill of 1868), effectively mooting the case. In his opinion, Chief Justice Chase noted that the Court now lacked jurisdiction and was forced to dismiss McCardle’s petition. He noted that the “exceptions clause” in Article III of the Constitution permitted Congress to alter the Supreme Court’s appellate jurisdiction and that such authority extended to repealing the 1867 Habeas Act.

A year later in another habeas case, *Ex Parte Yerger*, Chase asserted that the 1868 McCardle Repealer Bill had not and could not completely vitiate habeas petitions. After all, Article I of the Constitution asserts that, except in certain emergency circumstances, the privilege of the Great Writ is always to be available. Therefore, the 1868 repeal could not eliminate the right to petition for habeas relief. Indeed, Yerger’s petition was based on the 1789 Judiciary Act. But the judicial surrender in

McCardle was already done. Indeed, by the time the Court granted Yerger's petition, he had already been released. *Yerger* represented at best a hollow assertion that the Court might place limitations on the Reconstruction government, if it chose to do so (which it did not).¹⁵ In later rulings, the Chase Court upheld Reconstruction policies in other disputes that came before it.

The New Deal to the Reagan Revolution

The election of 1932 marked a turning point in the U.S. political landscape as the Democratic Party gained a strong foothold in government for the first time since the 1860 election of Abraham Lincoln. Although it was not obvious at the time, we can see retrospectively that the elections of the early 1930s inaugurated a long era of Democratic dominance of the political, and eventually, the judicial branches. As in the previous two periods, the Supreme Court issued rulings that were largely congruent with the policy preferences of the national government. However, the Democratic majority was not generally ideologically homogeneous and was unable to maintain unbroken control of both branches of the federal government. Indeed, much of this period was dominated by the emergence and stability of a bipartisan conservative coalition, which enjoyed majority support in one or both congressional chambers for most of the period.¹⁶

The fact that there were few sharp confrontations between federal judges and the political branches is likely due to the fact that the ideological composition of the Court had come roughly to match that of the political branches, and not to any political timidity on the part of the justices. Indeed, for much of this period, the relative disunity of the Democrats and their failure to keep the Republicans from increasing control of the presidency suggest that the Court had a fair amount of latitude for independent

¹⁵ Although the Court issued its opinion in *Yerger* – indeed, using the occasion to lecture Congress that it did not have authority to vitiate habeas relief – this lecture amounted to little more than hectoring, as the Court was not instructing anyone to do anything in the case. This opinion parallels what Marshall had done in *Marbury* by saying how the Court would have ruled if it had jurisdiction.

¹⁶ The coalition appeared in 1937 and 1938, partly in opposition to FDR's court packing bill, and it played a regular part in the legislative process from that time forward.

action. At least in the economic regulatory area, however, the Court had no such ambitions. For most of this period, we argue that the typical spatial configuration looked like Figure 5.¹⁷

[Insert Figure 5 Here]

As was the case in the earlier two periods, the transition to this new era was by no means smooth. Indeed, the elections of 1932-1936 produced the same conditions for confrontation that were observed after 1800 and 1866. During Franklin Roosevelt's first term from 1932 to 1936, however, the Supreme Court successfully opposed the redefinition of the federal government's role in the economy; the Court managed to declare most of the New Deal interventionist programs unconstitutional. Until the landslide election of 1936, it was unclear that 1932 marked the beginning of an era of Democratic hegemony. Thus, the Court was able to retain its Republican, laissez faire stance for four years, as depicted in Figure 6. The Court ruled against the Railroad Retirement Act of 1934, the National Industrial Recovery Act of 1933, the Agricultural Adjustment Act of 1933, and the Bituminous Coal Conservation Act of 1935 (Cohen and Varat 1993, 204).

[Insert Figure 6 Here]

As time went on, however, the viability of the Court's independent stance came into question. The Democrats increased their representation in Congress in the 1934 mid-term elections. After the Democrats gained a two-thirds majority in both the House and the Senate along with nearly three-quarters of the state legislatures in 1936, Supreme Court Justice Roberts changed his opposition to minimum wage laws in *West Coast Hotel*¹⁸ and began to uphold New Deal legislation in subsequent cases.¹⁹ By the

¹⁷ Government remained united under the Democrats and maintained the interventionist economic policy through the early 1950s when Dwight Eisenhower assumed the presidency and appointed Earl Warren to the Supreme Court.

¹⁸ Roberts' vote upholding the minimum wage law in *West Coast Hotel* (which was voted on in December 1936, though not handed down until March of the next year) was surprising because he had voted to strike down a virtually identical minimum wage statute in New York only ten months earlier. Roberts himself did not write an opinion in this case; nor did he do so in some other decisions upholding New Deal legislation. Some legal historians have suggested that because Roosevelt's court packing plan was not announced until the following month, the plan could not have caused Roberts' vote. Our theory places no weight on the announcement of the court packing plan; the causal factor was the outcome of the November 1936 elections. Some legal historians have also credited Roberts' later claim that he would never have voted to override the New York law, had the question of overriding the Court decision that established the controlling precedent (the 1923 decision – *Adkins v. Children's Hospital* –

time of Justice Roberts' famous shift in 1936-1937, in fact, it had become clear that the 1932 elections marked a lasting rather than temporary electoral shift. Thus, by 1942, the Court upheld broad application of the National Labor Relations Act, the Fair Labor Standards Act, and the Agricultural Adjustment Act (Cohen and Varat 1993, 205).

The Rehnquist Court

In the early twenty-first century, it is increasingly clear that we have entered a new era of alignment between the political branches and the federal courts. Of course, we cannot know how long this alignment will endure, and we have to admit that, unlike previous electoral eras, this one did not begin with a “bang” – that is, with an election considered by many as a “critical realignment” (Key 1955, Burnham 1970). Instead, a combination of political circumstances permitted the Republicans essentially to remake the Court prior to taking control of the two political branches.²⁰ Unlike the previous regimes, the current era did not begin with a recalcitrant Court attempting to preserve a status quo against a new and energized political majority. Rather, the Court itself began, slowly at first in the 1970s and with increasing confidence during the next two decades, to undermine the doctrinal bases of the New Deal era. The spatial structure in 1980 (prior to the November elections) looked like Figure 7.

[Insert Figure 7]

which struck down a previous minimum wage law) been before the Court as it was in *West Coast Hotel*. We leave it to readers to assess the plausibility of this explanation.

19 There is a strand of legal history that denies that Justice Roberts actually capitulated to Democratic pressure. Cushman 1998, for example, argues that parts of Roberts' earlier opinions (especially his opinion in the 1934 *Nebbia v. NY*, which upheld a New York scheme for regulating milk prices) were consistent with his opinion in *West Coast Hotel* (1937), and therefore his vote in this and other cases should not be seen as a “switch” but as legally continuous with his own jurisprudence. We do not doubt that legal actors see a need to present their thinking as principled and regular and not as responsive to legally irrelevant factors. This is part of what it means to be a legal professional. And, if a legal actor is competent, he will have not problem in finding a plausible “internal” story of this kind. Indeed, in the previous note we indicated that Justice Roberts himself offered just such an account (though, we admit, credulity is stretched in this case). So it will be impossible to dispute Cushman's revisionist reading in the context of a single event. The power of a political model of the kind advanced in this article is its capacity to account for a large and diverse pattern of judgments.

20 These events include the fact that Democratic presidents had few opportunities to make appointments (Jimmy Carter had none in four years), appointed conservative justices (John F. Kennedy's appointment of Byron White), or had their appointments leave the court early (Abe Fortas and Arthur Goldberg).

With the election of Ronald Reagan, the president shifted sharply to right and the conservative Court was presented with a divided situation that, as we now know, lasted until at least 1992. In addition, the period of united Democratic government proved very short-lived and was perhaps only a prelude to a longer period of united Republican rule. So the conditions became favorable for a Court-led move in the conservative direction, and these conditions endured at least until 2000. Unlike the earlier eras, the fundamental shift in political circumstances was not caused by a sudden collapse in political fragmentation but rather by a sudden increase. Furthermore, because the Court does not have as much control over its agenda as do the political branches, the movement in policy was fairly gradual at the beginning, as it was regulated by the speed with which litigants brought cases and by the disposition of the lower federal and state courts (which were subject to similar dynamics) to frame issues permitting Supreme Court resolution.

With the advantage of hindsight, we can see the outlines of the judicial policy shift with increasing clarity, especially in the areas of federalism, criminal law, civil rights, and economic regulation. Perhaps the change in judicial policy is most evident in federalism jurisprudence where, in a series of decisions, the Court has limited congressional authority under the Commerce Clause and Section 5 of the Fourteenth Amendment, and strengthened Tenth and Eleventh Amendment protections of state authority. It is not yet clear how far this line of judicial policy will go, but there is no doubt that Congress' authority to address social issues has been substantially limited, especially if legislation affects the states.

Nonetheless, this last era has not witnessed a dramatic "constitutional" confrontation of the kind that marked the beginnings of the earlier eras. This is not to say that Democratic Congresses did not react to the Court's initiatives. Eskridge has documented amply that Congress did respond to the Court's statutory rulings in the civil rights domain by enacting new laws clarifying congressional determination to effect change in this area (Eskridge 1991). But there has not yet been a constitutional confrontation and it seems doubtful that one could occur in the foreseeable future; at least not unless the Democrats are able to engineer a takeover of national political institutions.

IV. Application of the Theoretical Framework to Argentina

The historical experience of Argentina also demonstrates a causal relationship between political fragmentation and the likelihood of independent judicial action. As in the United States, when the Argentine Congress and the president have been divided ideologically, the Supreme Court has demonstrated the capacity to act independently. On the other hand, when the presidency and Congress have been controlled by a homogeneous majority party, the Court has tended to reflect the partisan preferences of that party. We show that during periods of unified government, the executive and legislative branches have been able to coordinate their actions and engage in informal subconstitutional practices, such as court packing and removing judges for political reasons. Under these conditions, the Court has been unable to defend an independent course.

The executive-judicial balance of power has typically favored the executive in Argentina's ultrapresidential system, but the judiciary has at times been able to constrain the elected branches of government. In this section, we examine the executive-judicial balance during four eras: 1862 through 1946, 1946 through Argentina's 1983 democratic transition, the Unión Cívica Radical (UCR) administration of Raúl Alfonsín (1983-1989), and the Partido Justicialista (PJ) presidency of Carlos Menem (1989-1999). From 1862 until Juan Perón's 1946 assumption of the presidency, political fragmentation created circumstances that were favorable for a politically independent judiciary. Most presidents complied with constitutional guarantees of judicial autonomy and the courts issued rulings that challenged government policies. In contrast to the political fragmentation of early Argentine history, an ideologically unified majority controlled government for most of the 1946-1983 period, and the courts refrained from challenging the political branches. Divided government reemerged after the 1983 transition, and the courts began once again to assert their autonomy. During Menem's first eight years in office (1989-1997), however, the political branches were controlled by a determined majority, and the Court refrained from pursuing an agenda that was out of step with that of the unified PJ majority.

Political Fragmentation of the Pre-Perón Era

Political fragmentation early in Argentina's history allowed judges to challenge the government and to maintain an independent course with little fear of political reaction. During the 1862-1946 period, political fragmentation arose in two ways: the division of control over the political branches by ideologically distinct parties and control of the political branches by an ideologically heterogeneous majority coalition. From 1862 through 1880, competition among three relevant parties encouraged divided government. Argentina's first two presidents faced strong opposition in Congress. The years 1880-1906 were a period of unified government, but the party that held the executive and legislative branches was ideologically heterogeneous. In 1880, President Julio Roca united the disparate groups that brought him to power into the Partido Autonomista Nacional (PAN). Due to its lack of a party identity and low level of discipline, the heterogeneous PAN coalition had collapsed by 1906 (Remmer 1984, 24-33; Molinelli 1991, 104). The 1891 founding of the UCR contributed to the demise of PAN. From 1916 through 1930, the UCR captured the presidency but faced a Senate dominated by the conservative opposition. In 1924, feuding internal factions split the UCR, further hindering the ability of the UCR bloc in Congress to act as a unified majority (Molinelli 1998, 23; Alonso 2000, 164).

Argentina's 1930 military coup brought the conservative alliance to power, but with the exception of a four-year period, the conservative Concordancia administrations faced a hostile Congress. Indeed, from 1936 through 1943, the UCR dominated at least one house of Congress. Moreover, during the four years that the Concordancia held a majority in the legislature (1932-1936), discipline was low. Like PAN, the Concordancia was an ideologically heterogeneous coalition (Falcoff and Dolkart 1975, 32-36).

The political fragmentation of 1862-1946 period set the stage for judges to challenge the government without fear of retribution from the political branches.²¹ Indeed, political fragmentation

²¹ In theory, Argentine judges have the authority to declare any executive or legislative act unconstitutional. Article 116 of the Argentine Constitution provides the basis for judicial review: "To the Supreme Court and lower courts belongs the trial and decision of all cases arising under the Constitution." According to an 1862 law, the judiciary's duties include ensuring that no branch of government violates the Constitution. An 1868 law stipulated that judges

precluded presidents from engaging in practices such as court-packing and purging. From 1869 until Perón's first term as president, the size of the Supreme Court remained constant at eight. In addition, Argentine presidents respected the constitutional provision that granted judges life tenure during good conduct. No justices were removed for political reasons. The composition of the Court changed only after the death, retirement, or resignation of a member. Of the 38 justices who departed the Supreme Court between 1862 and 1945, 53 percent died while on the Court, 31 percent reached the legal retirement age, and 16 percent resigned. Between 1862 and 1946, the average tenure of justices was ten years (Molinelli, Palanza, and Sin 1999, 678-90). As a result of this respect for tenure protection, presidents often encountered Courts that had been appointed by the opposition.

The Court was able to sustain an independent course during this period of political fragmentation. In the 1863 *Ríos* decision, the Court declared an executive decree unconstitutional on the basis that the president does not possess judicial powers. The president had granted judicial power to a military official in the Port of Rosario, allowing the official to rule on a murder committed on board a boat in the Paraná River. In response, the Court declared that the president cannot exercise or delegate judicial powers; only Congress has the power to create courts (Carrió 1996, 33-34). In the 1864 *Calvete* ruling, the Court asserted its power to review the constitutionality of all lower court decisions (Eder 1960, 575; Fayt 1994, 29). In the 1888 *Municipalidad de la Capital* decision, the Court asserted its power to:

examine the laws in the concrete cases which are brought to their decision, compare them with the text of the Constitution... and abstain from applying them if they oppose the Constitution. This moderating attribution is one the fundamental ends of the federal judiciary and one of the greatest guarantees with which constitutional rights are deemed to be secured against possible and involuntary abuses of power (Nino 1993, 316-17).

In the Court's 1887 *Sojo* decision, Argentina's *Marbury v. Madison*, the Court ruled on the constitutionality of a congressional statute. In the ruling, the Court asserted that Congress cannot alter the Supreme Court's constitutional jurisdiction. Eduardo Sojo, a newspaper editor, had appealed directly to

apply the Constitution as the supreme law, giving the federal courts the power to examine the constitutionality of laws and decrees (Fayt 1994).

the Supreme Court after Congress had ordered his imprisonment for publishing a drawing considered offensive to the legislature's dignity. Sojo bypassed the lower courts and went directly to the Court with his habeas corpus plea. According to the Constitution, the Court has original jurisdiction only in cases concerning ambassadors, foreign diplomats, or an Argentine province. Thus, in order to bypass first instance and appellate courts, Sojo invoked an 1863 congressional law and claimed that the law extended the Court's original jurisdiction. In its decision, the Court declared that the Constitution prevails when in conflict with a congressional law. It also argued that its mission was to ensure that the different branches of government do not overstep the powers granted to them by the Constitution (Fayt 1994, 69).

During this early phase of Argentine history, Argentina's Supreme Court defended individual rights and prevented the government from repressing political opponents. For instance, the Court denied military courts the power to try civilians, and it upheld the right of citizens arrested for rebellion to be released on bail (Miller 1997). Miller demonstrates that from 1862 through 1932, the Court upheld Article 32 of the Constitution, which prohibited Congress from restricting press freedom. He cites a dozen cases in which the Court ruled that the federal judiciary could not exercise criminal jurisdiction over the press, even when the government had a strong interest in a particular case (Miller 1998).

Unified Government of the 1946-1983 Era

Argentina's first period of prolonged unified government occurred between 1946 and 1983, a period during which presidents had the legislative support necessary to overrule court decisions and manipulate judges. Indeed, the Court refrained from challenging the political branches during the 1946-1983 era. The president's party was relatively homogenous and had majorities in both congressional houses from 1946-1955, 1958-1963, and 1973-1976. The de facto military regimes of 1955-1958, 1966-1973, and 1976-1983 had a monopoly on political power that was tantamount to unified government.

In 1946, Perón's party captured all but two seats in the Senate and two-thirds of the House. Perón engaged in gerrymandering and intimidation to ensure that his party gained seats in the midterm elections. In 1948, the Peronists gained total control of the Senate and fourteen additional House seats. During

Perón's two terms in office (1946-1955), his Peronist Party, also known as the PJ, was ideologically homogeneous. Perón used his authority as party president to sanction and expel his opponents from the party. He based the PJ structure on the vertical organization of the army and even used the military terminology, as evident in his title "Supreme Commander" of the PJ (Luna 1984, 292-305; Gambini 1999, 81-88; Crassweller 1987, 186-97).

A homogenous party also controlled both political branches during the Unión Cívica Radical Intransigente (UCRI) administration of Arturo Frondizi (1958-1962), permitting the president to violate judges' tenure protection and to pack the Court.²² Frondizi's UCRI held a two-thirds majority in the House and absolute control of the Senate. In addition, like Perón, Frondizi led a homogenous, highly disciplined party. Frondizi punished party members who dissented. For instance, to get the necessary support for a 1960 bill that allowed private companies to invest in Argentina's natural resources and therefore contradicted the UCRI's nationalistic platform, Frondizi threatened to expel UCRI members who opposed the bill. After the law's passage, he expelled three and suspended six UCRI legislators who had voted against the bill (Smulovitz 1988; Szusterman 1993, 131-43; Rodríguez Lamas 1984, 72-73).

The military administrations that governed during the 1946-1983 phase of Argentine history had a monopoly on political power that enabled them to punish independent judges. After each coup, the dissolution of Congress led to "unified" military government, which permitted the manipulation of courts. For instance, in the wake of the 1955, 1966, and 1976 coups, the military governments bypassed constitutional channels to purge the Court.

During the 1946-1983 era, Argentina had only three years of political fragmentation. From 1963 through 1966, President Arturo Illia faced divided government, which prevented him from subordinating the courts. His UCRP held only one-third of the House, and Illia was unable to form a coalition to support his bills. The presence of strong legislative opposition contributed to the failure of his 1963 attempt to expand the Court from seven to eleven.

As a result of unified government under a relatively homogenous party from 1946 through 1983, informal practices such as court-packing and violating judges' tenure protection became the norm. Because the legislative and executive branches were able to coordinate their actions to punish independent judges, judges demonstrated an unwillingness to challenge the president. Argentine presidents began to use their discretion over the number of justices as a means of subordinating the Court. Perón reduced the number of justices from eight to five in 1950. In 1958, Frondizi raised the number from five to seven. After the 1966 coup, the size fell to five. Only Illia who faced political fragmentation was unable to alter the size of the Court. In addition, the unified government and frequent coups of the 1946-1983 period contributed to executive discretion over judicial appointments. Following each military coup and subsequent return to civilian rule, the executive had the opportunity to select new judges. In 1946, Perón replaced four of the five justices with his political allies. He rushed the approval of his nominees through the Peronist-dominated Senate. After the 1955 and 1966 coups, the military governments appointed anti-Peronist justices who were favorable to the armed forces.

In addition, in contrast to Argentina's early history, a high turnover rate characterized the Court after 1946. Supreme Court terms have tended to be coterminous with presidential terms. Accordingly, the Court experienced purges in 1946, 1955, 1966, 1973, 1976, and 1983. Perón embraced the practice of dismissing judges. In response to unfavorable rulings, the PJ-controlled Senate impeached four justices in 1947. The only justice who retained his seat was a militant supporter of Perón. In 1973, the PJ government dismissed the entire Court. After the coups of 1955, 1966, and 1976, the de facto governments bypassed constitutional channels to purge the Court.

Because a homogenous party controlled the political branches, the Court showed great restraint from 1946 until 1983. Perón's 1947 impeachment of four justices sent a clear message: judges who challenge the government's interests face political retribution. Indeed, after the impeachments, the Court supported acts of dubious constitutionality. For instance, in the 1950 *Balbín* decision, the Court upheld

²² In the 1950s, the UCR temporarily split into two parties: the UCRI and the Unión Cívica Radical del Pueblo (UCRP).

the 1949 law that forbade *desacato*, offending the dignity of a government official. The Court accepted the government's use of the law to suspend an opposition congressman on the basis that he had injured Perón's dignity, thus permitting the government to silence opposition legislators (Carrió 1996, 51-53). Limits on judicial review continued under the 1976-1983 military government. The Court failed to stop the rampant violation of constitutional rights, and it validated legislation of questionable constitutionality. For instance, the Court upheld decrees that submitted civilians to military tribunals and that prohibited the sale and ownership of certain books. Only after its domestic popularity plummeted and it found itself under increasing international scrutiny did the Court begin to accept habeas corpus pleas for individuals who had been in prison for several years (Zaffaroni 1994, 268; Helmke 2002).

Divided Government of the Alfonsín Administration (1983-1989)

Political fragmentation permitted movement in the direction of judicial autonomy during the Alfonsín administration. Alfonsín's UCR never had a majority in the Senate. Senators engaged in intense interparty bargaining over judicial appointments. Alfonsín appointed prestigious individuals to the Supreme Court, and only two of his five appointees were members of his UCR. Divided government also allowed the PJ majority in Congress to reject Alfonsín's 1987 proposal to increase in the size of the Court from five to seven.

Due to political fragmentation of the Alfonsín years, the judiciary demonstrated a renewed ability to challenge the executive. Rulings reflected a growing independence from the president. As depicted in Figure 8, the space between President Alfonsín's preferences and Congress' preferences was large, which contributed to the Court's ability to challenge executive policies. In ruling on government initiatives of questionable constitutionality, judges made the strategic choice to assert autonomy. In recognition that the administration would accept their rulings under divided government, judges were free to issue adversarial decisions.

[Figure 8 Here]

The Court declared major Alfonsín policies unconstitutional. The *Rolón Zappa* ruling rejected Alfonsín's economic emergency justification for seizing the assets of retired persons. In the *La Prensa* ruling, the Court prohibited the administration from imposing price controls on newspapers. In addition, the Court entered an era of unprecedented activism in protecting constitutional rights. Court rulings supported free expression, the right to information, and the protection of privacy (Nino 1992, 668-73).

PJ Hegemony of 1989-1997

In contrast to Alfonsín who faced a strong opposition in Congress throughout his presidency, unified PJ government from 1989 until 1997 prevented the Court from challenging the political branches. From December 1989 until the 1997 midterm elections, Menem's PJ controlled both houses of Congress. The PJ had an absolute majority in the Senate, which contributed to Menem's discretion over judicial appointments. The PJ and its allies dominated the House until 1997. During Menem's first term (1989-1995), the PJ and its ally, the conservative Unión del Centro Democrático (UCeDÉ), held a majority, and the PJ held an absolute majority from 1995 until 1997.

The PJ in Congress acted as a relatively homogenous bloc during the Menem administration. PJ legislators' voting behavior demonstrated a high degree of discipline. During the weekly PJ bloc meetings, party leaders informed legislators of the official party stance in upcoming votes. PJ legislators who opposed the official stance usually missed the session rather than register an abstention or vote against the PJ. The infrequency of roll call votes also suggests that Menem did not have to resort to these votes to secure discipline. In addition, the PJ voted as a unified bloc in the congressional committees that produce *dictámenes*, the majority and minority reports on proposed legislation. PJ committee members voted for the same *dictamen* in 496 out of 507 House votes, or 98 percent, and 519 out of 525 Senate votes, or 99 percent (Jones 2002, 151-58; Jones 1997, 279).

Menem's post as de facto PJ president provided him with a set of tools to produce discipline. These tools were essential due to the decentralization of the PJ. Menem had to produce discipline; it did

not arise naturally (Levitsky 2000).²³ Although the PJ charter prohibits the nation's president from serving as PJ president, Menem acted as the party leader. In order to maintain a façade of respect for the formal rules, the PJ designated Menem as party president and then placed him on sabbatical. In reality, however, he acted as party president. Menem's dual role as PJ leader and national president enabled him to create incentives for PJ legislators to support his policies. He used his discretion over access to PJ electoral lists, to economic resources, and to party leadership posts to counter the decentralized nature of the party. With these valuable resources, he rewarded PJ legislators who voted according to his orders and punished those who strayed (Mustapic 1998).

Unified government allowed Menem to embrace the informal practices introduced by Perón to subordinate the judiciary. He expanded the Court from five to nine in 1990, which permitted him to appoint four loyal justices. Menem used his appointment power to create a pro-government majority, known in Argentina as the "automatic Menemist majority." The majority of Menem's appointees had weak qualifications and had demonstrated loyalty to the PJ before joining the Court. Rodolfo Barra, a staunch Peronist, was representative of Menem's 1990 appointees. Barra admitted his deference to Menem: "My only bosses are Perón and Menem." (Verbitsky 1993, 56). During his tenure on the Court justice, Barra declared, "I only issue rulings that are favorable to administration officials." (Baglini 1993, 101-02). Menem's 1995 appointee Adolfo Vázquez stated, "When there is a case against the government, I do not rule against the administration" (Guagnini, O'Donnell, and Semán 1997, 10)

During this era of government control by a relatively homogenous party, the Menem Court refrained from challenging the executive in cases of political significance. From 1989 until 1997, with the help of his party, Menem prevented rulings outside the negligible interval between P and C. The policy preferences of Menem and the PJ-controlled legislature were virtually indistinguishable. The position of P dictated the Court's set of politically viable policy alternatives. Due to the constraints imposed by PJ control of the executive and legislative branches, the Court had very little independent

23 After the 1955 overthrow of Perón, a decentralized, informal organization emerged that overshadowed the formal vertical hierarchy.

force. The Court caved under pressure from a unified PJ government and upheld controversial Menem policies. Figure 9 illustrates graphically the configuration from 1989 until 1997.

[Figure 9 here]

The Court's decision to uphold Menem's 1991 decree dismissing Ricardo Molinas, the public prosecutor in charge of administrative investigations, was representative of the Court's stance toward the president. Menem's decree violated the constitutional right to a defense and the public prosecutor's tenure protection. According to Argentine law, impeachment is the only means of removing the head prosecutor. Both the district and appellate courts had ruled in favor of Molinas. In a 1991 ruling, the Court overturned the lower court decisions and upheld Menem's decree (Carrió 1996, 160-68; Baglini 1993, 147-49). The Molinas ruling represented a retreat for the Court and was part of a larger set of decisions in which the Court responded according to the incentives revealed by the spatial model.

The 1990 *Peralta* ruling also demonstrated the Court's unwillingness to challenge the Menem administration. The Court aligned itself with the president when it upheld Menem's 1990 Plan Bonex decree. In contrast to the Alfonsín Court's *Rolón Zappa* ruling, the Menem Court overturned lower court decisions and accepted the president's economic emergency justification to seize extraordinary powers. By permitting banks to honor deposits with bonds that had a weak market value, Menem's Plan Bonex decree freed banks of the obligation to return deposits in cash. By upholding the decree, the Court gave the executive tremendous discretion over bank deposits, violating Article 17 of the national Constitution that declares that property is inviolable. In effect, the ruling permitted the government to use economic emergency as a pretext to infringe on property rights (Carrió 1996, 174-77; Cafferata 1996, 125-32; Bianchi 1991). Moreover, *Peralta* sanctioned the use of decrees of necessity and urgency, a tool that permitted Menem to bypass Congress when formulating legislation.²⁴

Like *Peralta*, the 1990 *Aerolineas Argentinas* ruling upheld a controversial Menem policy. The privatization of the state-owned airline occurred at a critical moment in the implementation of Menem's

²⁴ For a discussion of decrees of necessity and urgency in Argentina, see Chavez 2004.

plan to address Argentina's economic crisis. A UCR legislator had opposed the airline sale on the basis of irregularities. In response to a district judge's ruling that ordered suspension of the sale, Menem's Minister of Public Works circumvented the appellate courts and appealed directly to the Supreme Court. To remove obstacles to the airline privatization, the Court obtained jurisdiction over the case by claiming that the sale was a "serious institutional matter." The Court applied "per saltum," a means for a higher court to bypass lower courts, arguing that the matter required quick resolution to avoid "irreparable harm." The ruling set a dangerous precedent that the Supreme Court could use per saltum to intervene in any case involving a "serious institutional matter," regardless of whether the case had first reached a lower court (Bianchi 1997).

The scandal surrounding the disappearance of a ruling against Argentina's Central Bank also cast doubt on the Menem Court's independence. On June 8, 1993, five justices had signed a ruling in favor of an attorney who was trying to collect fees from the Central Bank. The lawyer sought payment for his work for a bank that was in liquidation, Banco Patagónico. He turned to the bank in charge of the liquidation, Argentina's Central Bank, because Banco Patagónico could not pay his fees. The Menem administration argued that the ruling would have caused enormous financial harm to the Central Bank because it could have provoked similar cases. The June 8 ruling disappeared from Court records. A new ruling in favor of the Bank appeared on June 16 with the signatures of the four justices who voted against the original ruling. Executive officials had pressured the Chief Justice to replace the June 8 decision with a ruling in favor of the Menem administration. The Supreme Court Auditing Committee held that the Chief Justice was responsible for the disappearance.

The Supreme Court also intervened in local elections to ensure the victory of pro-Menem candidates. In 1992, the federal Court intervened in the gubernatorial election in the province of Corrientes. The provincial Supreme Court had ruled in favor of the Corrientes Electoral College's decision that the Pacto Autonomista Liberal (PAL) candidate had defeated the PJ candidate. The Corrientes PJ appealed to the national Supreme Court, and the Menem Court nullified the election on the day of the appeal. By declaring null the Electoral College's decision, the Court violated Article 105 of

the national Constitution, which declares that provinces may elect their officials without federal intervention (Carrió 1996, 186-98; Verbitsky 1993 211-18; Baglini 1993, 151-55). The Court also intervened in local elections in the 1991 *Avellaneda* case. Although the elections were replete with irregularities, including individuals voting twice, the Court ruled that the Menemist candidate could assume the mayorship of Avellaneda (Baglini 1993, 150-51; Verbitsky 1993, 191-97).

Political Fragmentation during Menem's Final Two Years in Office

The October 1997 midterm elections ushered in a return to divided government. The UCR and the recently formed Frente por un País Solidario (Frepasso) joined forces to become the Alianza Trabajo, Justicia y Educación that defeated the PJ. For the first time, Menem had difficulty imposing his agenda on the House. The Alianza majority in the House created the opportunity for judges to assert their autonomy from the executive. As the gap between Menem's preferences and those of Congress expanded, the Court gained more freedom to issue rulings against the president's interests. The position of P no longer dictated the Court's set of politically viable policy alternatives. As illustrated in Figure 10, the Court could issue rulings anywhere within the growing interval between P and C.

[Insert Figure 10 Here]

The return of political fragmentation permitted the Supreme Court to act independently. A change in the Court's composition was not necessary for the Court to assert its autonomy from Menem. Political fragmentation was sufficient to provide judges with the opportunity to rule against executive interests. For instance, divided government set the stage for the Court to oppose Menem's reelection for a third consecutive term, which Menem ultimately chose not to seek. Before the PJ defeat in the 1997 midterm elections, it appeared likely that the Court would permit Menem to run for a third term despite the constitutional ban on more than two consecutive terms. The growing strength of the opposition in Congress, however, permitted the Menem Court to resist executive pressure. Justices, including members of the "automatic Menemist majority," signaled that they would declare a third consecutive term unconstitutional if the case were to reach the Supreme Court.

The Court also reversed its stance on Argentina's illegal arms sales to Ecuador and Croatia. Before 1997, the Court had supported Menem by backing his efforts to halt investigations into administration officials' role in the sales. In response to efforts to in convict functionaries in the first instance courts, the administration tried to appeal directly to the Court. In contrast to the 1990 *Aerolineas Argentinas* ruling that applied per saltum, the Court refused to bypass appellate courts and seize jurisdiction in 1999.

The evolution of Argentina's Consejo de la Magistratura (Judicial Council) illustrates how the reemergence of political fragmentation in 1997 enhanced judicial independence. Argentina's 1994 constitutional reform created a Judicial Council to intervene in the selection of lower court judges with the goal of reducing executive control over court composition. For each vacancy, the Council proposes a three-person rank order list from which the president selects one member with Senate approval. In order to fulfill its constitutional role as a control organ, the Council must be autonomous of the executive. Only under divided government did the Council begin to check the president's appointment power.

The unified PJ government of 1989-1997 allowed Menem to delay the creation of a Judicial Council. The PJ majority in Congress prevented the Council's creation until the Alianza defeated the PJ in 1997. The 1994 Constitution dictated the Judicial Council's general guidelines, leaving the details up to the legislature. Article 114 stipulated that the Council's composition must reflect a balance among four groups: the political branches, the federal judiciary, bar associations, and academia. Congress had the important task of determining the meaning of balanced membership. The PJ-dominated Senate proposed legislation for a 23-member Council subordinate to Menem. The Senate bill called for a Council of eight legislators, two executive representatives, two justices, three academics, four lawyers, and four judges. At the time, the PJ majority in both houses meant that a majority of the eight legislators would be members of Menem's party. Menem could handpick the two executive representatives. Furthermore, because of Menem's subordination of the Court, the two justices would likely answer to the president. The Senate bill even gave the PJ discretion over the selection of the three academics. The PJ-dominated Constitutional Affairs Committee would choose the academics.

The emergence of divided government in 1997 permitted the defeat of the Senate proposal and the creation of a Council capable of acting as a control on the president. In December 1997, Congress passed Law 24,937 that called for a 20-member Council composed of the Chief Justice, four federal judges, four senators, four House members, four attorneys, one executive representative, and two academics. In contrast to the Senate proposal, the law stipulated that the academics be selected by their colleagues. Moreover, the law dictated that of the four Senate and the four House representatives, two would be from the majority party, one from the minority party, and one from the second minority. Even under unified government, only four of the eight legislators represent the president's party.

V. Conclusions

This chapter provides a theory that explains why some countries exhibit an independent judiciary and why the level of judicial autonomy in a given country can wax and wane over time. Justices typically have few resources with which to resist united elected officials intent on overturning judicial rulings. We show that the fragmentation of power among the elected branches can set the stage for an independent judiciary. Most often, this fragmentation will occur through divided government. When different parties hold the executive and legislative branches of government, the judiciary has more freedom to issue rulings in opposition to one of the political branches. The history of judicial independence in the United States and in Argentina shows that this approach provides considerable insight into the vicissitudes of judicial independence.

Our theory is part of a new literature on the self-enforcing constitution, the notion that to be sustained, political officials must have incentives to abide by constitutional provisions.²⁵ Major features of democratic constitutions – including the rule of law, citizens' rights, and democracy itself – must be self-enforcing to endure. Our approach contributes to this literature by showing a set of conditions under which a critical aspect of the rule of law, an independent judiciary, can be sustained. In particular, we

²⁵ See, for example, Ordeshook 1992; Przeworski 1991; and Weingast 2003.

show a set of conditions under which political officials have incentives to overrule the courts and those under which they will respect the autonomy of the courts.

Our approach is not without limitations, however. The spatial theory we have presented is an “externalist” account of judicial behavior in the sense that it claims that conditions external to the courts or to the law can shape the incentives of judges and, therefore, their behavior. One can imagine other externalist explanations that do not focus on the makeup of the political branches but rather on the dispositions of powerful social formations such as the military, relatively independent regional governments, labor unions, ethnic groups, or social movements. With the exception of the work on the role of social movements or reform coalitions, such alternative external accounts remain under-represented in the literature.²⁶

Moreover, our theory is formulated for separation of powers systems in which the judicial branch is supposed to enjoy constitutional independence from the legislature and the executive. In parliamentary systems the notion of judicial independence has a quite different form as the exercise of judicial (and executive) authority in such systems is supposed to be strictly subordinate to the legislature. Judicial independence in such systems is typically protected by requiring judges to give literalist interpretations for legal codes with the expectation that the legislature can quickly alter codes that lead to unacceptable results. One can imagine, however, operationalizing our idea of political fragmentation in ways that might fit the realities of parliamentary government. For example, coalition or minority governments might have a weaker capacity to respond to adverse judicial rulings and therefore provide judges with more scope for autonomous action. In addition, the relatively recent development of constitutional courts throughout the world has introduced the possibility that constitutional judges can sometimes act quite independently from the political branches (Ferejohn and Pasquino 2002, 21-36). Finally, the emergence

²⁶ The burgeoning literature on the construction of the rule of law includes some impressive scholarship on the key role of nonstate actors, particularly of civil society and the international community (Peruzzotti and Smulovitz 2006). In Guatemala and Mexico, non-governmental organizations have been key actors in the push for judicial reform (Sieder 2003; Domingo 2004). In his impressive study of the implementation of judicial policy in Mexico,

of powerful supranational judicial institutions, such as the European Court of Justice or the European Court of Human Rights, present further arenas in which judges are able to act independently.

Externalist theories, however, stand in some opposition to internalist account of judicial behavior. Part of the very idea of legality or the rule of law is the notion that there is an explanation for any proper judicial ruling that refers only to sources internal to law, including statutes, prior decisions, and accepted principles of interpretation. Thus, it is not surprising to learn that in virtually all of the cases we have discussed there will be a more or less plausible internal explanation for the result, at least plausible to legal actors and interpreters. The question arises therefore of the relation between internal and external explanations. Like Hilbink, we do not think that the relation is one of strict opposition (Hilbink 2007).

It could well be true that there are two separate and non-overlapping accounts of why a judge decides a case in a particular way. This could happen in several ways. First, it is possible that internal explanations are available for virtually any pattern of decisions. Even though the particular external account is true, there is always an ex post internal account that is available. One would have to say in this case, however, that the external explanation is doing the causal work. Pure legal realists and some political scientists often embrace such a view. A second possibility is perhaps more interesting: both internal and external factors place limits on decisions without strictly determining them. Typically, one would think that courts are not forced to make one particular accommodation to harsh external facts but have some choice regarding which precise line to take. John Marshall's opinion in *Marbury* exemplifies creativity in the face of reality – a kind of “snatching” some victory (the legitimacy of judicial review) from the necessity of backing down to the Jeffersonian Democrats. Obviously, on the basis of this study, we cannot say what is the most plausible way in which external and internal explanations interact. And some circumstances may pose the conflict between law and politics so sharply that only the legal realist alternative seems viable. We would think, however, that such circumstances are fairly rare.

Staton shows how public support for the courts creates pressure for officials to comply with adverse rulings (Staton 2004).

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Figure 1: Spatial Model of Unified Government

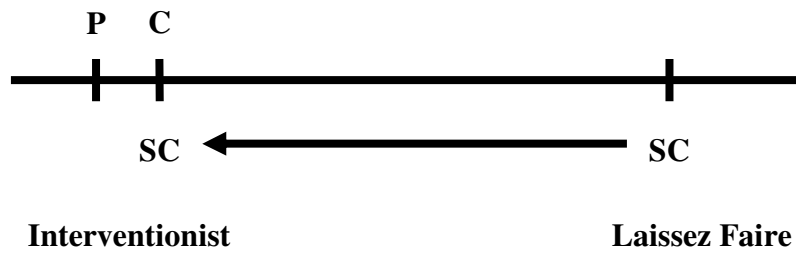


Figure 2: Spatial Model of Divided Government

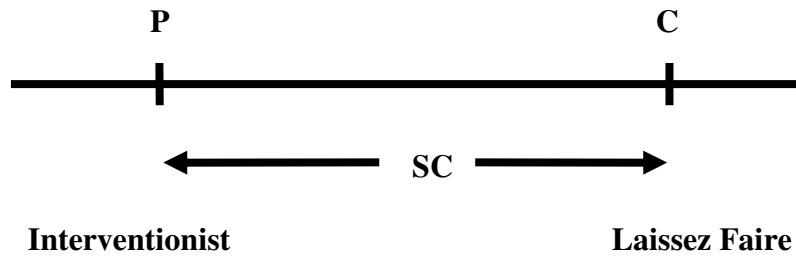
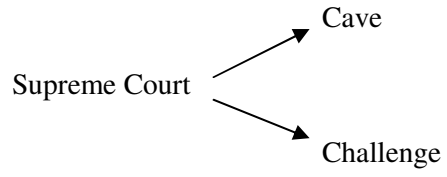


Figure 3: The Sequential Game

T1: The Court issues a ruling



T2: The response of elected officials

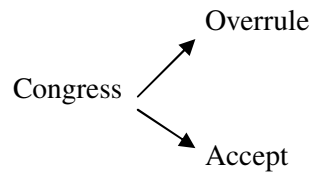
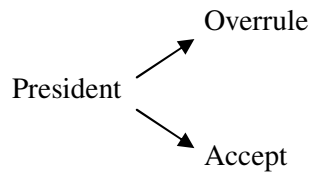


Figure 4: Spatial Model of the United States, 1860-1932

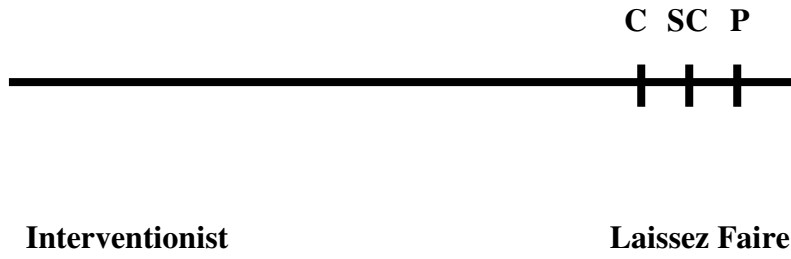


Figure 5: Spatial Model of the United States, 1937-1938

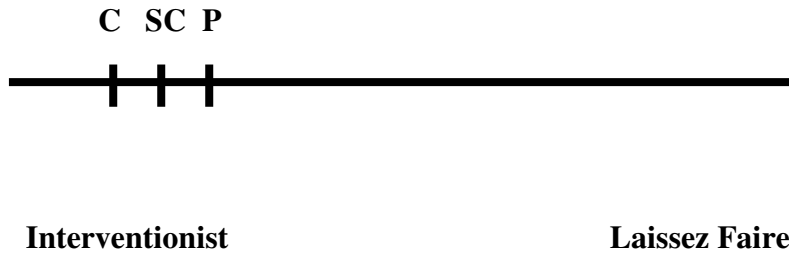


Figure 6: Spatial Model of the United States, 1932-1936

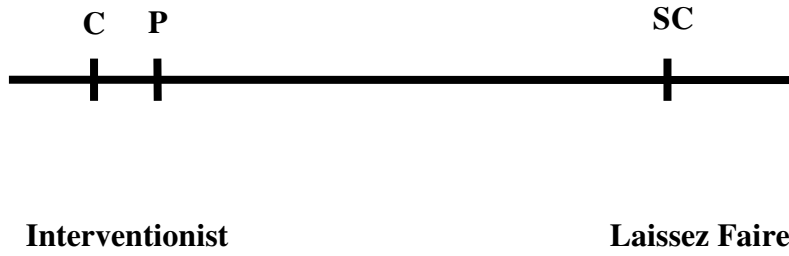


Figure 7: Spatial Model of the United States, 1980

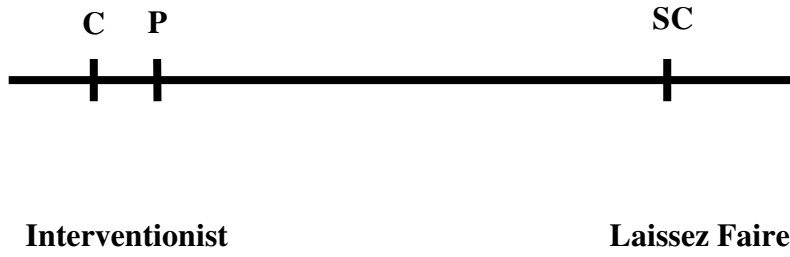


Figure 8: Spatial Model of Argentina, 1983-1989

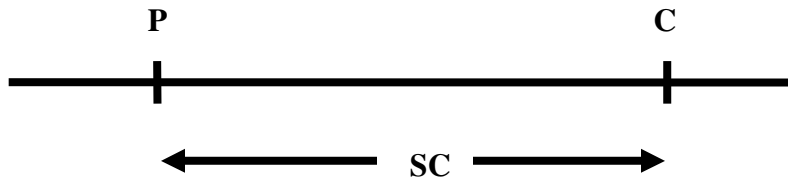


Figure 9: Spatial Model of Argentina, 1989-1997

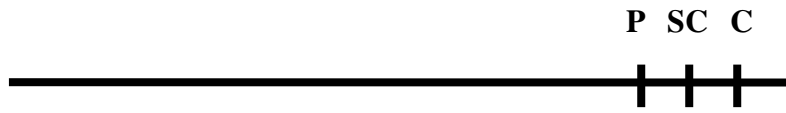


Figure 10: Spatial Model of Argentina, 1997-1999

