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# The Constitutional Protection of Property Rights in Argentina: A Reappraisal of the Doctrine of Economic Emergency

José Sebastián Elias

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**The Constitutional Protection of Property Rights in Argentina: A Reappraisal of  
the Doctrine of Economic Emergency.**

**A Dissertation  
Presented to the Faculty of the Law School  
of  
Yale University  
In Candidacy for the Degree of  
Doctor of the Science of Law**

**By José Sebastián Elias  
Dissertation Committee Supervisor: Prof. George L. Priest  
Readers: Prof. Owen M. Fiss  
Prof. Bruce A. Ackerman**

**May, 2014**

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## **Preface.**

If scholarly research agendas frequently have a biographical component to them, in my case it was the direct exposure to a number of critical situations where the relationship between individual rights and State action in alleged defense of the general welfare got to a point of maximum tension that takes this role. When I graduated from law school in February, 2001, Argentina was barely nine months away from sinking into the deepest economic crisis in its entire history as an independent nation. With a law diploma in my hands, I began a small practice in my hometown, Mendoza. As they say, crises usually bring with them both dangers and opportunities. In my case, the opportunities came with the massive litigation against the emergency measures enacted by the Government that exploded in early 2002. As a new, full-of-energy, attorney, I had the chance of bringing many lawsuits on behalf of people who experienced what the Administration was doing—freezing bank accounts, changing the currency of several kinds of contracts, cutting back salaries and pensions, etc.— as truly draconian. As a young adjunct law professor, teaching constitutional law, I was afforded the opportunity to reflect upon the legal and moral aspects of the economic emergency regime. Memories came rushing back from my early years in high school, when then-President Menem had decreed a compulsory swap of bank deposits for long-term bonds. Countless other situations where, as a child, I had heard people complaining for what I now interpreted as potential violations of property rights acquired a new significance. I was mesmerized by the complex, ambiguous character of the situation: on the one hand, it was clear that the Government had to do *something* to deal with the economic meltdown and it was not easy to see what else it could have attempted; on the other hand, the impact the measures had on common people appeared as *deeply unjust* (it was). How could it be that the Government was justified (if it indeed was) in doing something that looked as a blatant injustice? Should courts intervene and protect individual rights? Or were these the kind of situations where

the Judiciary has little to say? My attention was captured by the intricate relationship between the notion of an emergency situation (and other related ideas, such as the state of necessity, the state of exception, and so on) and the property rights guaranteed by the Constitution. When, a few years later, I was fortunate enough to pursue graduate studies at Yale Law School, I was exposed to the possibility of probing into these topics in much greater detail. Here is the fruit of those efforts.

This dissertation addresses the topic of the constitutional protection of property rights in the context of economic emergencies, especially —although not exclusively— in cases of financial crises. In so doing, it brings together several different strands that seldom appear side-by-side in the constitutional theory literature: emergency powers, property theory (especially, takings-related notions), constitutional interpretation, legal and institutional history, public choice, and theories of justice. It also resorts to recent empirical work on the legitimacy of courts and relies on insights from the fields of economics and behavioral economics to shed light on some of the more disquieting questions posed by the phenomenon of economic emergency. Throughout this journey, I will try to convince the reader that many of our most common assumptions regarding the role of courts in socio-economic matters and the place of property rights in the constitutional space, among others, deserve a profound revision. Conventional wisdom will be frequently put to question. While this work uses Argentina's history as a case study, it certainly aspires to offer quite a few insights that may contribute to the broader, global debate over constitutional property and over emergency powers.

## A. Introduction.

Property, in one way or another, has been around for a long time. Perhaps in the very beginning of human life, as there was only mild scarcity of most resources, worries about property may have been of lesser intensity. But it must have not been long<sup>1</sup> before relationships between persons made it necessary to implement a system of rules governing access to and control of material resources.<sup>2</sup> Ever since, property has generated heated controversies, bloody disputes, and attempts at justification of one or another proposed conception of property. Its allocative character, whether or not one considers it to be a distinctive feature of property rights,<sup>3</sup> makes it an especially contentious right. Exclusion seems to be a central feature of any system of private property,<sup>4</sup> which sets the stage for the battle of the “have-nots” against the “haves”.<sup>5</sup> At a

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<sup>1</sup> As early as *Genesis* 13:5-13, the Bible shows the problem of distribution of resources and the entitlements to them. Albeit in an amicable way, Abram and Lot decide to part ways and take each a different piece of land, in order to avoid any contention. Then, in *Job* 1:10-20, the Accuser takes as a given that Job would be very sensitive to any advance over his property.

<sup>2</sup> Jeremy Waldron, *THE RIGHT TO PRIVATE PROPERTY* 31-32 (Oxford, Clarendon Press, 1988. I will be using here the distinction between concept and conception suggested by John Rawls, and applied to the topic of property by Waldron.

<sup>3</sup> See, e.g., Laura Underkuffler, “Property: A Special Right”, 71 *Notre Dame L. Rev.* 1033, 1038 (1996) (arguing that “the institution of property is different [from the institutions that embody other rights]. Property involves allocation...the giving to one person necessarily denies or takes from another”); Gregory S. Alexander, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY* 5 (Chicago-London, The University of Chicago Press, 2006) (acknowledging the allocative feature of property rights as a cause for debate around them, but denying that this feature is unique to property: other rights may also have allocative effects, though they are not understood as a core function of such rights).

<sup>4</sup> See, e.g., J.E. Penner, *THE IDEA OF PROPERTY IN LAW* 103 (Oxford, Clarendon Press, 1997), Jim Harris, “Is Property a Human Right?”, in Janet MacLean (editor), *PROPERTY AND THE CONSTITUTION* 67 (Oxford-Portland, Hart Publishing, 1999); Douglass C. North, *STRUCTURE AND CHANGE IN ECONOMIC HISTORY* 21 (New York-London, W.W. Norton & Company, 1981).

<sup>5</sup> Of course, this does not mean that such social “battles” exist only because of private property nor that were the current property arrangement replaced for another based on a different conception of property, there would be no confrontation. As Alan Ryan points out, once it’s admitted that men may have an interest in domination for other than material reasons and that they can satisfy their material interests without actually owning anything, it seems clear that the division between “haves” and “have-nots” is one possible stage for confrontation, but not the only one. Still, the distinction is significant, because what you own, how much you own, and what you can do with it makes a lot of difference to your well-being and

minimum, the dispute may involve the exchange of passionate arguments for both sides and the demand for justification of possessions; at a maximum, the dialectical battle may turn into actual contests of physical force.

Rivers of ink have run, trying to supply the definitive argument for one or another position.<sup>6</sup> Property has been idolized<sup>7</sup> and demonized in similar proportions.<sup>8</sup> Some have

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security. See Alan Ryan, *PROPERTY AND POLITICAL THEORY* 188, 192 (Oxford-New York, Basil Blackwell, 1984).

<sup>6</sup> The literature on the topic is very extensive, indeed. For a brief, but thoughtful, analysis of the different arguments offered for and against private property, see generally Lawrence C. Becker, *PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS* (Boston, London, Melbourne & Henley, Routledge & Kegan Paul, 1977). See also Peter G. Stillman, "Property, Freedom, and Individuality in Hegel's and Marx's Political Thought", in J. Roland Pennock & John W. Chapman, *NOMOS XXII: PROPERTY* 130-167 (New York University Press, New York, 1980) (comparing Hegel's and Marx thoughts on property, and the role property plays in each of these systems of political thought: while for Hegel private property is essentially linked to individuality and development of the self, for Marx capitalist private property is nothing but the suppression of individuality).

<sup>7</sup> See, e.g., J. Roland Pennock, "Thoughts on the Right to Private Property", in J. Roland Pennock & John W. Chapman, above n. 6, at 173-182 (arguing that the justification of the institution of private property does not seem a difficult task, on both deontological and utilitarian grounds, and that property is one of the "Great Rights", playing a prominent and valuable role in modern societies); John W. Chapman, "Justice, Freedom, and Property", in J. Roland Pennock & John W. Chapman, above n. 6, at 298-299 (arguing that "comparative history strongly suggests, if not outright demonstrates, that private property is crucial to formation of just and open societies"); J.E. Penner, above n. 4, at 206 (arguing that the legitimacy of property rights *per se* is "nigh indisputable, for the practice of property protects a liberty, i.e. exclusively to determine the use of things, that has proved marvelously productive in contributing to the good life of many", despite the important issue of property's distribution); Richard Pipes, *PROPERTY AND FREEDOM* 286-287 (New York, Alfred A. Knopf, 1999) ("Property is an indispensable ingredient of both prosperity and freedom. The close relationship between property and prosperity is demonstrated by the course of history [...] The historical evidence indicates that property can coexist with arbitrary and even oppressive political power, whereas democracy cannot do without it").

<sup>8</sup> See, e.g., Pierre-Joseph Proudhon, *WHAT IS PROPERTY? OR, AN INQUIRY INTO THE PRINCIPLE OF RIGHT AND OF GOVERNMENT* 262 (New York, Dover, 1970) (electronic version available at <http://etext.lib.virginia.edu/etcbin/toccer-new2?id=ProProp.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&pat=;all>; last visited 01/04/2013) (attempting to show the "perfect identity" of property and robbery); Jean-Jacques Rousseau, "Discourse on the Origin and the Foundations of Inequality Among Men", in Victor Gourevitch (ed.), *ROUSSEAU: THE DISCOURSES AND OTHER EARLY POLITICAL WRITINGS* 171 (Cambridge, Cambridge University Press, 1997) (arguing that "competence and rivalry on the one hand, conflicts of interest on the other, and always the hidden desire to profit at another's expense; all these evils are the first effect of property, and the inseparable train of nascent inequality"); Richard E. Flathman, "On the Alleged Impossibility of an Unqualified Disjustificatory Theory of Property Rights", in J. Roland Pennock & John W. Chapman, above n. 6, at 221-222 (arguing that property rights are, *prima facie*, doubly objectionable and doubly dangerous, and that there are good reasons for the persistent strain of anti-property thoughts); Thomas W. Merrill & Henry E. Smith, "The Morality of Property", 48 *Wm. & Mary L. Rev.* 1849 (2007) (pointing to a tradition, which would be stronger in academic circles than in popular thought, that associates property with immorality).

thought it to be a pre-social, natural right expressing the rights of persons which are prior to the state and the law; some have regarded it as a social, positive right created instrumentally by the community to secure other goals.<sup>9</sup> It has been pointed out as the cause of the “First Economic Revolution”,<sup>10</sup> and the efficiency of its structure as a determinant of economic growth or, alternatively, stagnation.<sup>11</sup> From the other side of the fence, some have argued that this sort of association between the property rights characteristic of capitalist economies and their prosperity is nothing but a sign of institutional fetishism<sup>12</sup> —or, at least, a very contestable assertion—,<sup>13</sup> and that private property is a bulwark of inequality.<sup>14</sup>

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<sup>9</sup> Joshua Getzler, “Theories of Property and Economic Development”, 26 *J. Interdiscip. Hist.* 639, 641 (1996) (arguing that theories of property within the Western philosophical tradition can be divided roughly along these lines).

<sup>10</sup> Douglass C. North, above n. 4, at 63-64, 74 (fn. 3), 89.

<sup>11</sup> *Id.*, at 17, 148. Also see Angus Maddison, *GROWTH AND INTERACTION IN THE WORLD ECONOMY: THE ROOTS OF MODERNITY* 19 (Washington D.C., The AEI Press, 2005) (arguing that non-discretionary systems of protection of property rights play a role in the explanation of the accumulation of wealth in Western economies); David A. Leblang, “Property Rights, Democracy, and Economic Growth”, 49 *Polit. Res. Q.* 5, 21 (1996) (arguing that empirical evidence shows that nations that protect property rights grow faster than those that do not).

<sup>12</sup> Roberto Mangabeira Unger, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 7 (London-New York, Verso, 1996) (arguing that institutional fetishism is the belief that abstract institutional conceptions, like the market economy, and a free civil society, have a single natural and necessary institutional expression). *Id.*, at 24 (“The more ideologically reactionary and aggressive forms of political economy have identified a particular system of market institutions and of private law as the natural and necessary form of the market economy [...] The property regime is the quintessence of this evolutionary achievement”)

<sup>13</sup> Alan Ryan, above n. 5, at 178.

<sup>14</sup> See, e.g., Jennifer Nedelsky, “American Constitutionalism and the Paradox of Private Property”, in Jon Elster & Rune Slagstad (editors), *CONSTITUTIONALISM AND DEMOCRACY* 256 (Cambridge-New York, Cambridge University Press, 1993) (arguing that in the American tradition property has been tied to inequality and, thus, despite some serious strategic problems, one could see the alleged disintegration of property and decline of the concept with some satisfaction, hoping to give the values once associated with property a primacy now unencumbered by the egalitarian tradition). *Id.*, at 260 (arguing that inequality has been at the center of the traditional understanding of the relationship between property and liberty and that the protection of property requires the protection of inequality). *Id.*, at 271 (considering that property has been a pernicious force in the American constitutional tradition).

Moreover, the discussion over property rights does not end with the eventual settlement of disputes about its institutional worth. It seems that even if we were in complete agreement regarding the value of organizing the access to, and control of, material resources under a system of private property and we had convinced ourselves of the moral worth of such conception, we would still have reasons to feel moral anxiety.<sup>15</sup> Any distribution of resources that we may deem just is highly unlikely to remain stable, unless we are of a favorable disposition towards a permanently intervening state, something whose moral attractiveness is quite disputable, indeed.<sup>16</sup> Such instability wouldn't be a problem, if we could only manage to guarantee that all exchanges made after a just state of affairs is achieved were themselves free, voluntary, and just.<sup>17</sup> Presumably, we could also consider just the state of affairs arisen from an initially just situation through just steps. But, as Gerald Cohen has poignantly argued, it is far from clear that just exchanges can transmit justice to their results.<sup>18</sup> Justice doesn't seem to be movable from an initial state-of-affairs "A" to an end-state "B", via just transactions, in the same way a couch can be moved from house "A" to house "B", using a rental truck.

Anxiety can only rise if we make a mistake in the selection of our system of property entitlements, so that it is not just. For whatever we may think of the justice of the original entitlements, those entitlements become integrated in people's lives in morally significant ways,<sup>19</sup> thus acquiring "a moral life of their own" and becoming "morally

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<sup>15</sup> Emily Sherwin, "Three Reasons Why Even Good Property Rights Cause Moral Anxiety", 48 *Wm. & Mary L. Rev.* 1927, 1934 (2007).

<sup>16</sup> Robert Nozick, *ANARCHY, STATE, AND UTOPIA* 161-162 (New York, Basic Books, 1974).

<sup>17</sup> *Id.*, at 151.

<sup>18</sup> Gerald A. Cohen, "Robert Nozick and Wilt Chamberlain: How Patterns Preserve Liberty", 11 *Erkenntnis* 5, 9 (1977).

<sup>19</sup> Emily Sherwin, above n. 15, at 1939.

wrong to interfere with them, even though it would not have been morally wrong to set up the system of property on a different basis altogether”.<sup>20</sup> In effect, property seems to exhibit a peculiarly resilient quality, thanks to which justificatory judgments about the institution itself and judgments about the conduct or character of individuals constrained by the institution appear somewhat dissonant or independent from each other to a greater degree than what happens with other legal institutions.<sup>21</sup> Someone who steals is generally regarded as dishonest, and his action is considered morally wrong, despite the fact that existing property entitlements may not be adequately justified. Attempts to change a system of property radically are profoundly disruptive and, thus, injustices made in its establishment are not easily correctible.<sup>22</sup>

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<sup>20</sup> Jeremy Waldron, “The Normative Resiliency of Property”, in Janet MacLean (editor), above n. 4, at 186.

<sup>21</sup> *Id.*, at 176-177.

<sup>22</sup> A good example is the situation of property rights in South Africa. It is almost impossible to imagine any theory of justice that could support the distributive situation the country was after almost a whole century under the regime of apartheid. However, when the new constitution was negotiated, the solution to a wholly unjustified system of property wasn’t starting from scratch. On the contrary, Section 25 of the South African Constitution is committed to land reform and to the correction of past injustices, but it still provides for equitable compensation in case of expropriation. If property didn’t exhibit the normative resiliency identified by Waldron, what would be the reason for requiring compensation in cases of land reform? It would be enough to invoke the necessity of land reform to justify the taking of land without any compensation whatsoever. Presumably, those who hold land in sufficient extension for it to be useful for general reform purposes have benefited from the apartheid regime, in one way or another. Even if they did not commit any morally unjustified act themselves nor supported the regime, they might have benefited from their ancestors’ injustice. They might have inherited wealth acquired in unjustified ways. Then, why not simply establish that, being morally unjust the system of entitlements in place, expropriation aiming to establish a just system should be carried out with no compensation at all? Putting aside the obvious practical response that points to the political power property owners held during the negotiation of the new constitution, one could reply that compensation is required because otherwise the system to be established in the name of justice would itself be unjust. Presumably, current holders are entitled to *something* in the new regime. Otherwise, it would mean just the substitution of one kind of oppression for another. But such reply just will not do: compensation is not conceptually required by the new, justice-oriented system; much less a compensation mechanism that takes into account a number of factors that may return a close-to-market-value result. The new system, in order to avoid charges of injustice, would have to redistribute something to the current holders, in accordance with its own internal distributive principle, but not necessarily anything near market value, nor anything that deserves the name of “compensation”. The very use of the word “compensation” conveys the idea that there is something deserving of protection in the current entitlements, however unjust the property regime —considered on the whole— may be.

These, among many other points, have generated extensive debate on whether property rights are adequate candidates for constitutional protection. It is often argued that there is an inevitable tension between constitutional property and democracy.<sup>23</sup> Indeed, that is the very same charge sometimes made against *any* kind of right whose content is ultimately determined by unelected judges who enjoy the institutional ability of allegedly trumping the will of elected majorities, bar the exceptional case of constitutional reform.<sup>24</sup> But for a number of reasons, the most important of which seems to be the essentially contestable character of judgments regarding the justice or injustice of economic and social regulations,<sup>25</sup> the tension appears to be particularly acute in the case of property rights.

It is clear, thus, that simply assuming the justice and moral worth of the stability of the status quo, in today's complex societies, just won't do to end the debate. Even staunch defenders of minimal state intervention acknowledge the need of correcting market failures,<sup>26</sup> and those of a less suspicious predisposition towards state's activities

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<sup>23</sup> See, e.g., Gregory S. Alexander, above n. 3, at 30-34.

<sup>24</sup> See, e.g., Jeremy Waldron, "The Core of the Case Against Judicial Review", 115 *Yale L. J.* 1346 (2006).

<sup>25</sup> John Rawls, above n. 4, at 174-175 (Cambridge, Belknap-Harvard, 2003) (arguing that frequently the best we can say about a rule dealing with social or economic issues is that is not clearly unjust); *Lochner v. New York*, 198 U.S. 45 (1905) (Harlan, J., dissenting, "I do not stop to consider whether any particular view of this economic question presents the sounder theory [...] It is enough for the determination of this case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion", 198 U.S. 45, 72), (Holmes, J., dissenting, "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution", 198 U.S. 45, 75-76).

<sup>26</sup> See, e.g., George L. Priest, "Poverty, Inequality, and Economic Growth", *SELA paper 1999 7* (arguing that many political decisions do enhance societal value, in particular, those that create a legal and institutional structure that channel market exchanges so that they are uniformly value-enhancing) (available at [http://www.law.yale.edu/documents/pdf/Priest\\_poverty\\_inequality\\_and\\_economic\\_growth\\_simple\\_principles.pdf](http://www.law.yale.edu/documents/pdf/Priest_poverty_inequality_and_economic_growth_simple_principles.pdf); last visited 02/08/2013). There is Spanish translation: "Pobreza, inequidad y crecimiento economico. Principios basicos", SELA 1999, *Revista Juridica de la Universidad de Palermo* 157 (2000); George L. Priest, "Economic Rights, Personal Rights, and Other Constraints on Majoritarian Outcomes", *SELA*



will argue that a stronger intervention is needed in order to achieve distributive justice.<sup>27</sup>

The complexities of modern capitalist economies often prompt the need for one or another degree of collective action in the management of economic affairs. But, as Bruce Ackerman has pointed out, “just because state intervention sometimes improves upon the invisible hand, it does not mean that activism is without its own moral difficulties.”<sup>28</sup> Potential instability and crude contests over the control of resources is one difficulty that quickly comes to mind. The possibility of abuses against those who have less political power, in the occasion of such contest, is another.<sup>29</sup> How much flexibility, or rigidity, should be allowed for the re-allocation of entitlements is, ultimately, the question lurking

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*paper 2001 17* (arguing that we can confidently predict that, beyond the basic structure of property, contract, tort, and antitrust law, the greater the extent of majority regulation or control, the lower the total societal value enhancement will be) (available at [http://www.law.yale.edu/documents/pdf/Priest Economic Rights Personal Rights and Other Constraints on Majoritarian Outcomes.pdf](http://www.law.yale.edu/documents/pdf/Priest_Economic_Rights_Personal_Rights_and_Other_Constraints_on_Majoritarian_Outcomes.pdf); last visited 02/10/2013). There is a Spanish translation: “Derechos económicos, derechos personales, y otras restricciones sobre los resultados de las mayorías”, in Roberto Saba (ed.), *SELA 2001 LOS DERECHOS FUNDAMENTALES* (Buenos Aires, Editores del Puerto, 2003).

<sup>27</sup> See, e.g., Ronald Dworkin, *JUSTICE FOR HEDGEHOGS* 375 (Cambridge-London, The Belknap Press of Harvard University Press, 2011) (“[...] your liberty includes the right to use property that is rightfully yours, except in ways your government can rightfully restrict [...] The structure and level of taxation in force may invade liberty if it is unjust —if it does not show equal concern and respect for all. Taxation in many countries now is unjust, but because it takes too little, not too much. It does not deprive people of what is rightfully theirs; on the contrary, it fails to provide the means of granting them what it is rightfully theirs”); Frank I. Michelman, “Possession vs. Distribution in the Constitutional Idea of Property”, 72 *Iowa L. Rev.* 1319, 1319-1321 (1987) (distinguishing between a “possessive” and a “distributive” conception of constitutional property and arguing that “we primarily understand property in its constitutional sense as an antiredistributive principle, opposed to governmental interventions into the extant regime of holdings for the sake of distributive ends [...] the distributive side of this normative constitutional idea of property has, from the beginning, been recessive in the discourse of American lawyers and judges [...] That the consequences are in some measure unfortunate may not be very controversial [...] [the] legal recovery of the full constitutional idea of property requires some relaxation of the distinction between law and politics, some visionary *rapprochement* of the two. We would have to accept some greater degree of politicization of our ideal understanding of adjudication, and particularly of constitutional adjudication, than we have yet learned to find comfortable”; emphasis in the original).

<sup>28</sup> Bruce A. Ackerman, *PRIVATE PROPERTY AND THE CONSTITUTION* 2 (New Haven-London, Yale University Press, 1977).

<sup>29</sup> An argument of this kind may have played an important role in the endorsement, by oppressed sectors, of the inclusion of a property clause in the South African Constitution. See Andre J. Van Der Walt, “The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation”, in Janet MacLean (editor), above n. 4, at 112.

in the shadows of any system of private property. Constitutional protection of property rights, at least in societies where the power of judicial review is recognized, has a direct impact on all these issues and, thus, the decision whether to include a property clause among constitutional provisions is a consequential one.<sup>30</sup>

Emergency powers are also an old legal-political institution. The idea that there exist circumstances in which rules can't be observed, either because compliance is materially impossible or because it would lead to consequences that are deemed unacceptable, has been around for a long time. Expressions such as state of exception, state of emergency, constitutional dictatorship, constitutional necessity, among others, have been coined to conceptualize the issue. Perhaps the most frequently cited institution regarding the problem of exception and extraordinary powers is the Roman dictatorship.<sup>31</sup> Closer in time, common law countries acknowledge a tradition of "martial law", as a model for dealing with emergencies, and France has developed its own "state-of-siege" model. Many other countries follow one or another tradition, and sometimes mix elements of the different traditions, in search of a workable formula. One thing is clear, though: the issue of emergency, although for a long time relegated to the shadows of scholarly concern and under-theorized, is omnipresent throughout the world and is rightly deserving of the attention it has received lately.

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<sup>30</sup> See Kenneth R. Minogue, "The Concept of Property and Its Significance", in J. Roland Pennock & John W. Chapman, above n. 6, at 21 (arguing that the concern with property and the constitution goes back as far as Solon and Lycurgus).

<sup>31</sup> See, e.g., John Ferejohn & Pasquale Pasquino, "The Law of Exception: A Typology of Emergency Powers", 2 *Int'l J. Const. L.* 210 (2004); Oren Gross & Fionnuala Ní Aoláin, *LAW IN TIMES OF CRISES: EMERGENCY POWERS IN THEORY AND PRACTICE* 17-26 (New York, Cambridge University Press, 2006). But see Giorgio Agamben, *STATE OF EXCEPTION* 47-48 (Chicago-London, The University of Chicago Press, 2005) (arguing that it is a mistake to equate state of exception with dictatorship, and that it is this mistake that has prevented writers as Schmitt and Rossiter from resolving the aporias of the state of exception; instead the state of exception would acknowledge its origin in the more obscure Roman institution of *iusitium* which would imply not a fullness of powers but an emptiness of law).

Many countries, small and large, powerful and weak, developed and in development, have had one or another encounter with the idea of emergency powers. Such experiential reality seems to be a *prima facie* good reason to explain the tendency of contemporary constitutional regimes to provide for emergency institutions in some way.<sup>32</sup> After 9/11, there has been a sudden renaissance of interest in emergency powers. But, clearly, the problem has been there since long ago, and citizens of nations more accustomed to dealing with crises have always kept a worried eye on the exercise of exceptional powers.

John Locke sowed the seeds of theorization of discretionary powers with his elaboration on the executive's prerogative:

“[...] the good of society requires that several things should be left to the discretion of him that has the executive power. For the legislators not being able to foresee and provide by laws all that may be useful to the community, the executor of the laws, having the power in his hands, has by the common law of nature a right to make use of it for the good of society [...] it is fit that the law themselves should in some case give way to the executive power [...] This power to act according to discretion for the public good, without the prescription of the law, and sometimes even against it [...] is called prerogative”<sup>33</sup>

Later on, Carl Schmitt built a sharp critique of liberalism around the idea of exception, in which he thought lay an inherent contradiction of the liberal system itself,<sup>34</sup>

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<sup>32</sup> See, e.g., Oren Gross & Fionnuala Ní Aoláin, above n. 31, at 37; Venelin I. Ganey, “Emergency Powers and the New East Constitutions”, 45 *Am. J. Comp. L.* 585 (1997) (analyzing the emergency provisions of eight East-European constitutions, which represent all regions of the former communist empire); Gabriel L. Negretto & José Antonio Aguilar-Rivera, “Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship”, 21 *Cardozo L. Rev.* 1797 (2000) (arguing that the abuse of emergency powers in Latin American countries is due to the lack of an adequate theoretical framework in the original constitutions which, absent a valid model, led to the incorporation of flawed emergency provisions later).

<sup>33</sup> John Locke, *THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 74 (Dover Thrift Editions, Mineola/New York, 2002).

<sup>34</sup> See also Rune Slagstad, “Liberal constitutionalism and its critics”, in Jon Elster & Rune Slagstad (editors), *DEMOCRACY AND CONSTITUTIONALISM* 101 (Cambridge-New York, Cambridge University Press, 1993) (“Schmitt unites themes drawn from both conservative and radical critiques of the ideology of constitutionalism. He asserts a discrepancy between idea and reality, and, turning reality against idea, finally rejects the concepts of the liberal *Rechtsstaat* and the parliamentary legislative state as outdated bourgeois ideology. His alternative is absolute state power [...]”)

and threw a large shadow over all attempts to regulate emergency powers. Liberal constitutionalism, according to Schmitt, aspires to subject political power to a system of norms, but it is a futile enterprise that depersonalizes the political, and moreover, hides the true reality of its goals. The essence of the political is, according to Schmitt, decision, not normativity. Since all liberal constitutional systems are built upon a founding decision that, in turn, does not depend on “normativities”, liberal constitutionalism does nothing but perpetuate the same kind of dictatorial act it aims to prevent.<sup>35</sup>

For a long time, the idea of emergency powers was closely related to situations dominated by violence and in which the survival of the community itself, or at least that of many of its members, was at stake. Civil wars, rebellions, attempted invasions, and more traditional interstate wars have played a prominent role in the development of emergency institutions from Republican Rome on. Emergency powers were usually called on to deal with alleged “existential threats” to the state,<sup>36</sup> which couldn’t be managed with the use of the resources the legal order provided. This situation is, ultimately, at the root of Schmitt’s critique: the fundamental “normativity” championed by liberal constitutionalism is ineffective for resolving truly life-threatening political conflicts,<sup>37</sup> and thus, to preserve the very same functional political system that is an unacknowledged, but nonetheless fundamental, assumption of a liberal constitution.<sup>38</sup> Therefore, an unrestrained decision-maker is needed.

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<sup>35</sup> William E. Scheuerman, “Carl Schmitt’s Critique of Liberal Constitutionalism”, 58 *Rev. Polit.* 299, 309 (1996).

<sup>36</sup> Bruce A. Ackerman, *BEFORE THE NEXT ATTACK* 21 (Yale University Press, New Haven-London, 2006).

<sup>37</sup> William E. Scheuerman, above n. 35, at 306.

<sup>38</sup> *Id.*, at 305.

But, for a number of reasons, the “existential threat” that is at base of Schmitt’s construction has somehow lost part of its actual, although nothing of its rhetorical, preeminence in emergency theories, and the justification for a powerful center of discretionary decision has moved beyond the survival of the political community.<sup>39</sup> Alternatively, the grounds for considering a crisis as an “existential threat” have expanded notoriously, to encompass cases well beyond violent dangers. In any case, there is a clear tendency towards an increasing concentration of discretionary powers in the executive branch.

The compression of time and space generated by technological progress in transportation and communications has also affected traditional assumptions of liberal constitutionalism, particularly those concerning the relationship between the executive and the legislative branches. As William Scheuerman has said

“[s]ince Locke the ideal of the rule of law has typically entailed a preference for legislation that is not only supposed to be prospective or future-oriented in character, but relatively stable as well [...] Unfortunately, this core attribute of liberal jurisprudence probably presupposes a relatively static social and economic setting characterized by little pressure to update legal rules”<sup>40</sup>

The essentially dynamic character of contemporary economic and social life puts pressure on legal rules to be brought up to date. This pressure has often been conceived of as an emergency situation in itself. The Executive branch, allegedly best equipped to take swift and knowledgeable action, has been keen on taking a central role in the legislative process, taking for itself functions that traditional separation of powers

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<sup>39</sup> See, e.g., William E. Scheuerman, “Emergency Powers”, 2 *Annu. Rev. Law Soc. Sci.* 257, 274 (2006) (arguing that “many and perhaps most crisis or emergency situations constitute serious threats, but by no means entail the prospect of the physical elimination of the political community”); Bruce Ackerman, “The Emergency Constitution”, 113 *Yale L. J.* 1029, 1039 (2004) (arguing that terrorist attacks do not trigger the “existential rationale” for emergency powers); Owen M. Fiss, “The War Against Terrorism and the Rule of Law”, 26 *Oxford J. Legal Stud.* 235, 256 (2006) (arguing that what is at stake in the so-called “War on Terror” is not whether the U.S. will survive, but the terms of the survival).

<sup>40</sup> William E. Scheuerman, “Liberal Democracy and the Empire of Speed”, 34 *Polity* 41, 54 (2001).

arguments reserved to the legislature. This tendency has been reinforced by the increasing interdependency of domestic and foreign affairs, with the latter having an ever-growing impact on the former, and the executives absorbing more legislative functions as a consequence of the process.<sup>41</sup>

Emergency powers, along with its close relative, the idea of executive lawmaking, pose a whole range of significant questions for a political system. Some of them are exclusive to its function as a justification of discretionary powers, and some are indeed shared with cases where discretion is justified on other grounds but where the legal effects are similar. Addressing the issues raised is quite important, if nothing else, because “the voluntary creation of a permanent state of emergency (though perhaps not declared in the technical sense) has become one of the essential practices of contemporary states”.<sup>42</sup>

Constitutional property and the theory of emergency powers are, then, two major issues of contemporary law.<sup>43</sup> What happens when they collide?

Argentina is an interesting case to undertake the experiment and explore the remnants after a violent encounter of constitutional property and emergency powers. It has a written Constitution, heavily influenced by the U.S. Constitution,<sup>44</sup> that declares

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<sup>41</sup> Oren Gross & Fionnuala Ní Aoláin, above n. 31, at 209.

<sup>42</sup> Giorgio Agamben, above n. 31, at 2.

<sup>43</sup> But see Thomas C. Grey, “The Disintegration of Property”, in J. Roland Pennock & John W. Chapman, above n. 6, at 74-75 (arguing that the concept and the institution of property have disintegrated and are no longer a crucial or coherent category in our conceptual scheme).

<sup>44</sup> Jose Benjamin Gorostiaga, one of the drafters of the 1853 Constitution, said that the Constitution “was cast in the mold of the U.S. Constitution”. See Emilio Ravnani (editor), 4 *ASAMBLEAS CONSTITUYENTES ARGENTINAS* 468 (Buenos Aires, Casa Jacobo Peuser, 1937).

itself “the supreme law of the land”<sup>45</sup> and considers property as inviolable.<sup>46</sup> Other provisions guarantee that every inhabitant of the country is entitled to “make use and dispose of their property”, in accordance with the laws that regulate the exercise of said rights,<sup>47</sup> laws that “shall not alter” the rights to be regulated.<sup>48</sup>

At the same time, Argentina’s recent history is rich in examples of profound economic crises that reverberate very strongly in the political realm. During the last 80 years, the usual governmental tool to deal with such crises has been the doctrine of economic emergency, which has justified repeated State interventions in economic rights—property, according to Argentina’s Supreme Court constitutional understanding of the concept—.<sup>49</sup> The Supreme Court, strongly influenced by U.S. Supreme Court

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<sup>45</sup> Article 31, Constitution of the Argentine Nation (“This Constitution, the laws of the Nation enacted by Congress in pursuance thereof, and treaties with foreign powers are the supreme law of the land; and the authorities of province are bound thereby, notwithstanding any provision to the contrary included in the provincial laws or constitutions, except for the province of Buenos Aires, the treaties ratified after the Pact of November 11, 1859”).

<sup>46</sup> Article 17, Constitution of the Argentine Nation (“Property is inviolable, and no inhabitant of the Nation can be deprived of it except by virtue of a judgment based on law. Expropriation for reasons of public interest must be authorized by law and previously compensated. Only Congress levies the taxes mentioned in Article 4. No personal service can be requested except by virtue of law or sentence based on law. Every author or inventor is the exclusive owner of his work, invention, or discovery for the term granted by law. The confiscation of property is hereby abolished forever from the Argentine Criminal Code. No armed body may make requisitions nor demand assistance of any kind”).

<sup>47</sup> Article 14, Constitution of the Argentine Nation (“All the inhabitants of the Nation are entitled to the following rights, in accordance with the laws that regulate their exercise, namely: to work and perform any lawful industry; to navigate and trade; to petition the authorities; to enter, remain in, travel through, and leave the Argentine territory; to publish their ideas through the press without previous censorship; to make use and dispose of their property; to associate for useful purposes; to profess freely their religion; to teach and to learn”).

<sup>48</sup> Article 28, Constitution of the Argentine Nation (“The principles, guarantees, and rights recognized in the preceding articles shall not be altered by laws that regulate their exercise”).

<sup>49</sup> CSJN, *Bourdieu, Pedro Emilio c. Municipalidad de la Capital*, 145 *Fallos* 307 (1925). The Court defined property in its constitutional sense as “every worthy interest that a man may possess, other than himself, his life and his liberty”. Although the decision is quite old, its conceptualization of constitutional property has stood. See, e.g., 311 *Fallos* 2034 (1988), (Belluscio, Petracchi, JJ., dissenting); 312 *Fallos* 343 (1989), (Petracchi, Bacque, JJ., concurring); 326 *Fallos* 417 (2003), (Fayt, J., concurring); 327 *Fallos* 4495 (2004), (Fayt, J., dissenting); 331 *Fallos* 2006 (2008) (majority opinion).

jurisprudence, has traditionally upheld almost every emergency measure taken under the flag of economic emergency.

A sample of relatively recent cases may help depict the idea. In 1990 a long process of uncontrolled inflation concluded in the compulsory exchange of bank deposits for long-term national bonds.<sup>50</sup> Consolidation of public debts in long-term national bonds was also ordered.<sup>51</sup> A few years before, during the mid-80's, a policy of “compulsory saving,” was put in force by the administration.<sup>52</sup>

The repetition of crises, the continuous use of the emergency powers doctrine to deal with them, and the Court's largely ultra-deferential attitude influenced constitutional politics, and in 1994, among many other amendments, the Constitution incorporated two new weapons to the governmental arsenal available to deal with emergencies: legislative delegation<sup>53</sup> and executive decrees by reasons of necessity and urgency.<sup>54</sup> Despite the

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<sup>50</sup> The constitutionality of the measure was assessed in the notorious *Peralta* case, 313 *Fallos* 1513 (1990).

<sup>51</sup> Law 23.982. The regime was, basically, reenacted in 2000 through Law 25.344. The scheme was generally upheld —316 *Fallos* 3176 (1993); 318 *Fallos* 1887 (1995)—, with exceptional rulings of unconstitutionality —e.g., the provision according to which the State could pay the compensation for a taking in long-term national bonds, struck down in 318 *Fallos* 415 (1995); the provision by which redresses owed by the State to physically-harmed individuals could be paid with such bonds, invalidated in 318 *Fallos* 1593 (1995); or the provision that allowed the State to pay the elderly their judicially-recognized social security credits with bonds, declared unconstitutional in 316 *Fallos* 779 (1993)—.

<sup>52</sup> The regime forced individuals to deposit money in bank accounts belonging to the State, under the promise of restitution after 60 months with an interest. Such scheme was upheld in the *Hornath*, —318 *Fallos* 676 (1995)— and *Indo* —318 *Fallos* 785 (1995)— cases.

<sup>53</sup> Article 76 provides that “The legislative powers shall not be delegated to the Executive Power except for issues concerning administration and public emergency, with a specified term for their exercise and according to the delegating conditions established by Congress [...]”

<sup>54</sup> Article 99, incise 3, in its relevant part, provides that “[...] The Executive Power shall in no event issue provisions of legislative nature, in which case they shall be absolutely and irreparably null and void. Only when due to exceptional circumstances the ordinary procedures foreseen by this Constitution for the enactment of laws are impossible to be followed, and when rules are not referred to criminal issues, taxation, electoral matters, or the system of political parties, he shall issue decrees on grounds of necessity and urgency, which shall be decided by a general agreement of ministers who shall countersign them together with the Chief of the Ministerial Cabinet”



Convention's stated intention of regulating the exercise of presidential powers and ameliorating hyper-presidential tendencies in our system, the amendments didn't seem to change the situation for the better:<sup>55</sup> in the late 1990's and early 2000's economic disruptions hit Argentina yet once again, and property rights suffered another heavy blow, as public employees' salaries and retirement benefits suffered numerous cutbacks justified on economic emergency grounds,<sup>56</sup> banks deposits were "frozen"<sup>57</sup> and, after a decade-long policy of "pegging" the peso to the U.S. dollar, obligations nominated in foreign currency were converted to national currency at an arbitrary rate that did not reflect the free market value of the currencies originally promised.<sup>58</sup> Needless to say, the disruption of ordinary life reached unprecedented levels, as Argentina went into the

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<sup>55</sup> It should be noted, first, that both lawmaking devices had been validated by the Supreme Court before the Convention incorporated them to the Constitution (emergency decrees in *Peralta* —313 Fallos 1513 (1990) and legislative delegation in *Delfino* —148 Fallos 430 (1927)—); and, second, that the Convention aimed at setting some limits to the practice admitted by the Court and at attenuating presidential powers. See CSJN, *Consumidores Argentinos v. Estado Nacional*, 333 Fallos 633 (2010) (analyzing the debates both in Congress when it enacted Law 24,309 —calling for a Constitutional Convention— and in the Convention itself and transcribing the parts of those debates where legislators and delegates to the Convention made explicit their intentions to limit the practice as regards emergency decrees) and CSJN, *Colegio Público de Abogados de la Capital Federal v. Estado Nacional*, 331 Fallos 2406 (2008) (same regarding legislative delegation).

<sup>56</sup> The Supreme Court dealt with these issues in the *Guida* —323 Fallos 1566 (2000)—, *Tobar* —325 Fallos 2059 (2002)—, and *Muller* —326 Fallos 1138 (2003)— cases. It should be noted that the Argentine Supreme Court considers the pension benefits and public salaries as protected by the guarantee against confiscations of the Constitution's property clause.

<sup>57</sup> The original restrictions on the withdrawal of money from bank accounts, along with the scheme of deferment of maturities proposed by the government, were declared unconstitutional by the Supreme Court in the highly controversial *Smith* case, 325 Fallos 28 (2002).

<sup>58</sup> The issue of the conversion of bank deposits originally nominated in dollars was directly addressed by the Supreme Court in three *leading cases*: *Provincia de San Luis*, 326 Fallos 417 (2003) (declaring the conversion unconstitutional on both formal and substantive grounds); *Bustos*, 327 Fallos 4495 (2004) (where a plurality of the Court, with a new line-up made up of President Kirchner's appointees, ruled the measures constitutional); and *Massa*, 329 Fallos 5913 (2006) (declaring the conversion formula, suitably modified by the Court, constitutional, insofar as the amount of pesos to be paid to depositors was equivalent to the free market value of the dollars originally deposited). The conversion of national bonds, nominated in dollars, was ruled constitutional in *Galli*, 328 Fallos 690 (2005). The issue of obligations outside the financial system was dealt with in *Rinaldi*, 330 Fallos 855 (2007) and subsequent cases.

largest default of sovereign debt yet,<sup>59</sup> and the social tension peaked with street riots, looting, and attacks on banks' buildings by furious depositors.

Clearly, violent collisions between constitutionally protected property rights and economic emergency have occurred throughout Argentina's twentieth-century history. By examining the bits and pieces left after the smoke has faded, we can attempt to formulate a plausible reconstruction of the idea of economic emergency, one that uncovers its troublesome relationship with popular conceptions of constitutional property, its no-less complicated link with the sociological legitimacy of courts, the institutional and economic incentives it creates, and the opportunities for regressive redistributions of wealth it affords. Hopefully, such reconstruction will allow us to better understand how the economic emergency doctrine works and what alternatives we have, if any, to improve the perspectives of countries where economic emergency is a sword dangling over the citizens' heads.

Of course, my analysis will have important limitations, born out of the conditions of the case under examination. I will propose a different approach to interpretation of constitutional property rights, one that is both attentive to text and sensitive to popular conceptions of the concepts embodied in the text. I will also sketch a proposal for heightened judicial scrutiny of economic emergency regulations. Neither, however, will aspire to have universal value or to be applicable beyond countries where the institutional conditions that define Argentina's case obtain.<sup>60</sup> I am confident, however, that lessons

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<sup>59</sup> See, e.g., Carlos Escudé, "From Captive to Failed State: Argentina under Systemic Populism, 1975-2006", 30 *Fletcher F. Wild. Aff.* 125, 141 (2006); Laura Tedesco, "Argentina's Turmoil: The Politics of Informality and the Roots of Economic Meltdown", 15 *Camb. Rev. Int. Aff.* 469, 470 (2002). Matt Moffet, "Argentina Squeezes Bondholders", *The Wall Street Journal*, January, 11, 2005, C1 (referring to Argentina's default as the "largest sovereign default in history"); Maria Anastasia O'Grady, "Argentina's Lessons for Global Creditors", *The Wall Street Journal*, March, 4, 2005, Section Americas A15 (stating that Argentina's was the largest and most complicated restructuring ever attempted).

<sup>60</sup> Some of the relevant characteristics of Argentina's political system are: a) a strong presidential office; b) a recent tendency to a particular functionality of the system that may be qualified as "delegative democracy"; c) a repetitive history of economic crises, dealt with through the use of emergency measures; d) a strong

learned from Argentina's experience will be useful for a significant number of political systems beyond its borders. As Vicki Jackson has put it, "single-case studies may contribute to functional understandings of constitutional law or institutions".<sup>61</sup>

One further qualification is in order: although I think the traditional deferential approach to economic emergency measures is, in the long term, at best ineffectual and at worst, counterproductive, I don't take it as a starting point of my research that Argentina's economic and political crises have been produced by judicial toleration of governmental emergency measures. A number of other factors have surely played a much greater role in the unleashing of the unfortunate episodes referred above: internal and external economic factors, political mistakes, and miscalculations, among many others.<sup>62</sup> But if law makes any difference in the actual outcomes of the political process, if

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perception by the people of lack of compliance with the Constitution, combined with an equally intense desire for its faithful observation. I will say more about these features along throughout the dissertation.

<sup>61</sup> Vicki C. Jackson, "Comparative Constitutional Law: Methodologies", in Michel Rosenfeld & András Sajó (editors) *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 65 (Oxford, Oxford University Press, 2012).

<sup>62</sup> See, e.g., Carlos Escudé, above n. 59, at 125-126 (arguing that from 1975 on, Argentina has suffered repetitive cycles of regressive transferences of wealth from taxpayers to private businesses, prompted by the latter, which, in turn, create more political instability). *Id.*, at 139 (arguing that in 2001, Argentina did not fall exclusively because of its own faults: there was also a purposeful hiding of information by investment banks who kept making profits out of the situation when the collapse was near and foreseeable); Laura Tedesco, above n. 59, at 469 (arguing that "informal politics" has played a contributory role in the unleashing of social and political turmoil in 2001). *Id.*, at 472 (stating that the roots of the 2001 crisis can be found in the way democracy was reestablished after 1983). *Id.*, at 480 (arguing that the lack of horizontal accountability explains why Argentina lurches from one crisis to the next); Carlos Escudé, "Argentina, a 'Parasite State' on the Verge of Disintegration", 15 *Camb. Rev. Int. Aff.* 453, 453-454 (2002) (arguing that the 2001-2002 crisis is associated with an unprecedented and financially unsustainable level of indebtedness, which in turn is the result of years of political mismanagement, fiscal irresponsibility, and corruption). *Id.*, at 455 (pointing towards the erosion of the rule of law as the overarching cause of the crisis). Alan Cibils & Ruben Lo Vuolo, "At Debt's Door: What Can We Learn From Argentina's Recent Debt Crisis and Restructuring?", 5 *Seattle J. for Soc. Just.* 755 (2007) (analyzing alleged causes of the 2001-2002 crisis, rejecting explanations based on the "debt intolerance concept" and on the public sector's inability to reduce its deficit, and arguing that the crisis was the logical outcome of a massive debt accumulation process, fueled by the negative effects of policy prescriptions by the international financial institutions —implemented by Argentina officials— and by a series of exogenous shocks —U.S. interest rate hikes, financial crises in Asia, Russia, and Brazil—); John V. Paddock, "IMF Policy and the Argentine Crisis", 34 *U. Miami Inter-Am. L. Rev.* 155 (2002) (arguing that the real problem in Argentina in the 1990s was not fiscal but economic —closely related to the perpetuation of the policy of pegging the peso to the dollar—, and pointing as causes of the 2001-2002 crisis IMF's policies —ill-suited to Argentina's situation—, United States' double-standard international economic policy and protectionism, and finally

it serves (to whatever extent) as an incentive for the behavior of political actors, then it is a legitimate question to ask what role the Supreme Court has played in the production and resolution of the crises and what alternative role, if any, was available.

The dissertation will be organized in two main parts. In Part One, I deal with the idea of a popular conception of constitutional property and explain why it is important when attempting to interpret the Constitution's property clause. I explore the relationship between emergency decision-making by the elected branches and the dominant conceptions of constitutional property. I also analyze the distributive effects of the measures and what influence, if any, the Judiciary's intervention had in this regard. The interplay of these two analyses returns some results at odds with widely held convictions regarding, first, what branches are more responsive to popular understandings of the concepts at stake and, second, which of them better protect the interests of the relatively weak and politically-unconnected. The "countermajoritarian difficulty" is turned upside down, and a "regressive redistribution difficulty" is brought to the fore of the constitutional discourse. In Part Two, I analyze the theoretical underpinnings of the justices' stances on some of the central cases dealing with economic emergency and provide some explanations for seemingly untenable doctrines, such as the "haircut versus deferment of maturities" distinction, itself related to the traditional "right-remedy" distinction of the U.S. Supreme Court case law. I also defend the use of such doctrinal distinction, drawing upon insights from the behavioral economics field and crossing them with observations from a growing literature on the legitimacy of courts.

If it is true that a constitutional regime, in order to be able to survive, must tap into, and bear some consistency with, deeper social understandings of how that regime

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the Constitution's permission of discordancies between branches of government regarding an economic plan —both interbranches at the federal level and between the federal government and the provinces—).

should be,<sup>63</sup> then what people think about constitutional property and the political decisions dealing with it, must have some relevance in the assessment of what has been done so far. If it is true that governments have nothing to support them but opinion,<sup>64</sup> then it must be equally true that judicial rulings dealing with constitutional property should be aware of how people conceive of it. This doesn't mean, of course, that rights are to be construed in purely majoritarian terms, if by that we understand the political preferences of current majorities, as reflected in the elected branches' composition. Instead, I argue that constitutional interpretation of a property clause must bear a reasonably close relationship to contemporary public understandings of its text, in order to avoid noxious effects on the public perception of the rule of law.<sup>65</sup> These effects include the devaluation of the very idea of the rule of law and the undermining of the Court's legitimacy. Firstly, in political cultures where the belief in law is closely associated with the effectiveness of its enforcement, under-enforced property rights may bring about a cynical attitude towards the Constitution. Secondly, in contexts where the Judiciary's legitimacy is not firmly grounded in any source of authority other than the written text of the Constitution it is supposed to apply, the consistent application of a model of adjudication that is responsive to pressures' from powerful political and economic actors severely undermines the courts' claims to legitimacy. Finally, rights must mean something other than a space of pure possibility of determination by current

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<sup>63</sup> See Barry Friedman, "The History of the Counter-majoritarian Difficulty, Part Four: Law's Politics", 148 *U. Pa. L. Rev.* 971, 980 (2000).

<sup>64</sup> See David Hume, "Of the First Principles of Government", in C. Hendel (editor), *DAVID HUME'S POLITICAL ESSAYS* 24 (Bobbs-Merrill, Indianapolis, 1953), cited by Robert A. Burt, *THE CONSTITUTION IN CONFLICT* 34 (Cambridge-London, Belknap-Harvard, 1992).

<sup>65</sup> Clearly, a similar argument could be made regarding any other right. However, I will not attempt to defend such a broad argument here. If nothing else, because people seem to have a high sensitivity in matters pertaining to their property, I will limit myself to the specific case of property rights entrenched in a reasonably clear constitutional clause.

majorities, in order to be meaningful. Importantly, I contend that ultra-deferential attitudes towards political branches may be, paradoxically, countermajoritarian, due to the disjunction existent between the political process through which economic emergency measures are taken and the dominant conception of constitutional property.

These themes appear, from different perspectives, in both Part One and Part Two of the work.

In the Epilogue I offer reasons why, despite the genetic connection between the Argentine and the U.S. constitutions,<sup>66</sup> the Argentine Supreme Court should not follow the model of its U.S. counterpart regarding constitutional protection of economic rights. If there is any merit to the idea that what societies have gone through in the past partially determines what rights they should be particularly careful in protecting,<sup>67</sup> then it may make sense to separate oil from water, so to speak, and to depart from the path the U.S. Supreme Court has generally followed since 1937. Finally, I advance a tentative proposal for a reform of the judicial approach to economic emergency and present a sketch of how such an approach, sensitive to different circumstances that should trigger more searching judicial scrutiny, might look like.

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<sup>66</sup> See Sujit Choudhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation", 74 *Ind. L.J.* 819, 838 (1999) (arguing that constitutions are genetically related if one constitution influences the framing of the other, or if both are framed under the influence of a third).

<sup>67</sup> See, generally, Alan M. Dershowitz, *RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGIN OF RIGHTS* (New York, Basic Books, 2004) (arguing that rights may be explained as arising from particular human experiences with injustice).

## B. Part One: Property and the People. Mood Swings? (The Popular Conception of Constitutional Property)

### The Importance of the Common Understanding of Constitutional Property.

Argentina's Constitution introduces a *concept*<sup>68</sup> of property in the constitutional realm, by declaring that every inhabitant has the right to use and dispose of his/her property and that such right is "inviolable", only subject to reasonable legal limitations that cannot alter it (Arts. 14, 17, and 28 Arg. Constitution). While the document contains prescriptions that spell out, to a certain extent, the features of constitutional property,<sup>69</sup> no provision completely specifies what it is to be understood by constitutional property. Within—at least theoretically— certain restrictions of "fit",<sup>70</sup> different *conceptions* may dispute the prize of inviolability, and in fact they have done so in the past. People—and courts— have tried to read into the property clause their own ideas about the proper content for the protection of individual entitlements and, indirectly, about the adequate relationship that must exist between the Judiciary and the elected branches when it comes to deciding who bears what costs in emergency situations. This chapter will

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<sup>68</sup> See, e.g., W. B. Gallie, "Essentially Contested Concepts", 56 *P. Aristotelian Soc.* 167, 176 (1955-1956) (introducing the idea of "essentially contested concepts" as those where an exemplary use of the concept must be recognized by all contesting parties, "yet, because of the internally complex and variously describable character of the exemplar [...] it is natural that different features in it should be differently weighted by different appraisers, and hence that [they] should have come to hold their very different conceptions" of the concept); John Rawls, above n. 4, at 5 (applying the "concept"- "conceptions" distinction to the idea of justice); Ronald Dworkin, *LAW'S EMPIRE* 70-76 (Cambridge, Massachusetts, The Belknap Press of Harvard University Press, 1986) (explaining the distinction and applying it to the idea of justice).

<sup>69</sup> On the prohibition of confiscations, regulations of expropriations, etc.

<sup>70</sup> See, e.g., Ronald Dworkin, above n. 68, at 255 ("[Any working theory] will include convictions about both fit and justification. Convictions about fit will provide a rough threshold requirement that an interpretation of some part of the law must meet if it is to be eligible at all [...] That threshold will eliminate interpretations that some judges would otherwise prefer, so the brute facts of legal history will in this way limit the role any judge's personal convictions can play").

explore what conceptions of constitutional property have taken a hold in Argentina at different times of the country's existence and which, if any, are dominant today.

It is a widely held view among contemporary U.S. legal scholars that courts should not try to second-guess legislatures and should be, instead, deferential to legislative judgments on social and economic matters. A broad field of experimentation is, thus, open to political majorities.<sup>71</sup> A central part of the thrust of this argument is that it is hard to say whether any given economic regulation is clearly unjust,<sup>72</sup> and thus such judgments should be left for the citizens' representatives to make.<sup>73</sup> Unelected, life-tenured, politically-unaccountable judges should not substitute their policy judgments as to the wisdom of economic legislation for that of the elected branches of government.

In *Ferguson v. Skrupa*,<sup>74</sup> the U.S. Supreme Court gave a clear formulation to this deferential stance on economic matters:

“Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy [...] ‘the proper course is to recognize

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<sup>71</sup> High liberalism, a position currently dominant in the U.S. academia, holds a thin conception of economic liberty, which is subordinated to a robust idea of substantive equality to be achieved through redistribution by elected officials. See, e.g., John Tomasi, *FREE MARKET FAIRNESS* 54-56 (Princeton University Press, Princeton & Oxford, 2012).

<sup>72</sup> See, e.g., John Rawls, above n. 4, at 174-175 (arguing that, frequently, the most we can say about such regulations is that they are not clearly unjust). See also *Lochner v. New York*, 198 U.S. 45, 72 (1905), (Harlan, J., dissenting, “I do not stop to consider whether any particular view of this economic question presents the sounder theory [...] It is enough for the determination of this case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion”). *Id.*, at pp. 75, 76 (Holmes, J., dissenting, “[...] a Constitution is not intended to embody a particular economic theory [...] It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution.”)

<sup>73</sup> An argument of this sort, based upon the generalization of the existence of good-faith disagreement concerning the content of any right, is at the base of the radical attack on judicial review of legislation. See, e.g., Jeremy Waldron, “The Core of the Case Against Judicial Review”, 115 *Yale L. J.* 1346 (2006).

<sup>74</sup> 372 U.S. 726, 729-730 (1963).



that a state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain' [...] We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned [...] with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our government' [...]"

While Argentina's Judiciary did not wholly embrace such a deferential conception of the judicial role for economic rights generally, the dominant trend in the Supreme Court's jurisprudence certainly did when emergency justifications were at play.<sup>75</sup> Thus, in *Bustos*, for instance, it was held that:

"It must be kept in mind that the powers of review of administrative action and of constitutional review that judges enjoy do not authorize them to substitute

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<sup>75</sup> There may be several reasons for this difference between the stances taken by the Argentina's Supreme Court and the U.S. Supreme Court—whose decisions have long been a source of inspiration for Argentina's Court—. One relevant factor may be the differences between both constitutional texts: while the U.S. Constitution provides for what seems to be, at least at face value, only a procedural protection of property (the Due Process Clause of the Fifth Amendment), Argentina's text explicitly deems property "inviolable" (article 17) and establishes property, as any other right, cannot be "altered" by laws purporting to regulate it (article 28). Arguably, both Courts have built their political capital upon different basis of legitimacy. Argentina's Court seems to have been more closely tied, in this regard, to textual constitutional support of its decisions which may have prevented the development of a more general theory of deference. See Jonathan M. Miller, "Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and Its Collapse in Argentina", 21 *Hastings Int'l & Comp. L. Rev.* 77 (1997) (explaining the sources of authority of Argentina's Supreme Court; however, Miller argues that a more general deferential position, extending to all areas of economic regulation, was adopted by the Court). In contrast, the rejection of the doctrine of emergency powers by U.S. judges and scholars may help explain the rising of a different constitutional model, based upon deference in economic matters. See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22, fn. 19 (1977) (Brennan, White, Marshall, JJ., dissenting) ("*Blaisdell* suggested further limitations that have since been subsumed in the overall determination of reasonableness. The legislation sustained in *Blaisdell* was adopted pursuant to a declared emergency in the State, and strictly limited in duration. Subsequent decisions struck down state laws that were not so limited [...] Later decisions abandoned these limitations as absolute requirements [...] Undoubtedly the existence of an emergency and the limited duration of a relief measure are factors to be assessed in determining the reasonableness of an impairment, but they cannot be regarded as essential in every case"). See also Michal R. Belknap, "The New Deal and the Emergency Powers Doctrine", 62 *Tex. L. Rev.* 67, 68 (1983) (arguing that the lack of enthusiasm of the legal community for the emergency doctrine played a role in the later adoption of the ultradeferential stance in economic matters). See also John A. Fliter & Derek S. Hoff, *FIGHTING FORECLOSURE: THE BLAISDELL CASE, THE CONTRACT CLAUSE, AND THE GREAT DEPRESSION* 164 (Kansas, University Press of Kansas, 2012) (arguing that "Even after the economy dipped significantly during the 'Roosevelt Recession' of 1937-1938, additional proposed economic regulation simply could not be justified as emergency measures. Liberals needed a new rationale. That rationale emerged in 1937, in the form of a new stress on judicial deference to legislatures on matters of economic regulation").

their criteria for those of the Administration in the determination of policies or in the appraisal of the opportunity of measures [...] even less so when the impossibility of banks to repay their matured obligations exceeded the particular financial situation of each intermediary and acquired the dimension of a systemic crisis, whose revision requires an integral analysis [...] The question involves not only the recovery [...] of entities that operate in a sector that is essential for the good performance of the national economy, but also their ability to help to repay, in an orderly and egalitarian way, bank deposits. *The exercise of the aforementioned powers of revision cannot justify that all economic measures taken by the competent branches be reviewed, not under their legality but under their wisdom and opportunity instead, because such a situation would imply the substitution of the predominantly technical criteria of the Judiciary for those of the constitutional branches that are elected directly by popular will. [...] Judges are called upon to judge, not to administer or to set economic policies, nor to review the policies set by the political branches; otherwise, the democratic regime would be destroyed or substituted by a judicial dictatorship, which would impede the development of any coherent government program, especially in the context of an emergency which judges are not properly-equipped to contain [...].*<sup>76</sup>

The gist of this part of the *Bustos*' plurality opinion is nothing but yet another invocation of the arch-famous "countermajoritarian difficulty".<sup>77</sup> There is another argument as well in the precedent paragraph, which I will call the "technocratic objection", that is, the argument according to which judges wouldn't be suited to make decisions on emergency situations due to institutional limitations.<sup>78</sup> They would be in no position to make accurate judgments as to what measures are appropriate to deal with contingencies whose scope exceed the traditional format of a contentious lawsuit. I will deal with it later. But for now I want to focus on the more classic objection to judicial review: its allegedly undemocratic character.

<sup>76</sup> CSJN, *Bustos, Alberto R. v. Estado Nacional et al.*, 327 Fallos 4495 (2004) (Belluscio, Maqueda, JJ., plurality opinion, section 12, emphasis added). The rationales used by the Court to justify emergency measures may have varied slightly through the different cases, but there has certainly been a very consistent line of precedents upholding most economic emergency legislation. See CSJN, *Massa, Juan Agustín v. Estado Nacional et al.*, 329 Fallos 5913 (2006) (Lorenzetti, J., concurring, section 27).

<sup>77</sup> Alexander M. Bickel, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16, 23 (New Haven & London, Yale University Press, 1986). Although I am citing to Justice Belluscio and Justice Maqueda's opinion here, similar lines of argument can be detected in the other concurring opinions (see, e.g., Zaffaroni, J., concurring, §3; Boggiano, J., concurring, §33; Highton de Nolasco, J., concurring, §22).

<sup>78</sup> See, e.g., Lon L. Fuller, "The Forms and Limits of Adjudication", 92 *Harr. L. Rev.* 353, 395 (1978-1979).

My attention on the “countermajoritarian objection” will have two prongs. First, I will argue that, at least in economic emergency situations, judges may often act in a countermajoritarian fashion by deferring to decisions by the elective branches, as Argentine history shows. This part of my argument does not attempt to prove a positive case for a more intrusive judicial review of economic emergency situations. Instead, here I pursue a more modest goal: to deflect the attacks launched against judicial review based upon arguments of deference towards democratically-elected branches, due to their purportedly closer connection to the “popular will”. Second, I will advance an argument to the effect that judicial decisions that systematically depart from popular understandings of constitutional property are self-defeating and, in the long run, they undermine the Judiciary’s legitimacy while devaluing public perceptions on the value of the rule of law. Let us see.

One could say, as Jerry Mashaw does, that it is the flawed image of democracy underlying most of the theorizing about the “countermajoritarian difficulty” that creates the “difficulty” in the first place: once a few insights of public choice theory are grasped, it is clear that we don’t have the kind of democracy that the argument presupposes, and that we can never have it.<sup>79</sup> In other words, “if the suggestion is that courts reviewing statutes confront the will of the people, the image is surely false [...] On the other hand, if all that is meant is that a majority of elected representatives voted for this bill, then ‘countermajoritarianism’ loses a good bit of its punch.”<sup>80</sup> I intend to tackle the

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<sup>79</sup> Jerry L. Mashaw, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 201, 202 (New Haven & London, Yale University Press, 1997).

<sup>80</sup> *Id.*

paradigmatic objection on its own terms, and show why it fails to give constitutional review a decisive blow—in economic emergency situations, at least—.<sup>81</sup>

Mashaw’s argument, however, could prove too much for my present purposes. It could be argued that if democracy cannot possibly consist of an accurate representation of collective preferences—due to conceptual impossibilities in the aggregation process, or any other problem—, then how could I aspire to reconstruct *any* popular conception of constitutional property? Surely, the aggregation problems that affect the democratic system would also trouble my enterprise.

Moreover, Bruce Ackerman has pointed out the problems that anyone standing on the Ordinary Observer’s shoes—to borrow his terminology—<sup>82</sup> will face in attempting a reconstruction of the dominant social expectations regarding property rights, as expressed in ordinary language. In a complex society, people of different classes, with different cultures, will expect different things from the same interactional context.<sup>83</sup>

My reply to these problems is as follows: public choice theory does not tell us that majoritarian collective preferences are a conceptual impossibility. All it tells us is that we are unlikely to ever design institutions that can flawlessly aggregate individual

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<sup>81</sup> Here I will follow the steps of a recent strand in the constitutional scholarship that, drawing partially upon political science empirical work, suggests that courts and public opinion stand in a closer relationship than the “countermajoritarian” critique presupposes. See, among many others, Barry Friedman, *THE WILL OF THE PEOPLE* (New York, Farrar, Straus & Giroux, 2009); Barry Friedman, “Mediated Popular Constitutionalism”, 101 *Mich. L. Rev.* 2596 (2003).

<sup>82</sup> Bruce A. Ackerman, above n. 28, at 15 (defining the Ordinary Observer as “an analyst who elaborates the concepts of nonlegal conversation so as to illuminate the relationship between disputed legal rules and the structure of social expectations he understands to prevail in dominant institutional practice”).

<sup>83</sup> *Id.*, at 95. See also Jennifer Nedelsky *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 259 (Chicago & London, The University of Chicago Press, 1990) (arguing that in the United States “there seem to be somewhat different forms of belief about property rights in different segments of the population”).

preferences into collective choices.<sup>84</sup> My aim, on the other hand, is rather more modest. I don't attempt to offer a perfect description of what constitutional property meant for the majority of Argentines at any given period of time. Neither do I seek to build counterfactual hypothesis about what a majority of the people would have preferred, as a matter of economic policy, on each of the economic emergency situations faced by the country in its history. Instead, I will survey Argentina's political, social, and legal landscape, to offer a general picture of popular reactions to certain paradigmatic economic emergency measures. Notice that this modest goal does not demand, either, that I show what measures could have been regarded as constitutionally-admissible, according to popular understandings. To paraphrase Lon Fuller, we can know what is plainly unconstitutional without committing ourselves to declare with finality what perfectly constitutional measures would be like.<sup>85</sup> No aggregation of individual preferences into collective choices is at stake here.<sup>86</sup>

Ackerman's challenge seems to be avoided by my minimalist goal. I need not offer an accurate, highly detailed reconstruction of popular views on property. As I said before, all I want to show is that judges will often contradict majority sentiment by deferring to economic emergency judgments by either the President or the Congress<sup>87</sup>

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<sup>84</sup> See Jerry L. Mashaw, above n. 79, at 15.

<sup>85</sup> Lon L. Fuller *THE MORALITY OF LAW* 12 (New Haven & London, Yale University Press, 1969) (arguing that we can know the bad on the basis of very imperfect notions of what would be good to perfection, and that "we can, for example, know what is plainly unjust without committing ourselves to declare with finality what perfect justice would be like").

<sup>86</sup> I will occasionally resort to sources that are themselves affected by the problems of aggregation of preferences identified by public choice theory, such as legislative or constitutional reforms. Notice, however, that I will use these elements as traces that may help to rebuild general positions for or against certain economic measures and that may, hence, give content to a general conception of constitutional property.

<sup>87</sup> I must admit, though, that even this modest approach presents difficult tasks: history has a way of privileging voices, and public opinion on any given area of public interest is more of a collage of ever-shifting views than a clear-cut, sharp picture of a coherent set of ideas. Nonetheless, at least in regard to the paradigmatic instances of emergency measures I will deal with, it is possible to reconstruct large

and, therefore, that we may have good reasons to put the conventional wisdom on the topic into question.

The second prong of my argument here will build upon the first one. I will make a few brief introductory remarks about Argentina's legal and political system in order to introduce the second part of argument.

Argentina has a mixed legal and political system, as far as sources and influences go. Our Constitution has followed fairly closely that of the United States.<sup>88</sup> We have a presidential system, with a bicameral Congress, and an independent Judiciary, headed by a Supreme Court. The Court, building upon both *Marbury v. Madison*<sup>89</sup> and our constitutional text's own potential for deriving such implications, started a practice of constitutional review early on.<sup>90</sup> The power of judicial review can be exercised by any court, whatever the hierarchy and jurisdiction, but it is always restrained by the need of a case, understood as a concrete collision of rights between different parties. The effects of a judicial decision, in principle and theoretically at least, do not extend beyond the parties

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tendencies in public opinion, with an acceptable degree of accuracy. For an argument in this sense, which I believe to be generally applicable to Argentina's case on property rights and economic emergency, see Barry Friedman, above n. 81, at 16-18 (elaborating on the difficulty of reconstructing public opinion in the U.S. context and on the reasons why it is a possible task).

<sup>88</sup> See, e.g., José A. Seco Villalba, *FUENTES DE LA CONSTITUCIÓN ARGENTINA* 129 (Buenos Aires, Depalma, 1943) (quoting José Zuviría, secretary of the Constitutional Convention, to acknowledge the influence of the U.S. Constitution but stating expressly that the Argentine document has its own originality).

<sup>89</sup> 5 U.S. 137 (1803) (Cranch).

<sup>90</sup> See CSJN, *Municipalidad de la Capital v. Elortondo*, 33 *Fallos* 162 (1888) (arguing that the power of constitutional review by the courts is a necessary corollary of the separation between constituent and legislative power, and of the inferiority of the latter, established by the Constitution, and applying such doctrine to invalidate a law authorizing a taking because it did not satisfy the "public utility" requirement of the Constitution). See also CSJN, *Caffarena v. Banco Argentino del Rosario de Santa Fe*, 10 *Fallos* 427 (1871) (arguing, *obiter dictum*, that constitutional judicial review is of the essence of the constitutional order); *Sojo*, 32 *Fallos* 120 (1887) (ruling unconstitutional a law that extended the Court's original jurisdiction, a la *Marbury*).

of a case.<sup>91</sup> Judges are appointed by the President, with the approval of the Senate.<sup>92</sup> At the same time, the private law system was taken from the continental European tradition, following upon the Napoleon Civil Code of 1804. With the codification, Argentina also imported, at least partially, a certain view of a judge's proper role: a somewhat mechanical applicator of written laws, without much room for influencing the political process. Interpretation was to be rationalist in fashion. Legal education, suitably adapted to the new era of Codes, quickly took a heavily formalist stance.<sup>93</sup> In this context, the Supreme Court initially relied on a strongly textualist approach to interpreting the Constitution.

Jonathan Miller has argued that the main source of the Supreme Court's authority and independence and, at least, a partial explanation of its initial relative success, was its ability to point to clearly established constitutional rules as grounds for its decisions.<sup>94</sup> If this is true, then it seems relevant that the Court pays close attention to how its interpretations relate to the people's understandings about constitutional texts. Public

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<sup>91</sup> But see CSJN, *Halabi, Ernesto v. Poder Ejecutivo Nacional*, 332 Fallos 111 (2009) (acknowledging certain categories of cases where judicial rulings can have "expansive effects" that reach beyond the parties to the case). See also Art. 43, Constitution (providing for *amparo colectivo*, a type of legal process in which judicial rulings may have expansive effects).

<sup>92</sup> After 1994, lower-court judges are nominated by the President from a list of three candidates, prepared by the "Consejo de la Magistratura". They still need to be confirmed by the Senate. Supreme Court judges are not subject to this procedure, and they are selected directly by the President at his or her discretion, and subject to approval of the Senate.

<sup>93</sup> See, e.g., Jonathan M. Miller, above n. 75, at 110 ("[...] civil law courses began to offer a mechanical approach emphasizing exegesis of Code provisions based on the structure of the Code and extensive use of French commentators [...] By the mid-1870s Argentine legal education had transformed itself from a practical education in the courts combined with study of philosophy, natural law, and non-systematic study of some civil law concepts, to five years of legal science focused primarily on the Civil Code. The old requirement of three years of training in the courts disappeared entirely").

<sup>94</sup> *Id.*, at 79-80. Correlatively, Miller holds that once the Court faced the need to adopt an interpretive approach that was more accommodating to new social needs, it lost all grounds of credible authority and fell prey to the Executive branch—who would not be prone to tolerate either a rationalist, formalist Court that would likely oppose its policies whenever they didn't fit acceptably within the letter of the Constitution, nor to a "responsive" Court that could be turned against the Executive, when the political winds changed—.

perceptions on constitutional property do matter. If Roosevelt was right that a constitution is a “layman’s document, not a lawyer’s contract”,<sup>95</sup> then judicial decisions that systematically depart, in a significant way, from what the people generally understand by constitutional property are self-defeating, in the sense that they undermine the very basis of the Judiciary’s legitimacy to interpret the Constitution in the first place.<sup>96</sup> Even if Roosevelt’s case is a bit overstated —and it probably is— one could think that any constitution aiming at establishing government by the People, as well as for the People, should be interpreted in a way that does not frontally contradict popular understandings of the text. Not only are decisions of this kind detrimental to the Judiciary’s legitimacy, but they also bring about a sensible devaluation on the public’s perception of the rule of law, possibly creating incentives for lawless behaviour. Let’s examine the reasons for these two assertions in a bit more detail.

Any community of interpreters has standards for assessing the correctness or wrongness of decisions.<sup>97</sup> These “disciplining rules”, to use Owen Fiss’ terminology, constrain the range of acceptable interpretations of a legal norm, within the community that accepts the rules. If one takes the people at large as an important interpretive community in constitutional questions,<sup>98</sup> then —for the purposes of this dissertation—

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<sup>95</sup> See Larry D. Kramer, *THE PEOPLE THEMSELVES* 217 (New York, Oxford University Press, 2004) (quoting F. D. Roosevelt). Although Roosevelt was referring to the U.S. Constitution, the same argument could be made regarding the Argentine Constitution, also made in the name of the People.

<sup>96</sup> This would be so unless, of course, the Court managed to build a different source of legitimacy that could sustain it as a credible independent guarantor of rights and controller of the elective branches. This, however, is a highly complicated task, in which the Court has been notoriously unsuccessful, so far. See, generally, Jonathan M. Miller, above n. 75.

<sup>97</sup> For an explanation of the possibility of objective interpretation in law and the role of the “disciplining rules” in allowing for such a practice, see Owen M. Fiss, “Objectivity and Interpretation”, 34 *Stan. L. Rev.* 739 (1982).

<sup>98</sup> Many would argue that it is the most important interpretive community. See, generally, Larry D. Kramer, above n. 95. See also Richard A. Epstein, *TAKINGS* 20 (Cambridge, Massachusetts & London, Harvard University Press, 1985) (“The community of understanding that lends meaning to the Constitution comes



those standards are constituted, basically, by what the community thinks the expression “property is inviolable” (art. 17, Arg. Const.) means in each relevant context. These standards —the conception of constitutional property—, then, set the limits of “semantic resistance”, using Justice Zaffaroni’s very apt expression,<sup>99</sup> of the property clause of the Constitution.

If courts, giving way to pressures from the other branches at every juncture, consistently interpret the property clause as admitting measures that frontally contradict the people’s understandings of what the text of the clause means —following Miller, let us call these decisions “responsive” decisions—,<sup>100</sup> then they cannot point towards the written text as a source of legitimacy for their decisions.<sup>101</sup>

For a judicial decision to be legitimate, from this perspective, a reasonably informed layfolk should be able to consider it as a proper application of what he understands from the constitutional text. The expression “property is inviolable” has

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of necessity from outside the text, in the way these words are used in ordinary discourse by persons who are educated in the normal social and cultural discourse of their own time”).

<sup>99</sup> See CSJN, *Simón, Julio H. et al.*, 328 *Fallos* 2056 (2005) (Zaffaroni, J., concurring, §24) (using the idea to delimit what is properly an interpretation of a legal norm and to distinguish it from what is not); See also CSJN, *Casal, Matías et al.*, 328 *Fallos* 3399 (2005) (majority opinion, §21; Fayt, J., concurring opinion, §7) (taking up Justice Zaffaroni’s expression in *Simón*).

<sup>100</sup> What is important here is that the decisions contradict common interpretations of the constitutional texts, not that they reflect the substantive views furthered by means of political pressures. There would be no problems, from this standpoint, if a decision fitted the constitutional text *and* also reflected views held by certain actors that pushed for the decision.

<sup>101</sup> It must be noticed that I am not making the argument here that the Court’s legitimacy depended on any kind of myth about its purportedly apolitical and neutral decision-making processes as a legal expert and that it fell when people found out that law is relatively indeterminate. My claim is more modest: whatever the people’s position regarding the indeterminacy of legal rules and its implications for the legitimacy of the Court, I hold that economic emergency decisions often went far beyond the realm of “semantic resistance” of the texts, which presupposes that indeterminacy is not radical. It is not that the Court lost legitimacy because the people thought it decided cases using relatively indeterminate materials that allowed for extra-legal considerations to enter the decision; it is that people thought that law was not indeterminate enough to accept such decisions as properly legal. For a slightly different argument, see Or Bassok, “The Sociological-Legitimacy Difficulty”, 26 *J. of Law & Politics* 239, 272 (2011) (arguing that the sociological-legitimacy difficulty originates from a clash between the promise of an expert legal authority and the indeterminacy of legal materials).

some core meaning, within which decisions need to fall in order to be acceptable. Otherwise, the general public will have no substantial reasons to take the Constitution seriously. If any measure can be taken, merely by invoking some urgent need (“emergency”) and the convenience of the measure, then the general perception will be that the constitutional text plays little or no role in the actual decision-making that is, ultimately, what matters to people.<sup>102</sup>

Should, by any chance, the *prima facie* unconstitutional measures occasionally succeed in their goals, there would be further reasons to disbelieve in the rule of law, regardless of one’s position on whether the measures were justified in the first place. The strictures of legal procedures for decision-making and content-related restrictions will appear to the public as formalistic hindrances in the pursuit of collective happiness. Effective government will appear as incompatible with legalistic restraints. One reader, sceptical of my position, may ask “So what? People just want to order their social life in ways that are considered satisfactory. Legal rules—including the Constitution—are just means to such ends, and if they do not foster those ends, well, only a rule-fetishist would want to keep them”. If the people think that the measures are substantially correct, what is the problem with them having their way, regardless of what the judges think the Constitution says—or even regardless of what the Constitution is unanimously considered to say—? We can call this an “instrumentalist” critique.

I think an objection of this sort is just too strong, if aimed at my point about the deleterious effects of “responsive” models of adjudication on the rule of law, and weak to the point of nonexistence if aimed at my more general assertion regarding the

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<sup>102</sup> See Bo Rothstein, “Creating Political Legitimacy: Electoral Democracy versus Quality of Government”, 2008:2 *QoG Working Paper Series* (2008), available at [http://www.qog.pol.gu.se/working\\_papers/2008\\_2\\_Rothstein.pdf](http://www.qog.pol.gu.se/working_papers/2008_2_Rothstein.pdf) (last visited, 05/12/2009) and [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1338615](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1338615) (last visited, 05/12/2009) (arguing that even if democratic electoral process are an indispensable part of the concept of political legitimacy, what happens at the other end of the political machinery, that is, actual public policies is what matters most to people).

“countermajoritarian difficulty” and its relationship to adjudication of constitutional property claims in times of emergency. In this second reading, the criticism would be that people should have their way in all matters concerning redistribution, regardless of what the Constitution says. Understood in these terms, the objection does not even touch my position, because what I intend to prove is, precisely, that —as a matter of history— fairly often people have not wanted what the elected branches have imposed on them. People do not seem to have had their way, whether it is right or wrong that they do.<sup>103</sup>

As far as the objection concerns the incentives for disbelief in the rule of law, the “instrumentalist” critique misses the point. My whole argument is built within a conceptual framework in which people actually care about having a constitution, and do not treat the legal order in the instrumental way assumed by the criticism. Of course the reason for having any legal order may ultimately be instrumental. We have constitutions and all sorts of other norms because we believe they help us live in a better-ordered society, making it possible to live together. In that sense, probably we are all instrumentalists. But we do not treat each measure we collectively take as instrumental in precisely the same way. Surely ordinary measures embodied in legal norms pursue some end we think worthy. But this instrumental quality of these measures is not an overriding principle. Measures must respect the restrictions established by other more fundamental norms that are basic to the system. Otherwise, there is no point to the practice of having such a normative system at all. We should just act on a case-by-case basis, deciding whatever we think it is best in each instance, in an act-utilitarian fashion. This is not the

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<sup>103</sup> An example of a case where courts might have acted in a countermajoritarian fashion by *upholding* — instead of by striking down— emergency legislation are the *Legal Tender Cases* in the United States. In *Knox v. Lee*, upholding the power of Congress to make notes legal tender for contracts celebrated before the passing of the Legal Tender Act, Justice Bradley admitted as much when he said that “...It might subserve the present good *if we declare the legal tender act unconstitutional*, and a *temporary public satisfaction might be the result*. But what a miserable consideration would that be for the permanent loss of one of the just and necessary powers of the government; a power which, had Congress failed to exercise it when it did, we might have had no court here today to consider the question, not a government or a country to make it important to do so”. See *Knox v. Lee*, 79 U.S. 475, 562 (1870) (Bradley, J., concurring; the italics are mine)

way our constitutional practice is commonly understood. But even if it were, at the very least, we would need norms for making decisions that could not be themselves subject of discussion each time, if we are to avoid infinite regression. We would need norms to determine who gets to decide what is best in each case.

The well-known rules-of-the-game analogy works just fine here.<sup>104</sup> If we want to play any given game, we need to respect some basic rules that make the game be what it is. If we don't, because we think our ultimate goal of having fun, is going to be reached more easily by breaking such rules, then we are not playing the game we were supposed to be playing. We may be creating a new game, which may be more satisfactory to us than the previous one, but we are not playing the original game. If we don't like the soccer's prohibition for all players but the goalie to grab the ball with our hands, we can change the rule and start playing with our hands. Someone may say that this will not be soccer anymore, but handball or something like it instead. But in any case, we should stick to the new rules, if we are to play a game at all. Constant changes of rules would prevent us from coordinating our actions in order to play *some* game, thus depriving us of the fun we were pursuing in the first place. There is a minimum level of stability that is needed for the game to make sense. Of course, changes of legal rules have a broader and deeper impact, one not likely to be fully captured by the sports analogy I have just drawn.<sup>105</sup> But this, if anything, just makes my case stronger; constant changes are profoundly disruptive and may even defeat their purposes altogether.

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<sup>104</sup> For an instance of the use of the analogy, similar to the one I make here, see Carlos S. Nino, *FUNDAMENTOS DE DERECHO CONSTITUCIONAL* 74-75 (2<sup>nd</sup> edition, Buenos Aires, Astrea, 2002).

<sup>105</sup> Someone might rightfully observe that changes of legal rules have an impact in our lives that far exceeds changes in games' rules and, thus, that legal changes are qualitatively different from changes in other rule-bound activities. My example would run the risk of trivializing what is at stake in constantly changing constitutional rules. While this is a fair observation, I do think that the soccer-handball analogy serves a useful purpose here. It shows that even if changes are made within permissible options (soccer and handball are both games that might serve our entertainment purposes), there is a limit to how much change is tolerable until it completely disturbs our practice and prevents it from making sense. This is especially

Moreover, we value different things differently. If we have a constitutional system with certain restrictions on what we can do, it is because we think that the value of stability it fosters is, in general, more important than the value of being free to adopt the decision we think best in each case. It is also probably the case that we adopt constitutional restrictions as a matter of second-best reasoning:<sup>106</sup> we think that, all things considered and given the fact that it might well be hard to ascertain what course of action will be the best in each case and that it will be costly to agree on that, we will err less if we stick to the constitutional constraints, even if occasionally they may produce suboptimal results.

If we have a certain view of our constitutional practice, as I believe we do, according to which constitutional clauses do matter and, in some way, play an important role in determining what can be legitimately done to further our political ends at each time, then the legitimacy of judicial decisions must be linked to how they relate to constitutional texts. We can surely change these “rules of the game”, but we need a

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true of changes in legal rules that organize the economic realm. Even if there may be different paths to fostering economic development —let us assume it is a constitutional goal, as it is in Argentina (Preamble; Articles 75 sections 18 and 19)—, and even if, as Justice Holmes would have it (see above n. 25), any given constitution is compatible with a range of economic plans that have the purported goal of promoting economic development, constantly switching between plans may leave the country with no plan (in any meaningful sense of the word) at all. See, e.g., Michael D. Bordo, *THE GOLD STANDARD & RELATED REGIMES: COLLECTED ESSAYS* 196 (New York, Cambridge University Press, 1999) (“Suppose the government calculates today an optimal plan, according to its objectives, for current and future policy choices. Now suppose that, sometime in the future. The remainder of the plan is re-evaluated by calculating the optimal plan from then on. Assuming the objectives have not changed, is this plan the continuation of the original one? The answer is generally ‘no’”. This is what it means to be time-inconsistent [...]. The literature on time inconsistency has demonstrated that, in almost all intertemporal policy situations, the government would benefit from having access to a commitment mechanism preventing it from changing planned future policy”). For an analysis of the complex issues involved in legal transitions, see, generally, Louis Kaplow, “Transitional Policy: A Conceptual Framework”, 13 *J. Contemp. Legal Issues* 161 (2003). For a model that analyzes the impact of legal changes in litigants’ behavior, see George L. Priest, “Measuring Legal Change”, 3 *J.L. Econ. & Org.* 193, 197-210 (1987).

<sup>106</sup> R.G. Lipsey & Kelvin Lancaster, “The General Theory of Second Best”, 24 *Rev. Econ. Stud.* 11, 12 (1956-1957) (developing the general idea that if there is any given constraint that prevents the attainment of one of the conditions necessary for the existence of a Pareto optimum situation, then the other necessary conditions although still attainable are no longer desirable; in other words, given that one of the optimum conditions cannot be fulfilled, then an optimum situation can only be achieved by departing from all other Paretian conditions; the situation thus achieved is second best, because it is attained subject to a constraint that prevents the attainment of the Paretian optimum).

mechanism of change that preserves the necessary minimum of stability. If everything is up for grabs at each juncture, then having a constitution, in the sense we understand it today, stops making sense. Judicial rubber-stamping of emergency measures that cannot be squared with reasonable interpretations of constitutional texts will hardly create incentives for lawful behaviour and, most certainly, it will not enhance the legitimacy of the courts.

Legitimacy is certainly a somewhat vague and ambiguous concept. It may be defined from various perspectives.<sup>107</sup> I do not intend to enter this debate. Suffice it to say that, broadly understood, legitimacy is the belief that authorities, institutions, and social arrangements are appropriate, proper, and just.<sup>108</sup> It is also a property that “leads people to defer voluntarily to decisions, rules, and social arrangements”.<sup>109</sup> For the purposes of my argument in this chapter, it is useful to note that the idea of political legitimacy seems to encompass more than just fair electoral processes.<sup>110</sup>

Bo Rothstein has argued that while electoral democracy is an indispensable part of a legitimate political system, it cannot be the central pillar of the creation and maintenance of legitimacy. Political legitimacy is something that seems to be much more at stake on the output side of the political system than on its input side.<sup>111</sup> Quality of

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<sup>107</sup> See, e.g., Richard H. Fallon, Jr., “Legitimacy and the Constitution”, 118 *Harv. L. Rev.* 1787, 1794-1800 (2005) (distinguishing legitimacy as a legal, sociological, and moral concept); Michael L. Wells, “Sociological Legitimacy in Supreme Court Opinions”, 64 *Wash. & Lee L. Rev.* 1011, 1020-1031 (2007) (comparing legal and sociological legitimacy, and sociological and moral legitimacy).

<sup>108</sup> See Tom R. Tyler, “Psychological Perspectives on Legitimacy and Legitimation”, 57 *Annu. Rev. Psychol.* 375, 376 (2006).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*, at 384 (arguing that procedural justice is not the only basis upon which authority can be legitimated and that law, for instance, has also been legitimated by reference to its substance).

<sup>111</sup> See Bo Rothstein, above n. 102, at 14.

government, not free elections or political representation, creates legitimacy.<sup>112</sup> There is, of course, a normative side to legitimacy, which may be fairly independent of public perceptions. Certain measures may qualify as embodying quality of government from an objective standpoint. Sociological legitimacy, on the other hand, depends heavily on what people *think* about a certain governmental measure, or on how they *perceive* it, regardless of what an impartial observer may think of it.<sup>113</sup>

If this line of argument is sound, then it is utterly important to pay attention to public perceptions of what is done to property rights under emergency situations.<sup>114</sup> Notice that my argument, while built upon the idea of public perceptions of measures and popular conceptions of constitutional property, is not completely engulfed by sociological legitimacy. Under my argument, legitimate decisions are those that can be deemed, from a layman's standpoint, as proper applications of reasonable, non-esoteric, understandings of constitutional texts.<sup>115</sup> Sociological legitimacy, on the other hand, does not need to rely on any text at all. An anomic people may well be content with institutions that contradict lay understandings of constitutional rules, if such institutions

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<sup>112</sup> *Id.*, at 3, 15-17. It should be noted here that Rothstein equates "quality of government" with impartiality (considered as a notion similar to, but broader than, the rule of law). For my present purposes, one need not argue about what constitutes "quality of government", because whatever it may be the proper conception of that concept, my argument stands of the fact that many people have often thought emergency measures as not being representative of quality of government. One could also make an argument that in many instances the emergency measures taken in Argentina have not been impartial either.

<sup>113</sup> See, generally, Or Bassok, above n. 101.

<sup>114</sup> It may be quite important from other perspectives as well. See, e.g., William W. Fisher III, "The Significance of the Public Perceptions of the Takings Doctrine", 88 *Colum. L. Rev.* 1774 (1988) (explaining why, for different reasons, public perceptions regarding the protection that private property should enjoy are relevant to all major theories of takings).

<sup>115</sup> My argument is, in a way, a mixture between legal and sociological considerations. See Richard H. Fallon, Jr., above n. 107, at 1848 (arguing that while "legal legitimacy depends fundamentally on sociological legitimacy [...] By no means, however, does legal legitimacy collapse into sociological legitimacy [...] it is possible for prevailing majorities of judges and officials, including Supreme Court Justices, to err about what the Constitution requires, despite the sociological predominance of their views").

cater to the people's immediate preferences and opinions. I will argue, however, that in Argentina's history with property rights, sociological legitimacy and my text-based approach tend to converge.

Judicial decisions upholding emergency measures that are thought to be contrary to popular conceptions of constitutional property are, under this light, illegitimate, as are the emergency measures themselves, of course.

A critic may say that this cannot be the whole story, that economic emergency situations are extremely complex phenomena and, thus, that often they cannot be solved at all, if we are to respect the people's immediate *wishes*. We should, therefore, be deferential to bureaucrats in the Executive Branch who know—or at least have better chances of knowing—what to do to overcome the emergency. We should focus on the people's best *interests*. Legitimacy should be assessed over the long run. People's perceptions should not be measured during the emergency situation, or immediately afterwards, but a long time later when people have the necessary hindsight to appreciate the results of the initially otiose measures.

Such an argument faces, at least, three problems. First, it cannot detach itself from the very target that the “countermajoritarian difficulty” aims at: that there should be no platonic guardians telling the people what is best for them. In this case, the Executive Branch would play precisely that role. Second, evaluation over the long run presents some important time horizon issues. Time heals all wounds; life goes on; people move on. If we try to assess legitimacy of emergency measures long after their enactment, we run the risk of finding a blurred picture of the facts. It may well be the case that people stop complaining about or resenting the emergency measures not because they think better of them now, after careful consideration of their overall consequences, but just because they no longer care about them. Quite often, resignation settles in. Other issues occupy people's minds and attention. Many times, after going through a troublesome



experience, and having gotten over it, a person just does not want to think about it anymore. Or she just does not care anymore, even if she did, and strongly so, during the emergency, and even if she, faced with a similar situation again would oppose the measures once more. But none of this, by itself, means that there was no harm done, or that the harm was considered legitimate. Current lack of interest does not make earlier measures legitimate. The fact that some of the politicians responsible for the measures may have not been thrown out of office —or may have returned to an official position— cannot be interpreted as a popular validation of the emergency measures. Administrations are assessed over a whole term. Electoral results depend on many complex, interrelated variables. Bundling problems affect their significance as expressions of popular will, as individuals vote for candidates who hold differing positions across a large number of topics, many of which are unknown to the voter or even contrary to her preferences.<sup>116</sup> Politicians may get re-elected because a significant portion of the electorate thinks that alternative candidates are worse, not because they think that every measure taken was indeed legitimate. Third, there are ways in which politicians may elude political responsibility for the (unconstitutional) measures they take, or may dilute it.<sup>117</sup> Indeed, one could convincingly say that

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<sup>116</sup> Patrick Luff, “Captured Legislatures and Public-Interested Courts”, *working paper* 40, electronic version available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2195169](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195169) (last visited 03/18/2013) (“Aside from information difficulties —the difficulty of attributing a particular policy result to a particular legislation— representative control via election is also hindered by bundling problems: one may disagree with a clear wealth transfer to an interest group, and yet agree with the over job one’s representative is doing”).

<sup>117</sup> See, e.g., Ittai Bar-Simon-Tov, “Lawmakers as Lawbreakers”, 52 *Wm. & Mary L. Rev.* 805, 830-833 (2010) (arguing that procedural lawmaking rules are unlikely to be enforced by lawmakers when they collide with their first-order policy preferences, among other reasons, because of voters’ inattention to, and rational ignorance of, representative’s procedural performances, as well as because of a likely preference for substantive policy decisions as key criteria for casting their votes); see also, generally, Frederick Schauer, “The Political Risks (If Any) of Breaking the Law”, 4 *J. Legal Analysis* 83 (2012) (arguing that violating the law *qua* law is not ordinarily subject to non-legal sanctions and that the electorate, the media, and most other potential sources of social and political sanctions reward good policy choices and sanction bad ones, with the very fact of illegality playing a small role in constraining the choices of public officials, except possibly by increasing the sanctions for bad policy choices that are also illegal).

“[...] it is at least worth questioning whether the requirement of standing for election has much to do with accountability. The electorate increasingly feels it cannot control its elected officials in any meaningful sense. The numbers support the assertion: in many cases, despite the need to stand for election, legislators are serving every bit as long as unelected judges, and periodic elections do not appear to threaten this state of affairs significantly”<sup>118</sup>

Closely connected to time horizon problems, one could say that controversial measures can be taken immediately after holding office, and sufficiently far away from electoral contests, to decrease the impact of the measure on electoral results. A public interest façade may be erected in order to deflect criticisms on the measures. Often, the beneficiaries of the emergency measures will be powerful interest groups that have access to mass media and will use such influence to shape the public debate about the measures. Electoral systems may also help unfaithful representatives: earning a place in the ballot may depend not so much on the supposed constituency’s ideas about a given topic, but on how faithful the politician has been to the administration. Collective action problems may plague the camp of those in disagreement with the measure, thus making it harder for them to exact political responsibility from representatives and to display their genuine substantive disagreement.

We could keep on adding arguments to explain why there is a significant gap between theory and practice when it comes to political responsibility, but I think this is enough to make my point: the mere fact of retaining —or regaining— a political office does not tell us much about what people think about any given particular measure of government.

Another line of criticism that could be levelled at my argument is that the people may be simply wrong about property rights. In one version of the criticism, my argument would not take into account the fact that property seems to have a peculiar quality: for

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<sup>118</sup> Barry Friedman, “Dialogue and Judicial Review”, 91 *Mich. L. Rev.* 577, 610 (1993).

different reasons, it takes a hold on people's minds that transcends the justification (or lack of) of existing property arrangements, in a way that is different from what happens with other institutions.<sup>119</sup> Judgments about the moral worth and, therefore, the defensibility of particular instances of property rights seem to be relatively detached from judgments about the justifiability of the current distribution of entitlements and its initial legitimacy. For instance, theft is usually regarded as immoral, even if the victim cannot justify that his holding was morally deserved in the first place. A different version of the criticism could focus on the fact that many of the people who oppose emergency measures are property holders themselves, and thus their positions on the topic would not be impartial. But both versions would suffer from the same flaw: for different reasons, they disregard the people's preferences.<sup>120</sup> This is precisely the vice that the "countermajoritarian difficulty" attributes to judicial review and the worry that I'm trying to dispel here —bear in mind that I'm not trying to make a positive case for judicial review yet—.

If my argument so far is convincing, we should move now to try to identify the different conceptions of constitutional property that seem to have prevailed at various moments in the history of the country.

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<sup>119</sup> See Jeremy Waldron, above n. 20, at 174.

<sup>120</sup> There may be other reasons why the criticism should be rejected. For instance, one could argue that the reasons why property becomes "resilient" are not morally irrelevant and, thus, provide grounds for justifying the protection of property holdings.

## A Taste of Originalism: Property and the Founding of the Republic.

If one is interested in *common* or *popular* understandings of constitutional property, it is not clear why it may be important to survey the dominant ideas on the topic at the time of the founding of the republic, when Argentina's founding, arguably, was neither particularly democratic<sup>121</sup> nor inclusive enough to consider its conceptions of constitutional property sufficiently representative of a wider understanding of the idea. Until 1912, Argentina did not have universal suffrage nor were votes cast in anonymous envelopes. And it was only in 1947 that women were included in the franchise. One could conclude, thus, that massive political participation was not a feature of Argentina's politics until the beginning of the twentieth century at least.

Yet I think it is worthwhile to explore briefly the founding era for several reasons. First, because grasping the conception dominant at Argentina's founding should tell us something about where we came from and where we have headed to since. Second, because no matter how elitist the framing era may have been —and I'm not making any assertions in this regard here—, the idea of including property as a constitutional right, and making it the object of formally strong protections, must have been a response to some particular situation of the community that may have included more widely-shared concerns. Property being ubiquitous as it is, it is hard to think that its regulation did not reflect an accommodation of the concerns of different sectors of the population, reveal their situation in one way or another or, at least, stir a minimum of attention. Third, because electoral politics do not come even close to exhausting the political activities of a society nor do they always reflect accurately popular views on a number of topics. Indeed, this is a central point in my argument. Fourth, because the

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<sup>121</sup> See, e.g., Carlos S. Nino, above n. 104, at 34.

constitutional provisions dealing with property rights have not been modified,<sup>122</sup> despite the fact that the Constitution has undergone several reforms—including one extensive revision in 1994—which may make original understandings relevant as, at least, hints of current common understandings of constitutional property.<sup>123</sup>

One of the first sources deserving close attention, when it comes to original understandings of the 1853 Constitution is Juan Bautista Alberdi and his writings. Although Alberdi was not a delegate to the 1852 Constitutional Convention in Santa Fe, his influence on the Constitution is undeniable.<sup>124</sup> He wrote a book called *Bases y Puntos de Partida para la Organización Política de la República Argentina*, where he presented his views on how a future Argentine Constitution should be crafted. He even drafted a constitutional project, which was added to *Las Bases* and used by the Framers as a base for the final text that would be enacted. Article 18 of Alberdi's project is the direct source, with very small variations, of Article 17 of the Constitution, the "property clause".<sup>125</sup> And Alberdi has been called *The Father of the Argentine Constitution*.<sup>126</sup> Whatever

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<sup>122</sup> Property provisions were thoroughly revised, indeed, in the 1949 Constitution, approved during the Perón administration. But this text was abrogated in 1955 and the old 1853 constitutional text was put in force once again. More on this later.

<sup>123</sup> Of course, even if the text itself has not changed, context has, and current common understandings are heavily influenced by current context. See, e.g. Lawrence Lessig, "Understanding Changed Readings: Fidelity and Translation", 47 *Stan. L. Rev.* 395 (1995). However, this does not, in itself, rule out the possibility that some features of the interpretation of constitutional property clauses have remained fairly stable over time or that some contextual issues repeat themselves over time.

<sup>124</sup> See, e.g., Jorge M. Mayer, *ALBERDI Y SU TIEMPO* 452, 461-462 (Buenos Aires, Editorial Universitaria de Buenos Aires, 1963) (stating that Alberdi's ideas on constitution-making were generally accepted by the Framers and that his ideas inspired the Constitution); Manuel José García Mansilla & Ricardo Ramírez Calvo, *LA CONSTITUCIÓN NACIONAL Y LA OBSESIÓN ANTINORMEAMERICANA* 65-67 (Salta, Virtudes, 2008) (acknowledging that Alberdi's ideas were very influential among the Framers).

<sup>125</sup> José A. Seco Villalba, above n. 88, at 151 (transcribing article 18 of Alberdi's project, and mentioning it as one of the national sources of article 17).

<sup>126</sup> See Segundo V. Linares Quintana, *EL PODER IMPOSITIVO Y LA LIBERTAD INDIVIDUAL* 24 (Buenos Aires, Editorial Alfa, 1951).

the merit of this bold assertion, the truth is that Alberdi was, and remains, an extremely influential thinker in constitutional matters, and that he is frequently treated —nothing less than by the Supreme Court itself— as if he were indeed an authoritative voice in expounding the Constitution. His writings on public law are frequently cited by the Court in the most varied constitutional topics: federalism;<sup>127</sup> interprovincial commerce;<sup>128</sup> taxation;<sup>129</sup> forced loans;<sup>130</sup> parliamentary immunities;<sup>131</sup> public education;<sup>132</sup> separation of powers;<sup>133</sup> constitutional guarantees in criminal procedures and trials;<sup>134</sup> horizontal effects of constitutional guarantees;<sup>135</sup> state of siege;<sup>136</sup> jurisdiction of the Supreme Court to decide and settle disputes between provinces;<sup>137</sup> impeachment;<sup>138</sup> the power of each

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<sup>127</sup> 326 *Fallos* 3899 (2003), (Petracchi, Maqueda, JJ., dissenting); 326 *Fallos* 1481 (2003), (Maqueda, J., concurring); 326 *Fallos* 193 (2003); 307 *Fallos* 360 (1985), 301 *Fallos* 1122 (1979), (López, J., concurring); 278 *Fallos* 62 (1970); 276 *Fallos* 62 (1970); 235 *Fallos* 571 (1956), (Orgaz, J., dissenting); 191 *Fallos* 170 (1941).

<sup>128</sup> 250 *Fallos* 154 (1961), (Oyhanarte, J., concurring).

<sup>129</sup> 333 *Fallos* 935 (2010); 331 *Fallos* 1942 (2008), (Fayt, J., dissenting); 321 *Fallos* 2683 (1998), 318 *Fallos* 1154 (1995), (Belluscio, J., concurring); 306 *Fallos* 516 (1984); 305 *Fallos* 1672 (1983).

<sup>130</sup> 318 *Fallos* 676 (1995), (Petracchi, J., dissenting).

<sup>131</sup> 328 *Fallos* 1893 (2005); 327 *Fallos* 138 (2004), (Maqueda, J., concurring).

<sup>132</sup> 306 *Fallos* 400 (1984), (Belluscio, Petracchi, JJ., concurring).

<sup>133</sup> 327 *Fallos* 4376 (2004) (Zaffaroni, Highton de Nolasco, JJ., concurring); 254 *Fallos* 116 (1962), (Boffi Boggero, J., concurring).

<sup>134</sup> 306 *Fallos* 2101 (1984); 306 *Fallos* 1752 (1984), (Petracchi, J., concurring); 254 *Fallos* 116 (1962), (Boffi Boggero, J., concurring).

<sup>135</sup> 241 *Fallos* 291 (1958), (Aráoz de Lamadrid, Oyhanarte, JJ., dissenting).

<sup>136</sup> 243 *Fallos* 504 (1959), (Boffi Boggero, J., dissenting); 203 *Fallos* 5 (1945); 167 *Fallos* 267 (1933).

<sup>137</sup> 310 *Fallos* 2478 (1987), (Fayt, J., dissenting).

Chamber in Congress to judge the elections, returns, and qualifications of its members;<sup>139</sup> the power of Congress to exercise exclusive legislation in all “needful buildings”;<sup>140</sup> the rights of immigrants;<sup>141</sup> the relationship between the Constitution and international law;<sup>142</sup> the independence of the judiciary, the rule of law and judicial review;<sup>143</sup> the need for judicial rulings to express the reasons that support them;<sup>144</sup> the role of the state in the regulation of the economy and the permissible limitations of property rights;<sup>145</sup> freedom of speech;<sup>146</sup> access to justice;<sup>147</sup> judicial review of constitutional reforms;<sup>148</sup> the relative character of constitutional liberties;<sup>149</sup> the constitutional foundations of public debt;<sup>150</sup> the

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<sup>138</sup> 332 *Fallos* 2208 (2009), (Zaffaroni, J., concurring).

<sup>139</sup> 330 *Fallos* 3160 (2007), (Maqueda, J., dissenting); 326 *Fallos* 4468 (2003), (Maqueda, J., dissenting); 324 *Fallos* 2299 (2001), (Vázquez, J., concurring).

<sup>140</sup> 240 *Fallos* 311 (1958).

<sup>141</sup> 164 *Fallos* 344 (1932).

<sup>142</sup> 330 *Fallos* 3248 (2007), (Fayt, J., dissenting); 328 *Fallos* 2056 (2005), (Maqueda, J., concurring; Fayt, J., dissenting); 327 *Fallos* 3312 (2004), (Fayt, dissenting); 317 *Fallos* 1282 (1994), (Boggiano, J., concurring).

<sup>143</sup> 330 *Fallos* 2361 (2007), (Fayt, J., concurring); 328 *Fallos* 3741 (2005), (Zaffaroni, Maqueda, JJ., plurality opinion); 328 *Fallos* 3399 (2005); 328 *Fallos* 2740 (2005); 326 *Fallos* 417 (2003), (Moliné O’Connor, López, JJ., concurring; Nazareno, J., concurring).

<sup>144</sup> 328 *Fallos* 2740 (2005).

<sup>145</sup> 323 *Fallos* 1374 (2000), (Vázquez, J., dissenting); 172 *Fallos* 21 (1934), (Repetto, J., dissenting in part); 136 *Fallos* 170 (1922), (Bermejo, J., dissenting).

<sup>146</sup> 312 *Fallos* 916 (1989), (Fayt, J., dissenting); 306 *Fallos* 1892 (1984), (Petracchi, J., concurring).

<sup>147</sup> 323 *Fallos* 732 (2000), (Vázquez, J., dissenting).

<sup>148</sup> 322 *Fallos* 1616 (1999).

<sup>149</sup> 321 *Fallos* 885 (1998), (Vázquez, J., concurring).

constitutional requirement that legislation be reasonable;<sup>151</sup> the need for the Constitution to be interpreted dynamically;<sup>152</sup> the supremacy of the federal legal order over the states;<sup>153</sup> the character of the Constitution as the basis, but not the details, of an ever-changing collective project;<sup>154</sup> the relationship between the Congressional powers to promote the general welfare and the constitutional protection of the right to pursue a lawful industry as well as of freedom of contract,<sup>155</sup> the constitutionality of road tolls,<sup>156</sup> takings and expropriations;<sup>157</sup> judicial supremacy;<sup>158</sup> among others.

A commentator has described Alberdi's influence in the following terms:

“Alberdi's intellectual influence is the most intense and enduring feature in the annals of Argentine thought. *In institutional and economic matters, he exercises a dictatorship...*Such a power of influence and irradiation is reached only when one hits the truth or *interprets correctly a state of the collective soul...*Alberdi represents an extraordinary case of influence and persuasion over the country's public opinion, without even being present in Argentina...He exercises an effective and constant influence in the Government of the Confederation. His writings circulate in all provinces and though them, he creates and supports opinion...”<sup>159</sup>

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<sup>150</sup> 319 *Fallos* 2886 (1996).

<sup>151</sup> 318 *Fallos* 1894 (1995); 136 *Fallos* 170 (1922), (Bermejo, J., dissenting).

<sup>152</sup> 315 *Fallos* 992 (1992), (Fayt, Barra, Nazareno, Levene, JJ., concurring); 315 *Fallos* 158 (1992).

<sup>153</sup> 314 *Fallos* 1796 (1991).

<sup>154</sup> 314 *Fallos* 1531 (1991), (Petracchi, J., dissenting).

<sup>155</sup> 333 *Fallos* 2367 (2010).

<sup>156</sup> 314 *Fallos* 595 (1991).

<sup>157</sup> 312 *Fallos* 2444 (1989); 116 *Fallos* 116 (1912).

<sup>158</sup> 308 *Fallos* 2268 (1986), (Petracchi, J., concurring).

<sup>159</sup> Ramón J. Cárcano, *URQUIZA Y ALBERDI XI-XII* (Buenos Aires, La Facultad, 1938). The italics are mine.



Alberdi's views on constitutional property seem relevant not only because of his general influence in all constitutional matters, but also because article 17 of the Constitution, the “property clause”, was taken almost word by word from article 18 of Alberdi's constitutional project.

Among his many writings, *Sistema Económico y Rentístico de la Confederación Argentina*, published in 1854, is of particular interest for my topic. In Alberdi's views, the 1853 constitutional text contained a complete system of economic policy.<sup>160</sup> The book aims at presenting the alleged system in its entirety, and to analyze the best means—which were the constitutional means—to achieve economic prosperity and growth for the country as well as the risks to such goal, posed by the circumstances of the time. Economic liberty was central for Alberdi and, unsurprisingly, so was the protection of individual property. Interestingly enough, Alberdi also favored a strong central government, with important taxation powers. Taxes, when justly and constitutionally established, were considered a spending made in the self interest of the taxes property owner, not an unwarranted governmental intrusion, insofar as they provided for the maintenance of law, peace, and security that were pre-requisites of the enjoyment of property and wealth. In Alberdi's thought, “laissez-faire” economic ideas, with some libertarian overtones, co-existed—perhaps somewhat uneasily—with the embrace of a strong government. At the same time, his views were that the government was not to provide for social benefits, nor to engage in any redistributive enterprise, any more than what is the inevitable effect of providing certain limited public services. Bad luck in life was to be accepted as such, and governments should not mess with the natural distribution of skills and talents. Alberdi would have none of Rawls' arguments on the moral arbitrariness of natural

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<sup>160</sup> Juan Bautista Alberdi, *SISTEMA ECONÓMICO Y RENTÍSTICO DE LA CONFEDERACIÓN ARGENTINA* 11 (Buenos Aires, Ediciones Ciudad Argentina, 1998).

lottery.<sup>161</sup> This is the general philosophical background on which his conception of constitutional property rests. Let us explore Alberdi's ideas on property rights in a bit of detail.

He thought that economic liberty was a central part of the constitutional project:

“The Preamble, in which the Constitution expresses summarily the great goals that preside over its provisions, enumerates [...] *to promote the general welfare, and to secure the blessings of liberty for ourselves and for all men in the world who wish to dwell on Argentine soil* [...] The liberty whose blessings the Constitution aspires to secure is not political liberty exclusively, but all kinds of liberty, civil and religious, economic and intelligent [...] all kinds of interests contribute to the general welfare, but none does so in such an immediate way as material interests”<sup>162</sup>

So central was the place economic liberty occupied in Alberdi's interpretation of the Constitution that he emphasized the enforceability of its protections and the limits set by the Constitution to the legislature:

“*Right* is the name and rank that the Constitution gives to economic liberty, which is immensely consequential, because liberty, as Guizot says, is an illusory gift when it is not a *right* whose enforcement can be demanded holding the Constitution in one hand. Neither law nor any power can deprive Argentine industry from its right to constitutional liberty [...] To regulate liberty is not to chain it [...] Every regulation that, under pretense of organizing the exercise of economic liberty, restricts it and encroaches upon it, attacks both the Constitution and national wealth”<sup>163</sup>

Thus, private property, as an expression of, and means for, economic liberty, was to be protected very intensely, both in regard to the intangibility of the object of property and to the liberty to use and dispose of the entitlements:

“[t]he liberty to use and dispose of one's property is a complement of the liberty to work and of the right of property; [it is] a very useful guarantee against the tendency of these times' *socialist economy* that, under pretense of organizing those

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<sup>161</sup> John Rawls, above n. 4, at 87.

<sup>162</sup> Juan B. Alberdi, above n. 160, at 21. Italics in the original.

<sup>163</sup> *Id.*, at 27. Italics in the original.

rights, attempts to restrict the use [...] of property (when it does not deny the right of property itself), and it *equates the work of the imbecile with that of the genius*”<sup>164</sup>

“Property, as a guarantee of public law, has two aspects: one legal and moral, another purely economic and material. Considered as a general principle of wealth and as a merely economic fact, *the Argentine Constitution establishes property in the most advantageous terms for national wealth* in its article 17 [...] *the most perfect and advanced political economy could not demand more complete guarantees in favor of property, as a basic principle of wealth-creation [...] Compromise or take away property, that is, the exclusive right that each man has to use and dispose [...] of his work, his capital and his lands to produce what is convenient to his needs and pleasures, and you will do nothing but to deprive production of its instruments...paralyze it in its fruitful functions, and make wealth impossible.* Such is the economic transcendence of any attack to property [...]”<sup>165</sup>

As can be easily imagined, Alberdi held a deep distrust of the State as a regulator of property rights and, more generally, of the economy.<sup>166</sup> However, the role he envisioned for property rights was mainly one of promoting the creation of wealth. Alberdi was not concerned so much with the individual aspects of property rights and what it meant to be (or become) an owner. Making the pie bigger was the idea behind such a strong view of property. How to distribute the benefits of the bigger pie was a wholly different issue, and one in which Alberdi was not to be inconsistent with the libertarian leanings in his thought. Let us explore these insights of his vision.

Alberdi states clearly that “the private thief is property’s weakest enemy”<sup>167</sup> and that article’s 14 guarantee of the use and disposition of one’s property is an iron safety

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<sup>164</sup> *Id.*, at 28. The italics are mine.

<sup>165</sup> *Id.*, at 33-34. The italics are mine.

<sup>166</sup> At some points, Alberdi held a deep distrust of the State generally, showing his most libertarian leanings. See, e.g., Juan B. Alberdi, “La omnipotencia del Estado es la negación de la libertad individual”, in Roberto J. de Titto (compiler), *EL PENSAMIENTO DE JUAN BAUTISTA ALBERDI* 243-253 (Buenos Aires, Ateneo, 2009) (attacking the notion of patriotism as damaging for individual liberty and Rousseau’s *Social Contract* as a negative influence in the new nation, quoting Herbert Spencer and Adam Smith, and criticizing that “despite our modern constitutions...no liberal among us would doubt that the right of the individual must [...] yield before the right of the State, in certain cases”)

<sup>167</sup> Juan B. Alberdi, above n. 160, at 35.

lock against socialism.<sup>168</sup> Trying to explain why he did not embrace a more absolute conception of individual rights and accepted that they are subject to the laws that regulate them, Alberdi explained, in a somewhat apologetic fashion, that

“Neither the Argentine Constitution nor any other would have been capable of avoiding this difficulty, granting the liberty without subjection or reference to the laws. This [...] was impossible, because [...] no Constitution realizes itself by the force of its own provisions and without the help of the law that regulates the means for the Constitution’s execution. If a Constitution were self-sufficient, there would be no need for any other law but it, and all civil and criminal legislation would lack their reason for being [...] [But] what the Constitution should have done in this regard, it certainly did, and it was to give the antidote, the counter-poison, the guarantee to prevent the power given to realize the Constitution from degenerating into the power of derogating the Constitution under the pretext of complying with it [...] the Argentine Constitution [...] saw the obstacles to the liberties not so much in the abuse of the private individuals as in abuse of [public] power”<sup>169</sup>

These guarantees for property and liberty were reinforced in the constitutional text through Article 29, a clause with a very concrete historical meaning, of which Alberdi strongly approved.<sup>170</sup> The clause reads:

“Congress may not vest on the National Executive Power —nor may the provincial legislatures vest on the provincial governors— extraordinary powers or the total public authority; it may not grant acts of submission or supremacy whereby the life, honor, or wealth of the Argentine people will be at the mercy of governments or any person whatsoever. Acts of this nature shall be utterly void, and shall render those who formulate them, consent to them or sign them, liable to be condemned as infamous traitors to their fatherland”.

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<sup>168</sup>*Id.*

<sup>169</sup> Juan B. Alberdi, above n. 160, at 76-77. The antidote Alberdi talks about is Article 28 of the Constitution: “The principles, guarantees and rights recognized in the preceding sections shall not be modified by the laws that regulate their exercise”. The Supreme Court has built upon this clause the guarantee of reasonableness of laws, fundamental basis of “substantive” judicial review today. See also Juan B. Alberdi, III *OBRAS COMPLETAS* 531-535 (Buenos Aires, Imp., Lic. y Enc. de la “Tribuna Nacional”, 1886) (arguing, in *Bases y puntos de partida para la organización política de la República Argentina* —1852—, that all constitutions need to provide for their defense against the actions of the legislators).

<sup>170</sup> Juan B. Alberdi, above n. 160, at 36.

What was the role of equality in this constitutional vision? Was there any redistributive role for the State to play? Let us not forget that Alberdi foresaw a strong central government with important taxation powers. He elaborated a somewhat complicated idea of the relationship between wealth, equality, and distribution:

“Acknowledging that *wealth is a means, and not an end in itself, the Argentine Constitution tends, by the spirit of its economic provisions, not so much towards making public wealth large, but well-distributed, evenly allocated; because only under such conditions it is national and it is deserving of the Constitution’s favor, [the Constitution] aims at the welfare and prosperity of [all] the inhabitants that form the Argentine people, not at the welfare and prosperity of only a part of the people, with the exclusion of another part. It has provided guarantees for the protection of this social end of wealth, without overlooking the fact that the social order stands on the bases of liberty, equality, property, security, etc.*”<sup>171</sup>

However, in order to better protect the social end of wealth, the Constitution

“[H]as preferred *free distribution to statutory and artificial distribution. The distribution of wealth occurs spontaneously, in a much fairer way as the State intervenes less in creating rules for it. Thus, the Argentine Constitution, instead of despotically creating rules and principles for the distribution of wealth, has taken them from the natural laws that govern this phenomenon of social economy...*”<sup>172</sup>

Therefore,

“The Constitution, by itself, creates or gives nothing: it declares as man’s own what is man’s by God’s deeds, man’s primitive legislator, who has shaped all men equal in *right*, [but] has given skills to some and ineptitude to others, thus creating unequal fortunes, which are the by-product of *capacity*, not of *law*. The Constitution should not alter God’s work, but it should express it and confirm it instead. It was not within its reach to equalize fortunes, nor was it its goal to do anything but declare the equality of rights.”<sup>173</sup>

So basically Alberdi aspired to an equal distribution of wealth, for he thought it was the only way in which wealth could be truly national, but at the same time he

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<sup>171</sup> *Id.*, at 133. The italics are mine.

<sup>172</sup> *Id.*, at 133-134. The italics are mine.

<sup>173</sup> *Id.*, at 136. Italics in the original.

disregarded any role for the State in attempting to equalize fortunes. Skills and efforts, however unevenly distributed, and not the State's aid or intervention, were the means to improving one's lot.

Interestingly enough, Alberdi's thought seems to acknowledge libertarian *and* consequentialist (perhaps utilitarian) inspirations, contradictory as this may seem.<sup>174</sup> More precisely, in *El Sistema Económico* Alberdi embraces the libertarian idea according to which misfortune (comprehensive of the lack of traits valued by a society at a given time) should stay where it falls, and that the State has no legitimate business in trying to compensate for the results of the "natural lottery".<sup>175</sup> Another libertarian overtone, perhaps more important in this context, can be found in his explanation of natural justice as a reason for the distribution of the fruits of work among those who took part in the effort through their own doings.<sup>176</sup> My work on something entitles me to enjoy the benefits I contributed to producing, as a matter of natural justice. Moreover, Alberdi believes that "work and the personal powers needed for its performance are man's most genuine property".<sup>177</sup> These ideas seem to have been inspired by John Locke's theory of labor as a basis for property.<sup>178</sup>

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<sup>174</sup> But see Richard A. Epstein, above n. 98, at 5 (arguing that "both libertarian and utilitarian justifications of individual rights [...] properly understood, tend to converge in most important cases").

<sup>175</sup> See, e.g., Jules Coleman & Arthur Ripstein, "Mischief and Misfortune", 41 *McGill L.J.* 91, 96-103 (1995), (explaining, in the context of torts but in a way that is applicable to my characterization of Alberdi's ideas, that libertarian positions hold that in the absence of causal responsibility, the costs of misfortune should lie where they fall —on victims—; in our context, those unfortunate in the natural lottery could be understood as "victims").

<sup>176</sup> Juan B. Alberdi, above n. 160, at 132.

<sup>177</sup> *Id.*, at 35.

<sup>178</sup> John Locke, above n. 33, at 12, 20 (Mineola: NY, Dover, 2002) (arguing that since every man owns himself and his labor, every time he removes something from the natural state, by an act of labor, this objects becomes his, provided there is enough and as good left for others).

At the same time, Alberdi seems to be inspired by a wealth-maximizing principle not unlike the one once championed by Richard Posner.<sup>179</sup> Property exists, and deserves protection, not because it is the only way we could imagine to arrange the social disposition of wealth and the relationships with things (which is not),<sup>180</sup> nor because it has some desirable features as regards the individual (which it has),<sup>181</sup> nor because individuals deserve it (which they may),<sup>182</sup> but because it fosters national wealth. On this reading, by far dominant in *El Sistema Económico*, collective prosperity, not individual interests, lurks behind Alberdi's justification of constitutional property.<sup>183</sup>

Perhaps this tension is a part of the explanation of later developments in Argentine history, and our current (and past) attitudes have not been all that different from the somewhat contradictory principles that animated Alberdi's thought. Perhaps all that would happen later in the realm of constitutional property is nothing but the consequence of a different assessment of the value property has for collective

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<sup>179</sup> See Richard Posner, "Utilitarianism, Economics, and Legal Theory", 8 *J. Leg. Stud.* 103 (1979).

<sup>180</sup> See, e.g., J. W. Harris, *PROPERTY AND JUSTICE* 15-22 (New York, Oxford University Press, 1996) (giving examples of imaginary societies organized around ideas other than private property as we know it today)

<sup>181</sup> See, e.g., Georg Wilhelm Friedrich Hegel, *PHILOSOPHY OF RIGHT* 4-24 (Mineola, NY, Dover, 2005) (§41-71) (property is one step in the ascending phases of development of the individual's will); Stephen R. Munzer *A THEORY OF PROPERTY* 120-147 (Cambridge, New York, Port Chester, Melbourne & Sidney, Cambridge University Press, 1990) (analyzing the virtues of character usually associated with property); Alan Ryan, *PROPERTY* 70-76 (Minneapolis, University of Minnesota Press, 1987) (analyzing "personalist" theories of property and explaining that, "[a]t one extreme it might be claimed that since personality is essentially embodied in single individuals, private property alone has moral standing").

<sup>182</sup> See, e.g., Stephen R. Munzer, above n. 181, at 254-291 (developing a labor-desert theory of justification of property rights)

<sup>183</sup> See, e.g., John E. Dougherty, "Juan Baustista Alberdi: A Study of His Thought", 29 *The Americas* 489, 497-499 (1973) (arguing that Alberdi's ideal constitution would be designed to foster the development of national wealth, and that it would include the protection of property rights among the necessary guarantees).

prosperity.<sup>184</sup> It may be the case that later politicians have taken measures Alberdi would have agreed with, had he shared their vision of the effects of such encroachments of rights on the national wealth. We cannot rule out such a possibility. It is also possible to speculate about the source of our uneasiness and discomfort with many such measures. Perhaps Alberdi's libertarian intuitions, closely linked to the ideas of desert and self-ownership, still have a hold in Argentine minds, and sit uneasily besides the wealth-maximization rationale. For now, let us be content with having a fairly complete sketch of what constitutional property may have looked like during the founding era, through the eyes of one of the most influential thinkers of the time, the Framers that never was, Juan Bautista Alberdi.

But what happened after the enactment of the Constitution? Was Alberdi's view on property rights the main conception, even among the ruling elites? Were there any instances where those principles could be tested against reality? What were the Government's schemes to deal with economic crises and, more importantly, the people's reactions to them?

I will try to survey popular moods and reactions and to answer these questions mainly through the use of published materials and, especially, newspapers. Why are newspapers so important? Besides their obvious general goal of trying to reflect the views of their readers —and to influence them as well—, newspapers of this era are of particular interest in Argentina, because electoral origins were not yet the exclusive or

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<sup>184</sup> If that were effectively the case, neither Alberdi's idea nor Argentina's later history would be particularly original in the point. See John Tomasi, above n. 71, at 35 (arguing that “[t]he change in the philosophical standard of liberalism was accelerated by changes in people's wider understanding of society and the laws of economics. The case for classic liberalism had long been cast in broadly consequentialist terms: free markets, against a background of secure economic liberties, would tend to bring about economically efficient distribution of good and services. The Great Depression of 1929 shook many people's confidence in that classical liberal claim [...] The rise of social justice was mirrored by the decline of economic liberty”).



dominant source of political legitimacy.<sup>185</sup> Fraudulent electoral practices, the lack of a universal franchise, among other reasons, turned elections into one ambiguous source of legitimacy, a source that needed to be completed by other means.<sup>186</sup> It was not infrequent, then, that the battle for political legitimacy was fought in the pages of the press. With these caveats in mind, let us move on to substantiate the issues, then.

Preliminary, let me say that Alberdi was right in one broad point: the formation of the national state brought about a period of significant economic growth. The clear demarcation and protection of property rights, helped by the enactment of the Civil Code in 1869, along with the expansion of national territories —through displacement of native Indian tribes—, fueled development.<sup>187</sup> The successful establishment of a constitution meant institutional normalization, which in turn improved substantially the country's access to capital markets, thus fostering investments and growth and, at the same time, further consolidating the national state.<sup>188</sup>

None of this, of course, was enough to avert economic crises; quite the opposite.

Crises arose, emergency measures were taken, and reactions took place. We will examine

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<sup>185</sup> See Paula Alonso, “*La Tribuna Nacional y Sud-América: tensiones ideológicas en la construcción de la ‘Argentina moderna’ en la década de 1880*”, in Paula Alonso (compiler), *CONSTRUCCIONES IMPRESAS: PANFLETOS, DIARIOS Y REVISTAS EN LA FORMACIÓN DE LOS ESTADOS NACIONALES EN AMÉRICA LATINA 1820-1920* 211-212 (Buenos Aires, Fondo de Cultura Económica, 2004). See also Paula Alonso, “La reciente historia política de la Argentina: del ochenta al Centenario”, *Documento de trabajo* (working paper) #10 *Universidad de San Andrés Departamento de Humanidades* (1997), at 17-28 (arguing that a new historiographic current in Argentina treats newspapers of that time as an alternative means of political participation, a channel through which all citizens, and especially those who were negated the right to vote, could have a more effective influence in the public sphere; for this position, even partisan newspapers played a dual role as partisan tools and forums for a principled debate, and the press generally reflected the public language of the time, bringing politics to the public and turning it into a *res publica*).

<sup>186</sup> See Paula Alonso, above n. 185, at 212.

<sup>187</sup> Leandro Losada, *HISTORIA DE LAS ELITES EN LA ARGENTINA* 125 (Buenos Aires, Sudamericana, 2009). See also Ezequiel Adamovsky *HISTORIA DE LA CLASE MEDIA ARGENTINA* 32 (Buenos Aires, Planeta, 2009) (arguing that the formation of the national state was crucial to the elite's project of developing national production to export goods).

<sup>188</sup> *Id.*

these events in more detail below. But let me pause to make one important caveat: the Argentine Supreme Court had not risen to much prominence yet, and extended economic crises, for the most part, were not judicialized. There were not many pronouncements of courts dealing with economic emergency measures at the time.

In 1871, the Supreme Court did decide an important case involving the alteration of banking contracts. In *Caffarena v. Banco Argentino del Rosario de Santa Fe*,<sup>189</sup> the Court upheld a provincial law that modified the terms in which bank notes should be redeemed. Concretely, a law enacted by the province of Santa Fe compelled banks that had issued notes nominated in Bolivian silver to repay them in gold. Of course, gold was a stronger, more valuable metal than silver. When Mr. Caffarena demanded the bank to repay his notes under the terms of the local law, the bank refused to do so, deposited the total amount it owed in accordance to the original terms of the note, and alleged the unconstitutionality of the local law, insofar as it purported to alter retroactively the terms of a private convention —thus impairing the obligations arising from such contract— and to set the value of a foreign currency, a power expressly delegated to the national government by the federal constitution. The Supreme Court found for Mr. Caffarena and, to uphold the provincial law, it argued that unlike the U.S. Constitution, the Argentine Constitution did not contain a provision forbidding the states to impair the obligations of contracts. Absent a similar provision from the corresponding local constitution, state legislatures could alter contracts, however unwise such policies might be. The Court also adopted a restrictive position regarding the doctrine of vested rights and the non-retroactivity of civil laws, a position that would be changed later. In this regard, it held that the federal Constitution did not provide expressly for the non-retroactivity of civil laws, therefore the principles underlying such a doctrine were nothing but pieces of advice to legislators, who were free to disregard them. As for

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<sup>189</sup> 10 *Fallos* 427 (1871).

vested rights, the Court limited its understanding of the idea to facts that had already occurred at the time of the enactment of new legislation, facts that could not be changed by legislative fiat.

Although one could think that the Court was ultimately protecting investors, this seems to have been something incidental, as the doctrine the justices developed allowed for the intrusion of contracts. The Court did not consider that article 17 of the federal Constitution, which declares property as “inviolable”, protected the bank’s property, in the sense of its rights arising from the terms of issuance of the notes. The decision seemed to leave ample room for the state, not only federal but also local, to regulate contracts in ways that implied altering their literal terms. This seems at odds with the conception of constitutional property analyzed a few paragraphs before. One should bear in mind, however, that in 1871 the Court had not developed yet the doctrine according to which constitutional property encompasses contractual rights, an idea that would not see the light of the day until the mid 1920s. This being the case, it is more understandable, from the doctrinal standpoint, why the Court argued—and ruled—as it did. One could also argue that *Caffarena* involved concurring property rights—the bank’s and Mr. Caffarena’s—and thus, finding for any of them would respect property. But this is not satisfactory. Property is linked to stability and respect for promises, and the Court’s decision permitted changing the obligations the bank had consented to. Moreover, in order to see “property rights” on both sides of the question, one needs to consider that constitutional property protects contractual rights and, as we have seen, this idea had not appeared in the Court’s case-law yet.

There are two other reasons that may account for the Court’s decision. First, the note’s issuing terms provided that repayment should be made in Bolivian silver *or* in gold, the option to be made by the bank. Therefore, the Court may have thought that the local law was not really imposing on the bank a burden it had not foreseen. Moreover, the

Court considered that such way of issuing notes contradicted the Bank's Charter, which authorized it to issue notes payable in silver or notes payable in gold, but not notes payable in one or another metal, to the option of the debtor.<sup>190</sup> More importantly, the federal government was embarked in a fight to establish a unified monetary system and was trying to take out of circulation Bolivian metals, which had played an important role during the 1860s and 1870s to avert liquidity crises in some provinces. Thus, the local law was considered as consistent with the Congressional policy of eliminating Bolivian silver from circulation, which in turn was deemed as within Congress' powers.<sup>191</sup> It is important to bear in mind that Argentina did not have a unified monetary system until 1881.<sup>192</sup>

The case seems to have received no attention in the media. I could find no mention whatsoever in the main national newspapers of the time,<sup>193</sup> despite the fact the issue of the conversion of paper money was being widely discussed. The decision was not published in the 1872 issue of the *Revista de Legislación y Jurisprudencia*, a law journal, either.

In 1876 Argentina suffered its first convertibility crisis. While the available sources for media coverage are definitely few and sparse—which severely hinders the kind of analysis I undertake here—,<sup>194</sup> the fact that there was no unified monetary system

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<sup>190</sup> 10 *Fallos* 427, 436-437 (1871).

<sup>191</sup> *Id.*, at 435 (1871)

<sup>192</sup> Leandro Losada, above n. 187, at 126 (explaining that during most of the nineteenth century currency issued by the Bank of the Province of Buenos Aires coexisted with other provincial currencies and with Bolivian currency, in the national circulation of money)

<sup>193</sup> Among the available archives for the time of the decision, neither the newspapers *El Nacional* and *La Prensa* nor the magazine *Revista del Río de la Plata* run articles or news that mentioned the decision.

<sup>194</sup> I could only find two newspapers and one magazine. See above n. 193.

in the country at the time, and the lack of judicial cases dealing with the emergency measures which elaborate —directly or indirectly— on the constitutional conception of property rights, all justify focusing in the 1885 crisis instead, a brief overview of the underlying facts may help understand the context in which the later suspension of convertibility, in 1885, took place.

In 1876 the country operated under a bimetallic (gold and silver) standard, as seen, for instance, in the *Caffarena* case analyzed above. While the world shifted from bimetalism to gold monometallism during the 1870s,<sup>195</sup> in Argentina as many as four different foreign currencies, using gold and silver, circulated in the different regions of the country.<sup>196</sup> Under the gold standard, which prevailed from 1880 to 1914,

“[...] the money supply is determined by (and in some cases consists partially or entirely of) the monetary gold stock. A gold standard provides a natural constraint to monetary growth because new production is limited (by increasing costs) relative to the existing stock. Under a fiat or paper money monetary standard, by contrast, there is no limit to money issue other than the good performance of the monetary authorities. Unlike a fiat standard, however, under a gold standard, authorities have considerably less flexibility to deal with shocks. Under a gold standard the monetary authority defines the weight of gold coins or, alternatively, fixes the price of gold in terms of national currency. By being willing to buy and sell gold freely at the mint price, the authority maintains the fixed price [...]”<sup>197</sup>

According to Cortés Conde, crisis struck in 1876 due to a peculiar feature of the Argentine monetary system of the times that differentiated it from the classic gold standard: there was no legal obligation to withdraw notes from circulation every time

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<sup>195</sup> See, e.g., Michael D. Bordo, above n. 105, at 7 (summarizing the arguments explaining the shift).

<sup>196</sup> Roberto Cortés Conde, *DINERO, DEUDA Y CRISIS* 124 (Buenos Aires, Sudamericana-Instituto Torcuato Di Tella, 1989).

<sup>197</sup> Michael D. Bordo, above n. 105, at 6.

banks converted them and gold went out of their vaults.<sup>198</sup> Instead, banks continued expanding credit using their notes. This fueled a further reduction of their gold reserves, as people preferred to reduce their holdings of notes and move to gold instead, to protect themselves from a possible devaluation as gold reserves diminished. Banks were legally obliged to convert notes to gold at a fixed rate. The gold drain got to a point where the President issued a decree suspending convertibility.<sup>199</sup> While depreciation of notes reached 30% immediately after the suspension of convertibility,<sup>200</sup> a subsequent strict fiscal policy, which brought about a series of operating surpluses, instilled confidence in the public that there would be no further depreciations of notes, which in turn increased their demand and thus prompted a return to the pre-crisis parity of exchange.<sup>201</sup> Convertibility was resumed in 1880.

In 1885 the debate around the “convertibility” issue returned to the forefront. Argentina had decided to stick to conversion of bank notes (promissory notes) to metal,<sup>202</sup> even when it was contested whether it was a sound policy for a country with huge needs of currency and relatively low production of metals of its own. At the time,

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<sup>198</sup> See, e.g., Roberto Cortés Conde, above n. 193, at 11 (arguing that “[a] closer look at the 1870’s events in Argentina shows that the [1876] crisis was the consequence of a drain of gold that was not followed by an equivalent reduction in notes, one of the basic requirements of the gold standard”). See also Roberto Cortés Conde, above n. 196, at 127-128 (explaining in detail the operation of the conversion mechanism and the dynamics that ultimately led to the suspension of convertibility in 1876).

<sup>199</sup> Interestingly, the Executive branch acknowledged that it lacked constitutional powers to order the suspension of convertibility and, thus, it urged Congress to make a decision on the issue with no delay, to secure legal certainty. See Roberto Cortés Conde, above n. 196, at 129.

<sup>200</sup> *Id.*, at 127-128.

<sup>201</sup> *Id.*, at 128.

<sup>202</sup> However, strictly speaking Argentina was not really under the gold standard. See Roberto Cortés Conde, “The Failure of the Gold Standard in Argentina: The Debate Revisited”, *Documento de trabajo* (working paper) #6 *Universidad de San Andrés Departamento de Economía* 7 (1995) (explaining that the law that enacted convertibility did not have any rule forcing the banks to reduce the amounts of notes outstanding when there were outflows of gold).

authorized banks issued promissory notes, not legal tender, but these notes were accepted by the public in cancellation of all kinds of obligation and they circulated as money. Two banks were the leaders of the market: the *Banco Nacional*, set up by the federal government, and the older *Banco de la Provincia de Buenos Aires*, Argentina's richest province and the official capital of the country since 1880. Both banks were somehow competing, and the federal government was trying to make the *Banco Nacional* dominant and, ideally, to unify the monetary system with the national bank monopolizing the issuing of notes which would receive the status of legal tender.<sup>203</sup> However, uncontrolled issuing of notes, fueled by political necessities, led to an outflow of reserves and posed a serious threat to convertibility.<sup>204</sup> In early January, President Roca issued an emergency decree establishing that bank notes issued by *Banco Nacional* were not to be converted in gold and were legal tender. There was strong pressure from Buenos Aires to extend the benefits of non-convertibility to notes from *Banco de la Provincia*,<sup>205</sup> which Roca did a couple of days later by another emergency decree.<sup>206</sup> Eventually, both emergency decrees would be ratified by Congress in October.<sup>207</sup>

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<sup>203</sup> See Pablo Gerchunoff, Fernando Rocchi & Gastón Rossi, *DESORDEN Y PROGRESO: LAS CRISIS ECONÓMICAS ARGENTINAS 1870-1905* 45 (Buenos Aires, Edhasa, 2008).

<sup>204</sup> Roberto Cortés Conde, "Fiscal Crisis and Inflation in XIX Century Argentina", *Documento de trabajo* (working paper) #18 *Universidad de San Andrés Departamento de Economía* 17 (1998) (arguing that excessive issuing of bank notes led to the incapacity of banks to pay in gold and to the suspension of convertibility).

<sup>205</sup> The *Banco de la Provincia de Buenos Aires* began to pay the savers their notes with notes from *Banco Nacional*, which had been declared non-convertible, instead of with gold. This was a maneuver to press president Roca to extend non-convertibility to the provincial bank. See "La cuestión palpitante", *El Nacional* January, 13, 1885, at 1. The formal argument made by the provincial bank to justify its new policy was that since the national bonds had become "legal tender" by virtue of the emergency decree, the provincial bank was legally entitled to pay its debts with such notes. See "La conversión de los billetes del Banco de la Provincia", *El Nacional*, January 14, at 1, and "Moneda de conversión", *El Nacional*, January, 15, at 1. See also "El curso forzoso y el Banco de la Provincia", *La Pampa*, January, 11, at 1.

<sup>206</sup> Article 1 of the emergency decree of January 15 granted the character of legal tender to the notes issued by the provincial bank, and article 2 authorized the bank to "suspend" for two years the conversion of its notes to metal currency. However, the bank could not diminish its reserves in metallic and while the conversion was suspended, half of the bank's annual profits were to be saved in order to increase the

Of course, non-convertibility implied a change of the terms of issuance of bank notes (promissory notes), as had been the case in *Caffarena*, and an alteration of expectations as well as a certain loss of value for note holders: they would have to be content with paper money which could not be redeemed in valuable gold as promised. Property rights did not seem to be well treated in this episode either. Was this treatment compatible with the conception of constitutional property held by Alberdi and, most likely, by the Framers? What was the people's reaction to the government's measures?

First of all, one should bear in mind that this was not a problem that concerned contractual rights exclusively or even mainly, but it also included the very central state power to "coin money, [and] regulate the value thereof" (article 67, section 10, Argentine Constitution).<sup>208</sup> What was at stake was the power, expressly conferred by the Constitution, to establish a currency and regulate its value.<sup>209</sup> Of course, contractual rights arising from promissory notes had been modified. But, as in *Caffarena* before, it was not clear yet, at least from the judicial standpoint, whether constitutional property protected obligations arising from contracts. But leaving these issues aside, for we are concerned here with *popular* conceptions of property rather than legal or technical ones, it is important to remark that the convertibility crisis of 1885 seems to have been perceived, at least partially, as a part of a larger conflict between the federal government and the

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bank's reserves (article 5). The text of the decree was published in its entirety in "El decreto esperado", *El Nacional*, January, 16, at 1.

<sup>207</sup> Pablo Gerchunoff, Fernando Rocchi & Gastón Rossi, above n. 203, at 58.

<sup>208</sup> Its direct source was Article I, Section 8, point 5, U.S. Constitution.

<sup>209</sup> Some newspapers framed the issue in exactly those terms. See, e.g., "Los dos bandos", *La Prensa*, January, 10, at 3 (arguing that in the circumstances of the emergency, the government did "not act as a Banker, but as a representative and constitutional embodiment of the Nation's sovereignty, regulating the monetary system, and providing for the normal organization of the circulation of currency and the measures of values").



government of Buenos Aires,<sup>210</sup> rather than as a state regulation interfering contracts between private parties —the banks and the holders of notes—. Thus, public reactions, at least as reflected in the mainstream newspapers of the time, focused on this aspect of the crisis, leaving in the background whatever impact the measures may have had over individual rights. Second, it seems that it was a fairly extended opinion that common people were not demanding conversion of their notes, and that demand came mostly from speculators and from brokers trying to remit gold abroad.<sup>211</sup> This last argument points to a certain conception of the values constitutional property served: the fostering of national wealth, for sure, as Alberdi repeatedly claimed, but also —at least implicitly— the protection of a sphere of personal autonomy, free from state interference,<sup>212</sup> and the

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<sup>210</sup> See, e.g., “Curso forzoso”, *La Pampa*, January, 11, at 1 (arguing that the federal government was trying to hurt *Banco de la Provincia* by excluding it from the suspension of convertibility, in order to boost the position of the *Banco Nacional*). See also “Quieren más ruina y más desquicio”, January, 16, at 1 (discussing federal plans to nationalize the *Banco de la Provincia*); “Los dos bandos”, *La Prensa*, January, 10, at 3 (reporting that it was a common impression among business people that the exclusion of the *Banco de la Provincia* from the suspension of conversion was a hostile maneuver of the federal government against the Governor of Buenos Aires); “La cuestión bancaria”, *La Prensa*, January, 14, at 3 (discussing nationalization plans and the exclusion of suspension of convertibility as measures aimed at the destruction of the local bank); “La cuestión del día”, *La República*, January, 10, at 1 (arguing that President Roca’s advisors intended to harm the provincial bank by limiting the suspension of convertibility to the *Banco Nacional*); “La cuestión bancaria”, *La República*, January, 11, at 1 (interpreting the suspension of convertibility limited exclusively to the notes of the national bank implied a tacit declaration of hostility towards the *Banco de la Provincia* and wondering whether the national government “longed for the extermination of the provincial bank”).

<sup>211</sup> If Cortés Conde is right, public perception may have been accurate. See Roberto Cortés Conde, above n. 204, at 18 (arguing that there was a speculative attack on bank notes in 1885, causing the government to take the analyzed emergency measures). See also “La obra del Banco Nacional”, *La Pampa*, January 11 & 12, at 1 (arguing that “rogues benefitted from immoral speculation”); “Chillidos destemplados”, *El Nacional*, January, 8, at 1 (explaining the mechanics of “agio” [a form of abusive speculation] in the crisis); “La inconvención”, *La República*, January, 6, at 1 (mentioning “agio” and stock market speculation among the causes of the crisis”. But see “Inacción”, *La Prensa*, January, 31, at 1 (arguing that “nobody believes the nonsense that speculation caused the suspension of convertibility”).

<sup>212</sup> Interestingly, at the time even some administrative law scholars, usually strong supporters of governmental powers at the expense of individual rights, paid close attention to the protection of property as the protection of self-government. See Lucio V. López, *DERECHO ADMINISTRATIVO ARGENTINO: LECCIONES DADAS EN LA FACULTAD DE DERECHO POR EL PROFESOR DE LA MATERIA DR. LUCIO V. LÓPEZ* 199 (Buenos Aires, La Imprenta de La Nación, 1902) (arguing that “if a single person’s will rules what is ours, there is tyranny and freedom disappears; if the will of the [greater] number disposes of the wealth formed by the taxation of property, it is clear that the owner does not govern what is his. It is likely that this is very democratic, but surely it is not the government of one’s own, because before civil and natural law, things are not the owners of the interests of proprietors and when things rule them based solely upon numbers, they do it like tyrants and absolutist kings do”). Thanks go to Eduardo Zimmermann for calling my attention to this and providing the citation.

protection of the “most genuine of man’s properties”: work and its fruits. Speculation and dubious remittances of money to foreign countries do not fit easily into this picture of constitutional property. Therefore, it may have been the case that most people did not believe the measures encroached upon anyone’s lawful property interests, at least not centrally. Let us see.

The newspaper *El Nacional* reported the situation on the days immediately before the suspension of convertibility in the following terms:

“Today the conversion in gold of bank notes has continued normally in both official banks [*Banco Nacional* and *Banco de la Provincia de Buenos Aires*]. Until 1 p.m. there had been very little conversion [...] *Most people who have showed up today in Banco de la Provincia are working people. Yesterday, a gentleman had 74,000 nationals [notes] to convert. After talking with the President [of the bank], he decided to deposit the full amount of money and not to convert one single peso, as he found no reason to get metals [...]*”<sup>213</sup>

Immediately after the issuance of the first emergency decree, suspending convertibility of the national bank’s notes only, *El Nacional* insisted that very few people were demanding conversion in *Banco de la Provincia*, still formally obliged to convert its notes in gold:

“The influx of people in the *Banco de la Provincia* is made up *not of people intending to convert notes, but of people intending to deposit them* [...] At 1 p.m. there were very few people converting notes in the exchange office of *Banco de la Provincia*. *Most of them are day-laborers trying to convert small amounts of money* [...]”<sup>214</sup>

Materials from other media point in the same direction. *La República* asserted that “until now, *the public* has not requested the conversion of their notes *here*”.<sup>215</sup> And the

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<sup>213</sup> “Chillidos destemplados”, *El Nacional*, January, 8, at 1. The italics are mine.

<sup>214</sup> “La cuestión palpitante”, *El Nacional*, January, 10, at 1. The italics are mine.

<sup>215</sup> “La cuestión del día”, *La República*, January, 8, at 1. The italics are mine.

newspaper *La Pampa*, attributing the suspension of convertibility to excessive issuance of notes by the national bank, remarked that

“[...] the surplus of paper money, obeying the rules that govern fiduciary circulation in the market, had to flow back to the banks’ vaults for conversion, either directly or by requests for remittances abroad. *For well-known reasons, conversion was made through requests for remittances to foreign countries [...]*”<sup>216</sup>

Surely, most lay people in XIX century Argentina did not have access to foreign accounts, and thus the fact that the bulk of the demand for conversion was channeled through remittances of gold to foreign countries points in the direction of relatively little involvement of the middle and lower classes in the outflow of gold that ultimately brought about the conversion crisis.

By emphasizing that common people, as opposed to brokers and —more generally— speculators, were not demanding conversion, at least not on a large scale, newspapers seemed to deflect the readers’ attention from the fact that note holders, common people among them, would lose value as a consequence of non-conversion. If this was an intentional strategy, it only made sense if one assumes that public reaction would have been more negative if focused on the loss of value for “the regular guy on the street”. If there was no such intention on part of the media, then the evidence is even clearer in showing that public opinion very much saw the crisis as sparked by speculators who, in any event, seem to have been the only ones requesting conversion.

A few days before the emergency decrees, three newspapers —*El Nacional*, *La Prensa*<sup>217</sup> and *La República*— proposed establishing the voluntary conversion of notes,

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<sup>216</sup> “La obra del Banco Nacional”, *La Pampa*, January, 12, at 1. The italics are mine.

<sup>217</sup> *La Prensa* was, at the time and along with *La Nación*, the newspaper with the largest print run and the best reputation and neither newspaper was partisan, in the sense of acting as official voices of political factions, and *La Nación* conceived its journalistic role as that of representing public opinion. See Paula Alonso, above n. 185, at 205, 228, 228. See also Ricardo Sidicaro, *LA POLÍTICA MIRADA DESDE ARRIBA: LAS IDEAS DEL DIARIO LA NACIÓN 1909-1989* 16, 18 (Buenos Aires, Editorial Sudamericana, 1993) (citing a Municipal Census in 1887 that reported *La Nación* and *La Prensa* has having a similar daily print run of 18,000 copies and arguing that “For decades, *La Nación* and *La Prensa* shared the

leaving up to each banking institution to decide whether to convert or not notes and when to do so. The main argument was that

“[...] it would be a *death blow to speculation with bank giros*, because banks, authorized to grant or deny conversion at will, would close their doors to speculators without any risks, and would reserve its metallic elements [...] to attend to commerce’s needs and, thus, they would increase the value of their paper [...]”<sup>218</sup>

Importantly, the article remarked that

“*Public opinion has no antipathy for such a measure because there is a founded conviction that national work and production is going through an era of prosperity and, therefore, that once the pace of the Nation is rid of the hindrance of a ruinous conversion that leaves room for the aforementioned unbridled speculation, there must be sufficient values to support international trade, leaving banks with the important mission of fulfilling, with their own resources, the legitimate remaining needs of commerce [...] banks have metallic reserves good enough for...normal situations and since their notes, convertible at will, are not used to support wars or unproductive spending, but to support the productive sources, there is no fear that its devaluation surpasses the limit reached today by gold’s prices and, on the contrary, taking action the resources produced by exportations of wool, notes should experience a sudden revaluation, heading towards the par of exchange [...]*”<sup>219</sup>

Similarly, Roberto Cortés Conde explains that “public expectations were those of a prompt return to convertibility at par”.<sup>220</sup> Such expectations may have been induced, among other causes, by the prior experience of 1876 —when inconvertibility lasted only four years and the same parity was achieved after the return of conversion— as well as

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media segment that became known as the ‘serious press’), and Leandro Losada, above n. 187, at 215 (arguing that, until the end of the nineteenth century, *La Nación* and *La Prensa* constituted almost a monopoly of the press in the capital).

<sup>218</sup> “La conversión facultativa”, *El Nacional*, January, 7, at 1 (reprinted from *La Prensa*’s magazine aimed at foreign readers). The italics are mine. Exactly the same argument appears in “La cuestión del día”, *La República*, January, 8, at 1.

<sup>219</sup> “La conversión facultativa”, *El Nacional*, January, 7, at 1. The italics are mine. See also “La cuestión del día”, *La República*, January, 8, at 1 (arguing that as soon as the national product had increased enough, the country would return to convertibility) and “La inconversión”, *La República*, January, 6, at 1 (mentioning agio and stock market speculation among the causes of the crisis).

<sup>220</sup> See Roberto Cortés Conde, above n. 202, at 14.

by the terms of the 1885 decrees, which provided for the suspension of convertibility for two years, instead of, say, indefinitely.

The 1876 experience was very much present in the public's memory when the Executive once again suspended convertibility in 1885. The combination of the belief in speculation as the source of the conversion crisis and optimism regarding the revaluation of bank notes, even after non-convertibility, may account for the relative lack of evidence regarding strong public opposition to the emergency measures in 1885. Another factor at play may have been the perception of the suspension of convertibility, and the ensuing legal tender law, as an inevitable calamity, something terrible but ultimately unavoidable.<sup>221</sup>

In any case, there were complaints and signs of disagreement with the emergency measures. Cortés Conde states that “[f]oreign creditors that had invested in internal bonds in *pesos* [national currency] and *domestic* ones that had done so in internal debt in *pesos fuertes* (gold), complained against a decision that generated widespread disbelief<sup>222</sup> and that the measures caused “an angry and energetic reaction from bondholders”<sup>223</sup>. We don't really know how energetic, or how angry, the reaction was and, in any event, it wouldn't tell us much about how the people at large conceived of the emergency measures just to know that some of those prejudiced by the measures —bondholders— complained about them. We need to know how extended the reaction was as well. Let us see what the press, aiming at broader audiences, said about the topic.

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<sup>221</sup> See, e.g., “Curso forzoso”, *La República*, January, 9, at 1; “Curso forzoso”, *La Pampa*, January, 8, at 1; “El decreto de inconvención”, *La Prensa*, January, 15, at 1.

<sup>222</sup> Roberto Cortés Conde, above n. 204, at 18.

<sup>223</sup> Roberto Cortés Conde, “Nuevos Aspectos de la Crisis de 1890”, *Serie Documentos de Trabajo Instituto Torcuato Di Tella Centro de Investigaciones Económicas* 15 (1987).

*La Pampa*, with a slight hint of resignation before what may have been inevitable, said

“[...] the situation has worsened day after day, until it put the [national] bank in a position where *it has to swindle the public, deceiving it with promises to convert its notes* [...] promises that are not fulfilled, under the pretense that conversion is requested with speculative purposes. Because, in truth, what the *Banco Nacional* is doing today is *a real fraud and a hoax on the holders of its notes*, even more shameful because it would be better that it acknowledged openly and frankly that it does not convert its notes because it doesn't have the means to do it [...]”<sup>224</sup>

A few days later, the same newspaper —this time complaining bitterly about the permanence of the members of the Directory of *Banco Nacional* after the decree suspending convertibility— would elaborate further on the perceived injustice of a situation created by the emergency measure:

“[...] that a Pacheco, aerolite fallen in the middle of Buenos Aires, a Gómez, a Forari, yesterday's upstarts, *e altri tipi*, will reinstate the credit of the *Banco Nacional*, amidst non-conversion, *surrounded by the antipathy that necessarily inspires someone who does not pay what he owes and does not pay it because public force protects him* [...] is to dream of chimeras [...]”<sup>225</sup>

In the writer's view, someone who does not pay his debts is someone rightly deserving of antipathy. But even graver is the case where the debtor is protected by the laws.

Another newspaper, *La Prensa*, analyzing the policy of the *Banco de la Provincia* of converting its own notes in notes issued by *Banco Nacional* —legal tender by virtue of the emergency decree of January, 9<sup>th</sup>— said that

“[...] we don't realize exactly what makes the solution morally-sound. Certainly, it will not be a delight for the holder of a *convertible* bank note to be invited to exchange it for another note, only that this time is non-convertible!”<sup>226</sup>

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<sup>224</sup> “Curso forzoso”, *La Pampa*, January, 8, at 1. The italics are mine.

<sup>225</sup> “¿Quiénes van a manejar bajo el curso forzoso?”, *La Pampa*, January, 12, at 1. The italics are mine.

<sup>226</sup> “Después del decreto”, *La Prensa*, January, 11, at 3. This argument was quoted, with approval, by *La República*. See “La solución financiera”, *La República*, January, 12, at 1 (it must be noted, however, that the argument is used to support extending the suspension of convertibility to *Banco de la Provincia*).

Later on, after the suspension of conversion had been extended to include the provincial bank, the same newspaper criticized the federal government for its apparent approval of non-conversion, and emphasized the strong losses the holders of (former) promissory notes and bonds were bearing:

“The absolute lack of initiative and energy of the public officials...cannot be watched without discontent and suspicion [...] The passive attitude of the Ministry seems to indicate that they are very satisfied with the situation, that they deem depreciation of paper money as convenient, that the country goes well and that there is nothing else to do [...] the national currency in circulation results in a loss for note holders of 30 percent!”<sup>227</sup>

*La República*, in turn, stated that the gold price and the depreciation of the currency

“[...] have to be great due to the *warranted expectations* that new instances of *economic arbitrariness* will come from the State, worsening the causes [of the crisis]. But, *given that freedom of contract among individuals harmonizes and equalizes all interests, today is the turn of individual initiative*, well directed, to take the necessary —today indispensable— measures as a future safeguard for their now-injured interests”<sup>228</sup>

The emergency decrees had mandated that both banks benefitting from the suspension of convertibility set half of their annual profits aside to recover their gold reserve. *La Prensa* suggested using the gold reserves to stop the depreciation of the inconvertible money, and stated:

“That *gold*, kept by the banks in their vaults, *belongs to the creditors* in the public, and it is even *morally required* that they put it to use in order to *foster revaluation* of depreciated paper”<sup>229</sup>

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<sup>227</sup> “Inacción”, *La Prensa*, January, 31, at 3.

<sup>228</sup> “Descuentos en oro”, *La República*, January, 25, at 1. The italics are mine.

<sup>229</sup> “Valorización del papel”, *La Prensa*, January, 26, at 3. The italics are mine. *La República*, in turn, chastised the government for allowing that both banks distributed up to half of their annual utilities among shareholders, thus effectively turning them into preferential creditors, instead of making them responsible for the losses caused by the suspension of convertibility. See “Caos económico”, *La República*, January, 25,

Both President Roca and his Minister of Finance Victorino de la Plaza gave public assurances of their opposition to inconvertibility more than once. *El Nacional* reported, one day before the issuing of the first emergency decree, that:

“The President of the Republic has declared that his administration *will not decree the suspension of convertibility*, and that before speculation makes the situation untenable, the abuse shall be nipped in the bud, *without resorting to any kind of arbitrariness* and demanding only that those who demand conversion justify their request”<sup>230</sup>

*La Pampa*, on January, 12<sup>th</sup>, brought to the fore the President’s recent statements, in the same way as *El Nacional*, and wondered:

“¿Is the President sacrificing his promises of a few days ago, when in his letter to Mr. Tornquist and in other statements, he assured that *he would never sign the inconvertibility decree* and that he would rather sell the *Casa Rosada* instead?”<sup>231</sup>

On January 13, after the decree, *El Nacional* elaborated on the Minister’s views:

“The Finance Minister is *entirely hostile to the suspension of convertibility*, and *he can’t find consolation* for having caused it by his recklessness. The Minister seems to be a family father who, certain that he has no descendants, is forced to recognize a newborn [...] He will never find solace for having brought about inconvertibility and has submitted his resignation several times [...]”<sup>232</sup>

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at 1 (transcribing a piece published by *Revista Financiera*, whose opinions and conclusions the newspaper declare to agree with).

<sup>230</sup> “Chillidos destemplados”, *El Nacional*, January, 8, at 1. The italics are mine.

<sup>231</sup> “¿Quiénes van a manejar el curso forzoso?”, *La Pampa*, January, 12, at 1. The italics are mine. The *Casa Rosada* —literally, the “Pink House”— is the building where the Executive Branch sits. However, and differently from the U.S.’ “White House”, the *Casa Rosada* does not serve as a residence for the President. A slightly different, though equally strong, rhetoric figure appears in Mr. Paz’s account, in his interventions in Congress during the debate of the law that eventually ratified the decrees. According to representative Paz, the president would have said that he would “cut his hand off before decreeing the suspension of convertibility”. See “La ley de curso forzoso. Discusión del artículo 2 en la Cámara de diputados. Discurso del Sr. Paz”, *La Nación*, October, 3, 1885, at 1.

<sup>232</sup> “La cuestión palpitante”, *El Nacional*, January, 13, at 1. The italics are mine.



Notice that the President’s discourse brings a moral dimension to the issue once again and considers the suspension of convertibility an arbitrary means to reach an important end,<sup>233</sup> such as cutting off speculation, and thus impermissible to the point of using a strong rhetoric figure to illustrate his opposition. Minister de la Plaza is depicted as a man devastated by his involvement in the maneuver. Of course, this may all well be cheap talk and expressions *pour la galerie*,<sup>234</sup> but this is precisely the point. Why would anyone make such assertions if they did not ring a bell with the audience? If opposition to the measures, on any grounds,<sup>235</sup> were not an extended political opinion —probably even an opinion of a majority—, why bother using exaggerated expressions to show reluctance to take them? Sincere or not, what these political statements show is that the themes of respect for promises and, more generally, property rights, clearly resonated with the public at large. Let us move forward a little bit, in order to explore further these issues.

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<sup>233</sup> *La República* held that the government’s actions were arbitrary and that the individuals, through freedom of contract, should make the necessary arrangements to protect in the future their then-injured interests, as new instances of arbitrariness could be expected from the State. See “Descuentos en oro”, *La República*, January, 25, at 1.

<sup>234</sup> Notice, however, that a similar aversion to granting legal tender status, at a fixed rate, to inconvertible notes appears in a *private* letter that then-Vice President Carlos Pellegrini—who in 1885 had had to defend the administration’s actions as a member of the cabinet— wrote in 1890 to President Juárez Celman. Explicitly invoking judicial protection of vested rights, Pellegrini stated: “I have heard rumors of legal tender as a suggested remedy [to the crisis]. I will not take them to mean granting *retroactive* legal tender status, as some have suggested, for *such a measure would be struck down by the Judiciary insofar as it would encroach upon vested rights*. I understand that [the proposal] only aims at prohibiting future internal obligations in gold, believing that it would thus reduce the demand of gold. I believe there is a fundamental mistake in such idea...” (the italics are mine). The private character of the letter allows some inferences regarding the sincerity of the statement. See Pablo Gerchunoff, Fernando Rocchi & Gastón Rossi, above n. 203, at 342 (reprinting Pellegrini’s letter).

<sup>235</sup> Admittedly, opposition could be based on rights-related arguments—or morality, for that matter— or on grounds of convenience. Convenience-related opposition need not convey any substantive position on rights and could be compatible with a position that saw no violation of property rights in the measures or, even more, with a position that saw no problem in violating property. But President Roca clearly rested his case against the suspension of convertibility on moral or rights-related grounds, by making reference to the *arbitrariness* of suspending convertibility.

In October, 13<sup>h</sup>, Congress finally ratified the decrees that had suspended conversion of notes in January. One of the most important provisions of the law dealt with the scope of the cancelling power that the now inconvertible notes would have. Should they reach all and any obligations created before the issuing of the decrees? Or should their effect be limited to certain kinds of obligations? The Minister of Finance defended the bill in the Senate and argued for the former position: all obligations born before the decrees should be paid in nonconvertible notes at their nominal value, while obligations born after the decree were to be paid in the currency agreed by the parties.<sup>236</sup> In the end, Congress adopted a different position regarding obligations born before the decrees. Obligations established in “peso de oro moneda nacional” (gold peso national currency) could be paid with inconvertible notes at their nominal value. Obligations incurred before the decrees but where the parties had established a special currency could be paid in nonconvertible notes, but at their market value.<sup>237</sup> This was an important exception, as it allowed certain obligations to retain their value, despite the fact that they could no longer be enforced in species (gold). There were heated arguments about this issue in Congress, in the press, and finally, in courts.

The debate in Congress, as well as opinions in the press, reinforce the idea that the people at large thought the suspension of conversion a grievous measure to property rights, however inevitable it may have been.

The Executive branch sent to Congress a very short project, limited to the ratification of the January decrees. The Senate, however, inserted an article in the bill, providing for the retroactive scope of the cancelling power of non-convertible notes at

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<sup>236</sup> Roberto Cortés Conde, above n. 196, at 163-164.

<sup>237</sup> Article 3 of the law. See the text in “La ley de curso forzoso. Sanción definitiva”, *La Nación*, October, 14, at 1. Roberto Cortés Conde, above n. 196, at 164.

their nominal value. When the bill reached the lower chamber —*Cámara de Diputados*—, things got complicated and the majority rejected the Senate’s addition.

Representative Villamayor held that the projected article was at odds with the Constitution and the civil law, as it impaired the obligations of contracts, that it contradicted public opinion, and that Congress did not have the power to take such measures.<sup>238</sup> To quote him:

“The Constitution determines the times of emergency [...] the state of siege and the other cases that go beyond the normalcy, are foreseen by it [the Constitution], that establishes the way to proceed, the limitation to individual rights. It is necessary to react against this great political superstition that has come to replace the old superstition about the kings’ divine rights with the unlimited power of Parliament, as Spencer says [...] to hold that Parliament can do anything is an unconstitutional theory that must be reacted against [...] It is necessary to become convinced of this: that all powers are delegated and limited; that the government is nothing but a committee of administration that has no intrinsic authority; [...] that if such authority goes beyond those bounds, *the people can repudiate it*. I, Mr. President, remember that in Belgium, not long ago, a law of beneficence, giving the clergy more participation [...] was discussed by the Chambers, enacted, and approved by the King, and nonetheless, it was not observed. The people gathered in meeting, in a great popular movement [...] But neither the Chambers nor the government took any offense regarding their respective authority in the episode; they deemed it as a burst of public opinion and the law was abandoned. *It is necessary, in order to pass these laws, to stick to the constitutional principles*, to stay within the scope of [our] own powers, to act with all the prestige of legality, of the precedents, and *consulting the public opinion* as well as the country’s interests [...]”<sup>239</sup>

Representative Dávila, in turn, had someone read aloud a petition signed by the association of tradesmen to prove that the public opinion did not accept the project,<sup>240</sup> and recalled that “all newspapers, without exception, have rejected the proposed

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<sup>238</sup> See “La ley de curso forzoso. Sesión de ayer de la Cámara. Discusión del art. 4. Debate animado. Discurso del Sr. Villamayor...”, *La Nación*, October, 7, at 1.

<sup>239</sup> *Id.* The italics are mine.

<sup>240</sup> Some signs of support for the Senate’s projected text, however marginal, can be found. See, e.g., an unsigned advertisement on “*curso forzoso*”, *La Nación*, October, 9, at 1.

article”.<sup>241</sup> He went on along themes of popular constitutionalism, recalling that in Italy a similar law had been rejected by all tradesmen but one, who was expelled as a leper.<sup>242</sup> In his view, the proposed article implied a limitation of freedom of contract that was inadmissible under the Constitution. Dávila recalled that when slavery was abolished by a public order law, the same law provided for the payment of compensation for the destruction of property, and that even if no one actually showed up to claim the price of the slaves that had been freed, the law was careful in protecting the right of property.<sup>243</sup> “Magnificent law, that which under the pretext of being a public order law, forces an individual to receive in payment papers that diminished his property”.<sup>244</sup>

Previously, representative Solveira had attacked the retroactive character of the Senate’s proposal because, if approved, neither liberty, nor industry, nor commerce, nor wealth would exist.<sup>245</sup> Representative Argento, after attacking the Executive’s exercise of legislative powers through the decrees, had emphasized:

“[...] the power to contract in any determinate species of money, established by the laws, guaranteed again and again *by the Constitution* as well as by many laws, we knock down such a principle by saying: these obligations have no effect [...] [the legal tender status of nonconvertible notes] is the financial cholera”.<sup>246</sup>

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<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> See “La ley de curso forzoso. La discusión en la Cámara de Diputados”, *La Nación*, October, 2, at 1.

<sup>246</sup> *Id.* The italics are mine.

The Executive branch, through the voice of the Minister of War,<sup>247</sup> insisted that Congress could not refuse to ratify the decrees, for severe damage to the collectivity would follow, and that a slightly modified version of the proposed text should be approved. The representatives dissented. They approved a text that, with minor revisions by the Senate, would become article 3 of the law and which created an important exception to the retroactive effects of granting legal tender status to non-convertible bank notes. The text exempted obligations where the parties had agreed to pay in “sealed gold” or where they had established a special currency, or had excluded expressly the possibility of payments with any kind of paper money. The bill went back to the Senate, where future president Juárez Celman took the lead to push forward the Executive’s project, within the political and constitutional constraints set by the *Cámara de Diputados*.<sup>248</sup> Astutely, he tried to minimize the reach of the original Senate text, and dismissed the exceptions approved by the lower house as unnecessary:

“I have requested that we take a vote on the proposed text by parts, because I want to rid article 4 of *Chamber of Deputies* of a mistake and an unnecessary insinuation. The first is [the reference to] ‘sealed gold’. It’s natural, gold needs to be sealed to become nationalized. Only in that way it becomes currency, by the seal. The second part is ‘with the exception of those [obligations] that designed a special currency’. *All this is futile. The stipulations made by private individuals, as long as they are not contrary to morals, are judged by the general laws. It is not necessary to include them here.*”<sup>249</sup>

The bill went back to *Cámara de Diputados* —Chamber of Deputies—, where there was still strong opposition to the retroactive effect of the Senate’s proposal. Representative Gil, for instance, emphasized three different constitutional problems: the

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<sup>247</sup> The Minister of War stood in for the Minister of Finance, who was sick.

<sup>248</sup> Constraints arising from Article 71 of the Constitution, similar in spirit and functioning to Article I, section 7 of the U.S. Constitution.

<sup>249</sup> See “El Banco de Entre Ríos ante el Senado. Sesión de ayer. Discusión de la ley de curso forzoso”, *La Nación*, October, 10, at 1. Emphasis added.

law would encroach upon freedom of contract, thus it would not be a public order law; it would be a “bill of attainder” of sorts with clear redistributive implications that turned it into “class legislation”; and it would alter property retroactively, a power that could not be inferred from Congress’ power to coin money and regulate the value thereof.

“This article 4 does not constitute what can be called a ‘public order law’. Far from it, *this article is an attack on public order* [...] it messes with a point not even private law could touch [...] it attacks the only right [...] reserved to the exclusive will of the contracting parties [...] *This law, Mr. President, which does not look forward, which looks only to the past, that in this way contradicts the very essence of law* [...] this law knows the persons over which it falls [...] it even knows their names and *it already has a name list of the creditors it will defraud and of those it will enrich*, it is not a public order law. This law is unconstitutional; it is a law-sentence, and law-sentences are always *law-deals*”<sup>250</sup>

Emphasizing the nullity of the retroactive effects the Senate’s texts provided for,

Mr. Gil went on:

“Today I buy a piece of land of 50 meters front and 100 meters deep. Tomorrow Congress passes a law, establishing that the meter no longer has one hundred centimeters, but half of it instead. ¿Would it be just that the law forced me to receive that land measured in [these new] small meters?”<sup>251</sup>

The text was finally approved with the Senate’s slight revisions, which left in place a still significant exception to the retroactive cancelling power of nonconvertible notes. The lower house was only four votes short of the two-thirds constitutional requirement to insist upon its original modification of the project. Reactions in the media generally supported the *Cámara de Diputados* position, eventually enacted into law, against the Senate’s original proposal. The suspension of convertibility was mainly depicted as an unconstitutional, albeit more or less inevitable, measure. General retroactive alteration of contracts was a whole different matter. However, freedom of

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<sup>250</sup> See “La Ley de Curso Forzoso. Sanción Definitiva. Discurso del Diputado Gil”, *La Nación*, October, 14, at 1. Emphasis added.

<sup>251</sup> *Id.*

contract, not the inviolability of property, was at the center of the stage. Constitutional property had not yet fully engulfed contractual rights.

*La Tribuna Nacional*, for instance, accepted the suspension of convertibility as the lesser evil, but argued for reducing the scope of the measures to the minimum necessary. The law of necessity might justify extra-legal measures but there were limits to what could be done under its invocation. Allow me to quote it at some length:

“Everybody has acknowledged and do acknowledge that *the suspension of convertibility is a serious evil* and it is not necessary to point out its *pernicious effects* upon civil and commercial transactions and upon the highest spheres of public credit. Just by applying the rigor of the universal principles, and even of *our own constitutional principles*; by judging it with the inexorable logic of the doctrines that limit the powers of government and declare the guarantees of the individual, *it would be easy to prove that the official decrees authorizing the suspension of convertibility are in themselves null and void. But everybody steps back before such a conclusion, and rejects a passive and indifferent role for the State, in the face of extreme circumstances that profoundly affect private wealth.* The adoption of fiat money is seen as *a sort of inevitable law*, which barely claims for official recognition. Nobody can point towards a determinate origin. It is born out of unknown sources [...] It is, in reality, a bane that falls over every person. *Social blame is a collective responsibility*, and nobody is allowed to split it in order to make it weigh down on the [...] less fortunate. On that score, the bill should not have been opposed. The country has gotten ahead of the legislative approval, and nobody dissents on legal tender being an imposition of circumstances [...] The Executive’s bill limited itself to only one article that approved the government’s decrees. The Senate broadened its scope considerably”<sup>252</sup>

“Article 4 [...] as approved by the chamber of senators, establishes that ‘obligations incurred before the date of the Executive decrees may be paid in legal tender notes at their face value, notwithstanding the currency agreed upon by the parties’. This provision, *the most momentous and culminating* of the bill under discussion, *the one that affects the most important interests and principles*, is the one that *has [...] stirred up the most violent protests and the best-grounded objections* [...] We tend to believe that the provision [...], in its literal terms, has an *extremely broad scope, and that it goes beyond the intentions of the legislators* that lent their vote to the bill, *as well as those of the Executive branch* that decreed the inconvertibility of banks’ note issues [...] Congress has the high power of coining money, establishing its value as well as the value of foreign coins, and making all the laws [...] that are necessary for carrying into execution the powers vested into the Government of the Nation [...] But the difficulty resides, precisely, in determining the features of money and in giving a concrete and clear notion of the value of money: does coining money amounts to creating an intrinsic value, beyond the variable relations of exchange,

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<sup>252</sup> See “El curso forzoso”, *La Tribuna Nacional*, October, 3, at 1. The italics are mine.

or does it consist in simply certificating value, or the quality and quantity of fine metal that each coin contains, whose valuation depends solely on the universal law of exchanges? [...] *Granting legal tender status to bank notes is an extraordinary, almost extra-legal, measure*, taken to save the country's situation, which had been compromised by unforeseen or unavoidable events. And *that's why such a measure must be subordinated, in its application, to the circumstances and must limit itself to the demands of social interest, in order to prevent the worsening of its effects, which are necessarily harmful*. Moreover, one must bear in mind that, in this matter, there is *an unwritten law*, that perhaps for that very reason imposes itself with the authority of facts [...] It's the law of *individual interest*, of private transactions...civil law establishes that, for a payment to be legitimate, it must consist in [the delivery of] the same thing that was owed and not of a different one...It is also a principle of our laws that they prescribe for the future, they don't have retroactive effect, and they cannot alter vested rights [...] *Those declarations are constitutional law* in some states. *Such are our principles, and there is no reason to alter them radically*. The adoption of the Senate's article, with no modification whatsoever, would unnecessarily disrupt those equity rules, without fundamentally solving the problem, and deflecting the conflict towards the courts [...] *the courts would have to decide consulting the intention of the parties. It is a principle of law that contractual clauses bind the parties with the same force of the law itself* [...] [a court] would have to investigate the circumstances and history of the contract. If the currency at the time the contract was made was gold notes, or if the clauses expressed the obligation of paying the nominal amount in metal or the stipulations simply obliged to pay a sum of gold national currency, without designating a particular species of currency, such as sealed gold, it could be thought that payment with the same circulating money, now legal tender, complies with such contractual provisions. It could not be said [...] that the parties have wanted to protect themselves from the depreciation or non-conversion of money [...] it would not be the same if the private contract excluded expressly [...] payment with depreciated notes"<sup>253</sup>

Interestingly, *La Tribuna Nacional* suggested that courts could find a middle ground and avoid a declaration of unconstitutionality, by engaging in contractual interpretation and giving priority to the parties' express and implied intentions. That courts could (and perhaps should) strike down the emergency legislation in order to protect private property seems clear enough from this fragment, taken from an article discussing the reform of the Judiciary, amidst the crisis:

“Delicate and transcendental is the function courts have in our constitutional regime. *Meant to protect and safeguard* the security and liberty of individuals, *private property*, and, ultimately, the primary rights of the individual, [the courts' function] responds to the first of social needs. *Without their free and untrammelled action*, amidst the conflicts that threaten the life, *liberty and possessions* of the country's

<sup>253</sup> See “La cuestión del día”, *La Tribuna Nacional*, October, 4, at 1. The italics are mine.



inhabitants, the laws would be a chimera and *the grandiose statements that we would stamp in the first page of our constitutions would be a vain artifice* [...]”<sup>254</sup>

In a similar vein, *La Nación* accepted somewhat reluctantly the constitutionality of the initial decrees, legitimated by the principle of necessity,<sup>255</sup> but attacked ferociously the Senate’s proposed retroactivity of the law with constitutional arguments.<sup>256</sup> Necessity does justify modifying contracts, but only to the minimum extent indispensable to cure the evil. It is striking how polished and lawyerly the arguments look, including direct references to John Marshall and Joseph Story, as well as to national and foreign case law. The tone of the argument sounds nothing like a layman’s opinion, but the themes must have clearly resonated with the people at large. Indeed, *La Nación* emphasized the public reaction against perceived constitutional transgressions. Once again, a fairly lengthy transcription may help illustrate the position:

“Lately, there has been in the House of Representatives [...] an interesting discussion of the draft law on legal tender, sent under review by the Senate [...] It has been denied that the Executive has the power to issue the decrees [that suspended convertibility] [...] The saving propaganda that is made within

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<sup>254</sup> See “Administración de Justicia”, *La Tribuna Nacional*, October 9, at 1. The italics are mine. See also “Justicia”, *La Tribuna Nacional*, October, 16, at 1 (arguing that the Constitution established the Judiciary as an independent power, and that such independence is a pre-condition of liberty).

<sup>255</sup> On the legitimating force of the idea of necessity in *La Nación*’s views, See also “La sección hipotecaria”, *La Nación*, October, 20, at 1 (arguing that although certain project dealing with mortgage bonds was, in the newspaper view, unconstitutional, the authorization for banks to operate in the mortgages market was “imposed by the force of circumstances” and, given that the law had been enacted, it was necessary to look for an interpretation that minimized its problems).

<sup>256</sup> From its birth, and throughout the nineteenth century, *La Nación* wrote aiming at lecturing administrations on the proper role of the State, resorting to the Constitution as a definitive argument. Its position was, obviously, not neutral, and it tended to sympathize with the interests of owners. Ricardo Sidicaro has put this point nicely: “The newspaper always questioned the different administrations and the State from its own doctrinaire perspective. By taking up such a role, it acted as a kind of Freudian superego, saying in the name of the Constitution what had to be done and what was prohibited. The newspaper managed to ground its positions on tradition and the Constitution at the same time, by means of showing them both as politically neutral...It can be said that the newspaper’s concern with reminding the different administrations of the content of constitutional norms was framed within the defense of the social order, and emphasis was put in those cases in which the supposed transgressions to the Constitution affected the interests of the main owners. But the coincidence of viewpoints between certain social sectors and the newspaper [...] is not enough to consider *La Nación* as an ideological instrument of such sectors”. See Ricardo Sidicaro, above n. 217, at 10, 11.

Congress and in the press is plausible, because violations of the principles happen time after time and they seem not to get the interest and attention of the public, who to a certain extent remains indifferent before those facts. It is not so, however. *There is a latent and vivid repulsion against the violators of the institutions and a complete condemnation of those attacks. The constitutional doctrine that is invoked, and which negates the Executive the power to issue decrees such those suspending convertibility, is substantially correct; but the facts modify it [...] in its various applications.* Public authorities are not passive entities in the constitutional body. They have the power to avoid unforeseen evils that may arise suddenly, and that power comes from the nature of things [...] *The legal tender is a condition imposed as a result of unavoidable events [...] Thus, the Executive branch, for lack of another entity that works instantly, has to intervene to prevent the evil [...]* Our own Supreme Court has said that government intervenes in matters pertaining to legal tender, for it is a first-order general interest matter. The decree did not create anything: it simply accepted the fact, trying to prevent or limit its bad effects. *If it weren't so, Congress would have the...remedy in its hands, be it by negating approval of the decrees and making the member of the Executive branch who signed them responsible for their illegal effects, or by accusing them [the member of the Executive] politically if, as it is said, they have committed political crimes [...]* Congress has the power to coin money and regulate the value thereof [...] so it can determine that such money has the power to cancel obligations [...] according to the value Congress set for it, *but without violating the law of the contracts [...]* *It has been said that the legal tender bill ignores the constitutional provision that declares property to be inviolable, and it would be so if the bill exceeded the prudent limit set by the same decrees [...]* When the Constitution guarantees property rights, and forbids the enactment of laws that affect vested rights or impair the obligations of contracts, it refers to *direct expropriations and not the indirect harms that property may suffer as a consequence of the exercise of a legal power*<sup>257</sup>

Slightly changing its position regarding the implications of the power of Congress to coin money and set the value thereof, the same newspaper went on:

*“That decree did nothing but to translate into law a fact, namely: that the bank could not convert its notes [...] and that, hence, it was released from such obligation [...] It did not say anything about prior obligations incurred by the government or by individuals, and therefore, current legislation on the matter was not changed, either for the past or for the future. Those decrees embodied a public order law, in the sense that the social interest overrode particular interest, by exception and due to a fact that imposed itself fatally as a necessity and a general convenience, but only insofar as it concerned commitments taken by the banks to the public [...] that is, the conversion of bank notes. It was a simple suspension, not an abrogation, of the laws that govern reciprocal monetary obligations [...] Once the decrees were submitted to Congress, the Senate [...] exaggerated their scope and distorted their economy by proposing that obligations prior to the date of the decrees could be paid in legal tender notes, regardless of the currency agreed upon by the parties. This was more than exaggerating the scope of the decrees [...]: it meant going out of the constitutional ground, regulating a point that, in addition to having its own special law, was beyond the legislative power. In effect, Congress, according*

<sup>257</sup> See “Curso forzoso y emisión”, *La Nación*, October 3, at 1. The italics are mine.

to the incise 10 of article 67 of the Constitution, only has the power to coin money, regulate the value thereof, and of foreign coin. Leaving aside that, taken literally, this provision only refers to metal money [...] the word value stamps its constitutional, as well as legal and economic, seal by linking the currency with real values that dominate exchanges and contracts and have nothing to do with the written or nominal value [...] Moreover, *it was an unconstitutional violation due to its retroactive character*, which abrogated the law of contracts in the past, abusively and needlessly damaging rights of the individuals which in no way affected the public order. It was more than this, [it was] an economic absurdity that intended, like alchemy, to turn paper into gold by legislative fiat [...] the Senate's bill could not be sustained, and so is that as soon as it was within the domain of the Chamber of Deputies, there was a reaction against it, and it was replaced by another article which prescribes a diametrically opposed solution [...] It is a triumph of the good doctrine [...] and the Chamber of Deputies deserves a warm greeting [...] *The capital argument*, which has not appeared in the discussion, *is that even if the Senate's bill had assumed the form of law, it would have never had the force of law, because being in itself unconstitutional, courts would have so declared it*, and they would not have applied it to the cases brought before them, in accordance to their established case law and using the constitutional power that they have over the legislative power when it exceeds its own [constitutional powers]<sup>258</sup>

The article also criticized the arguments made by the Minister of War in defense of the Senate's bill, by denouncing a confusion between the law of war and public order laws, and by complaining bitterly about the—in its view wholly inappropriate—equation of the legitimate creditors with conspirators against the health of the State. Finally, it rebutted the arguments based upon similar precedents in the U.S.A. and France by claiming that, leaving aside that in some cases courts had found those measures unconstitutional,<sup>259</sup> there was a crucial difference between the foreign cases and our own local situation. According to *La Nación* both in France and in the U.S.A. legal tender notes were not depreciated, due to either the strong metallic reserves in their banks or the confidence in their governments; hence, there was no defrauding of creditors and no substantial alteration of the value of contracts.<sup>260</sup>

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<sup>258</sup> See "El 4º", *La Nación*, October, 8, at 1.

<sup>259</sup> See, e.g., *Hepburn v. Griswold*, 75 U.S. 8 (1869).

<sup>260</sup> See above n. 258.

So this newspaper was willing to accept the suspension of convertibility, a measure that, while undoubtedly harmful for some people, was perceived as transitory,<sup>261</sup> but it decried the intention to go beyond that and retroactively affect all contracts. From a legal standpoint, it is remarkable that its reading of the property clause does not differ much from the case law in the U.S. at the time, where the takings clause was not read yet as encompassing regulatory takings.<sup>262</sup>

*Sud-América*, instead, in its characteristic partisan style,<sup>263</sup> supported the Senate's bill and tried to depict the sessions in the Chamber of Deputies as a total victory for the Administration. Its assertions, however, are not very persuasive. A careful reading of debates in Congress show a very different picture from the one *Sud-América* attempted to convey. It is true that there were voices in support of broadening the retroactive reach of the bill. But they were not a majority. In fact, the Chamber of Deputies was pretty close to overriding the Senate's modifications to its projected article, by a two-thirds vote, and the Senate accepted to keep an important limitation to its preferred text. More importantly, the exaggerated and triumphal style in which the newspaper depicts Minister Pellegrini's presence in Congress does not fit well with the rest of the testimonies. As per

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<sup>261</sup> See Robert Cortés Conde, above n. 202. See also "La ley de curso forzoso. Sesión de ayer de la Cámara...", *La Nación*, October, 8, at 1 (transcribing the debate in the House of Representatives, where representative Calvo expressly stated that the government's seal on the inconvertible bank notes implied a guarantee, by the national government, of a return to conversion at some point, specially because—in his view—granting cancelling power to fiduciary money could not be squared with either justice or law, unless it be temporary).

<sup>262</sup> The first U.S. Supreme Court case where a regulatory taking was found is *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

<sup>263</sup> *Sud-América* was founded to support Miguel Juárez Celman, a senator of the governing party at the time and later president of Argentina. As opposed to *La Nación*, which thought of itself as representing public opinion, *Sud-América* conceived of its role rather differently: according to its views, newspapers "discuss, illustrate issues, examine them from their own point of view and according to their passions, to form opinion, not to represent it". See "La prensa. A propósito del mensaje", *Sud-América*, May 11, 1888, reproduced in Paula Alonso, above n. 185, at 222-223.

its own open confession, *Sud-América* was not trying to reflect public opinion, but only to transform it.<sup>264</sup> Let us take a glimpse of its rather poetic statements:

“The Finance Committee of the Chamber, by a majority of its members, rejected *in limine* the Senate’s article [...] they all relied on constitutional norms that forbid public authorities to alter contracts and to pass resolutions with retroactive effect, as well as on economic principles that condemn legal tender and the arbitrary modifications in the value of money. The minority [...] relied on the constitutional power of public authorities to take all measures necessary to save and preserve the public order and the interests of the community [...] It was after [Mr. Dávila’s] discourse had given the opponents of article 4 *hopes of triumph*, that Doctor Pellegrini, the Minister of War, entered the debate...Dr. Pellegrini, *despite his improvisation* [...] *garnered lively shows of approval and dislodged the majority of the committee from their position, turning the result of the debate*, of course, in favor of an article that, without going as far as the Senate’s, would be enough to bring light to the chaos in commercial transactions before the legal tender decrees. Dr. Pellegrini *showed* that the public authorities’ powers of self-preservation [...] imposed partial sacrifices to save the fate of states [...] Then he *proved* how the idea behind article 4, whose scope it was believed to be limitable, constituted all that there is to the legal tender law [...] Dr. Pellegrini *fundamentally discredited the opposing discourses and, always moving forward, he took complete possession of the spirit of the Chamber* and even of the majority of the committee itself [...] Nonetheless, we deem the Senate’s article [...] more acceptable than the one approved yesterday by the Chamber of Deputies and we believe that [the Senate] should reestablish it”<sup>265</sup>

It must be born in mind that *Sud-América* was Juárez Celman’s newspaper, and that he had worked —and would still work— very actively in the Senate to push forward the idea of giving the legal tender law the broadest possible reach. Their statements, thus, are at least suspect, and in this concrete case, clearly false. The Chamber of Deputies approved a text that introduced a substantial exception to the retroactive effect of the law, an exception that the supposedly victorious and crowd-enchanting Pellegrini had opposed.<sup>266</sup>

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<sup>264</sup> See “La prensa. A propósito del mensaje”, *Sud-América*, May 11, 1888, reproduced in Paula Alonso, above n. 185, at 222-223.

<sup>265</sup> See “El Curso Forzoso ante el Congreso. Dr. Pellegrini”, *Sud-América*, October, 7, at 1. The italics are mine.

<sup>266</sup> Pellegrini supported the Senate’s bill. See “La ley de curso forzoso. La discusión en la Cámara de Diputados...”, *La Nación*, October, 2, at 1.

The Supreme Court decided on the applicability of inconvertible notes to payment of obligations arising from contracts in “pesos fuertes” —an old currency— in early 1886. It is important to bear in mind that the “peso fuerte” was a gold currency (1,66 grams of gold per coin) created by the law of September, 29<sup>th</sup>, 1875, that had lost its legal status as money by the law of November, 5<sup>th</sup>, 1881, which in turn created the “peso de oro moneda nacional”, another gold currency of lesser value (1,6129 gram of gold per coin).

In *Gowland v. Mallman*<sup>267</sup> the Court ruled that a contract that, prior to the suspension of convertibility, stipulated payment in “pesos fuertes” was included in the exception from cancellation in nonconvertible notes at their nominal value established by Congress (article 3). This was so because the “peso fuerte” had been “demonetized” (lost its legal status as money) by law in 1881 and, thus, it was a “special currency” that did not ordinarily circulate in the country, within the terms of the legal exception.<sup>268</sup> *Gowland* was, in a sense, an easy case. The Court did not need to address any constitutional issue, as it relied solely on the law that had exempted certain obligations from cancellation in inconvertible notes at face value. There are no constitutional arguments whatsoever in the very short decision, which at best was a case of statutory interpretation and, as I said, an easy one at that. But, in different sense, *Gowland* may have been an important case.

*La Tribuna Nacional*, for instance, considered the decision a very important one, as a large number of lawsuits with identical objects existed in the provinces, with new

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<sup>267</sup> 29 *Fallos* 304 (1886).

<sup>268</sup> *Id.*, at 308.

lawsuits being filed everyday.<sup>269</sup> Admittedly, the Court’s reading of the scope of article 3 is very plausible and, to a modern reader, it seems the more natural understanding of the clause and its implications. But it may have not been quite so obvious at the time. The mere fact that, as *La Tribuna Nacional* reported, numerous similar cases were being litigated throughout the country proves that it was contested whether contracts in “pesos fuertes” were subject to being paid in paper money at nominal value. A lay reader of *La Nación*, complaining about what he deemed as a lack of clarity in the *Cámara de Diputados* proposed exceptions, expressed exactly the same kind of doubts that may have led the parties in *Gowland* to litigate:

“Mr. Editor of LA NACIÓN: ¿What does it mean ‘moneda nacional oro’ (gold national currency)? Article 4 [...] passed by *Cámara de Diputados* makes a substantial difference between ‘moneda nacional oro’ and ‘moneda nacional oro sellado’ (sealed gold national currency), and I ask: when one says gold, isn’t it understood that one means ‘sealed gold’? [...] *I understand perfectly that the designation of a special currency, or a clause ‘with the exclusion of any kind of paper money in existence or to be created, are binding and that they compel compliance with the agreed terms* [of a contract]; but to establish a difference between ‘moneda nacional oro’ and ‘moneda nacional oro sellado’ is something I cannot fully comprehend, as many others cannot [...] *And what about still-existing agreements in old legal currency? How shall they be cancelled? In what kind of currency [shall they be paid]? All these points should be clarified by the law*”<sup>270</sup>

Thus, in *Gowland* there may have been more than one interpretive option open to the Court. Significantly, the justices chose the path of a broad interpretation of the exception, giving more space to the parties’ intentions, and leaving a larger universe of cases beyond the retroactive effect of the restrictive legislation. The ruling does not seem to have received criticisms of any sort for taking such an interpretive stance.

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<sup>269</sup> See “Impactante resolución de la Corte”, *La Tribuna Nacional*, February, 7, 1886, at 2-3. The article transcribed the Court’s decision and, without taking sides explicitly, it considered the decision a high-impact one.

<sup>270</sup> See “¿Cuántas clases de oro hay”, a reader’s letter signed by one C.s. de V., *La Nación*, October, 9, at 2. The italics are mine. The underlining reflects emphasis in the original.

Similarly to *La Tribuna Nacional*, *La Prensa* and *The Herald* used a very objective reporting style in their coverage of the case. The former simply transcribed the decision,<sup>271</sup> while the latter ran a short story describing the details of the litigation and the gist of the Court's argument.<sup>272</sup> Neither media criticized the Court.

*La Pampa* ran a rather curious story, mixing two property-related topics in one article.<sup>273</sup> The first part of the piece tells a story about one Teófilo N., owner of a hotel in a locality, who had suffered a theft a few nights before. According to the newspaper, when the said Teófilo N. was about to fall asleep, he heard a burglar breaking into his home. The burglar went into Teófilo's room, where he stayed very quiet and still, pretending to be sleeping. The burglar took some items and money, and left. The following day, Teófilo N. told his friends about the episode. Some of them asked:

“-Why didn't you ask for help or *defend your property*?”

“-Dude, for a very simple reason: I was afraid that he would *stab me*, and that's why I didn't even breath”, Teófilo replied.

Right after this dialogue, without any line of separation or noticeable break between the two topics, the article launches into the details of the lawsuit filed by Jorge Gowland and his sons against the Messrs. Mallman and the Court's decision. Is it just a press mistake, an article's title missed, the lack of an intended, but absent, line of separation between two unrelated stories? Perhaps. But *La Pampa* could also be read as establishing some sort of link between the theft that Teófilo N. had suffered at the hands of a burglar and the loss experienced by those who were creditors in contracts with gold clauses due to the government's emergency measures. Teófilo lost its property because

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<sup>271</sup> “Pagos a oro”, *La Prensa*, February, 7, at 4.

<sup>272</sup> “Business notes”, *The Herald*, February, 7, at 4.

<sup>273</sup> See “Teófilo N.”, *La Pampa*, February, 7, at 1-2.



he feared for his life and he had no one who could defend him and his property. The creditors, on the other hand, were threatened by the emergency measures but some of them were eventually protected by the Court's decision. Is there a moral link between both stories? Is there an implicit reference to theft in Gowland's case? I do not want to make too much of what can perfectly be an editorial mistake. But in any case, Teófilo's story has another important cue for my reconstruction of popular conceptions of property rights. Teófilo's friends assume that property is to be defended against all illegitimate attacks, even if they may pose some risk, an assumption that is shared by Teófilo himself, who only declines to stand up for his property because he feared for his life.

But regardless of how one reads *La Pampa's* intriguing coverage of the *Gowland* decision, what is true is that no negative references to the Court's ruling are found in the press that covered the case.

What can we learn from the 1885 conversion crisis? At any rate, it is hard to tell whether an actual majority of the people thought the suspension of convertibility unconstitutional because it violated property rights. The public discourse at the time of the emergency decrees, as could be reconstructed from press articles and news, was clearly dominated by considerations regarding the effects of convertibility, or its suspension, on national prosperity and domestic and international trade.<sup>274</sup> I could find only one explicit invocation of property as affected by the emergency, and it was not referred to individual property but to the provinces' property.<sup>275</sup> On the one hand, this is

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<sup>274</sup> See, e.g., "Curso forzoso", *La Pampa*, January, 7 & 8, at 1 (criticizing the suspension of convertibility on the grounds of the greater progress than a convertibility regime was bound to bring about).

<sup>275</sup> "Las camarillas y la cuestión bancaria", *El Nacional*, January, 15, at 1 (claiming that "the federal government and the national bank should not congratulate themselves on the good judgment of their defenders in the public debate, for they show the government and the bank as conspirators against the economic prosperity of the country, the *property* and autonomy of the provinces and the fundamental Charter of the Nation")

understandable: as Alberdi's preoccupations showed, Argentina was a country rich in natural resources, but lacking enormously in development. Thus, economic prosperity was probably a central concern in most people's minds. On the other hand, the discourse of rights had not taken hold yet.<sup>276</sup> With the country just coming out of a royalist system<sup>277</sup> and decades of internal war,<sup>278</sup> and barely breaking out of the rule of Juan Manuel de Rosas —a person who dismissed constitutions as “little paper notebooks”—<sup>279</sup> it is likely that public problems were not thought, at least not primarily, in terms of individual rights.<sup>280</sup> However, this does not mean that the protection of property was not an important concern for the people, or that its violations went unnoticed. At the time Congress debated whether to ratify the emergency measures taken by the President, arguments about property rights and the respect for contracts appeared prominently in the debates and carved a broad exception to the retroactive effects of the legislation.

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<sup>276</sup> Even constitutional law class books paid relatively scarce attention to issues of rights, the field being dominated by analysis of state's powers. In general, they devoted no more than one chapter to rights' topics. See Santiago Legarre, *PODER DE POLICÍA Y MORALIDAD PÚBLICA* 252 (Ábaco, Buenos Aires, 2004).

<sup>277</sup> Argentina was part of the Viceroy of the River Plate, created in 1776, and its process of independence took from 1810 to 1816. Although independence was declared in 1816, many colonial institutions and legal regulations remained in place until the enactment of the Constitution in 1853 and, afterwards, the Civil, Commercial, and Criminal Codes.

<sup>278</sup> From 1820 to 1853, there was internal division and no national government. Each province was on its own, commanded by a *caudillo*, and the external representation was delegated to the government of Buenos Aires.

<sup>279</sup> See, e.g., “El cuadernito”, *La Gaceta Federal*, available at <http://www.lagazeta.com.ar/cuadernito.htm> (last visited 04/25/2013).

<sup>280</sup> Esteban Echeverría, in a powerful short story that aimed at depicting the kind of people that were followers and protégées of Juan Manuel de Rosas, showed how little rights were worth in the Argentina of the times: “[...] two boys were training in the use of knives by throwing slashes at each other; [...] four other lads, already teenagers, were discussing the right to a tripe and gut, stolen from a butcher, by a knife fight; and not far from them, a group of skinny dogs were employing the same means to determine who would take a mud-covered liver. *This was a simulation, in a small scale, of the barbaric way in which all questions and individual and social rights are decided*”. See Esteban Echeverría, “El matadero”, 1839 (published in 1871), available in Spanish at <http://www.biblioteca.clarin.com/pbda/cuentos/matadero/matadero.html> (last visited 07/25/2011), the italics are mine. I thank Eduardo Zimmermann for calling my attention to Echeverría's piece.

Moreover, as I think I have shown, public outrage at emergency measures did take place, newspapers reflected such outrage in different ways, and politicians were quite ready to make statements appealing to values commonly associated with property rights. Finally, when the Supreme Court construed broadly the legislative exception to cancellation of gold obligations in non-convertible notes at nominal value, there was no outrage or even negative reactions towards the Court's seeming protection of contractual rights.

What about the redistributive effects of the emergency measures? The redistribution caused by the 1885 measures was probably regressive. The *Banco Nacional*, which had played an important role in unleashing the convertibility crisis by excessive issuing of notes and by lending to friends and associates at rates below the market's,<sup>281</sup> obtained large profits and, merely a year after the crisis, distributed a twelve-per-cent dividend.<sup>282</sup> Money holders, and among them wage earners especially, suffered the consequences of depreciation.<sup>283</sup> As it would happen again in 1890, large landowners associated with the export business lived in a different reality, benefitting from a depreciated national currency. The continuous influx of sterling pounds and French francs in their accounts "seemed to isolate them from the harsh reality, from the rapidly increasing gap between the value of gold and the value of paper".<sup>284</sup> Even Congress'

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<sup>281</sup> See, e.g., "Quiénes van a manejar el curso forzoso", *La Pampa*, January, 12, at 1 (arguing that the national bank lent money to debtors who would pay back "late, badly, and never", among other criticisms of the bank's operations)

<sup>282</sup> Roberto Cortés Conde, above n. 196, at 166.

<sup>283</sup> Roberto Cortés Conde, above n. 204, at 18, 22.

<sup>284</sup> Carlos A. Floria & César A. García Belsunce, *HISTORIA DE LOS ARGENTINOS* 704 (Buenos Aires, Larrouse, 2004) (quoting Thomas McGann). See also Michael D. Bordo, above n. 105, at 13 (stating that in some "peripheral" countries, powerful political groups benefitted from inflation and depreciation and mentioning Argentine ranchers as an example). Cortés Conde argues, however, that while landowners and exporting interests may have benefited from devaluation, "it is hard to imagine the local oligarchy carefully planning the demise of convertibility". See Roberto Cortés Conde, above n. 202, at 7-8.

sanctioning of narrow retroactive effects to the now-legal tender notes seems moderately regressive. Based upon the idea that contracts that merely stipulated payment in gold currency, as opposed to those that stipulated “a special currency”, could not be interpreted as aiming at preventing payment in paper money, Article 3 of the law put less skillful parties at disadvantage. Learned and well-advised people had probably set clauses that specified payment in special currencies. But why would do such a thing someone less familiar with legalese? To common people, agreeing upon a contract that set gold currency as money for payments could not have meant anything different than receiving, well, gold currency. Thus, the assumption underlying the contractual interpretation made by Article 3 only held when the parties were fairly acquainted with contractual niceties. The lay man in the street, bearing most of the burden of the crisis, had good reasons to oppose the measures and to appreciate property rights.

Almost contemporarily with the process leading to the 1890 great economic and financial crisis, the Supreme Court had the chance of deciding an important takings case, involving a project that enjoyed wide popular support. Buenos Aires had been growing at steady pace, requiring the opening of new streets and avenues. One of the main projects at the time was the opening of “Avenida de Mayo”, a wide avenue in the middle of the urban radio of the City that today connects the “Pink House” and “Plaza de Mayo” with the Congress building. Unfortunately, the City did not have the necessary resources to undertake the project. In this context, Congress —legislating for the federal capital as a local legislature— passed a law declaring the project as satisfying “public utility”.<sup>285</sup> It also declared the lands in both sides of the projected route of the avenue as subject to expropriation. As interpreted by the City, the law authorized to expropriate the full

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<sup>285</sup> Article 17 of the Argentine constitution, in the part regarding expropriations, establishes two conditions for the State to constitutionally take private property: a declaration by Congress of “public utility” (similar, but not identical, to the “public use” requirement in the takings clause of the U.S. Constitution), and the prior payment of compensation.

extension of the real properties “affected by the opening of the avenue”, regardless of the portion of land actually needed to physically open the avenue. If the avenue barely touched a piece of land, the City could expropriate the whole land. The undisguised goal of the State was to keep the remaining portions of land for itself and to sell them at a much higher price, taking advantage of the raise in value that the prospect of the opening of “Avenida de Mayo” would bring about. The profits thus made would be used, allegedly, to fund the works.

Isabel de Elortondo, owner of one of the lands adjacent to the route of the projected avenue, challenged the expropriation as contrary to the inviolability of property, insofar as it encompassed portions of land not necessary to the physical opening of the avenue. She argued, thus, that public profit —the confessed goal pursued by the City— was not the “public utility” demanded by the Constitution. The Supreme Court, in a four-to-one decision, agreed with her and struck down the law in *Municipalidad de la Capital v. Elortondo, Isabel*.<sup>286</sup>

Some of the arguments used by the majority emphasized the importance of property rights in our constitutional scheme. Basically, the majority argued that the Constitution establishes as an absolute principle the inviolability of private property and that, in order to better protect it against all possible illegitimate aggression on the part of the State, the Constitution declares that nobody shall be deprived of his property but by virtue of a judicial decision grounded upon law.<sup>287</sup> The majority also stated that even if the power to determine what is public utility resides with Congress, it cannot be

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<sup>286</sup> 33 *Fallos* 162 (1888). The Court would later abandon this position and settle for a doctrine according to which judges are to be extremely deferential to legislative assessments of “public utility”, unless a clear arbitrariness can be shown. The evolution of the “public utility” case-law in Argentina, thus, has not been too different from the evolution of the caselaw on “public use” in the U.S. See, e.g., *Berman v. Parker*, 348 U.S. 26 (1954); *Midkiff v. Hawai'i Housing Authority*, 467 U.S. 229 (1984); *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>287</sup> 33 *Fallos* 162 (1888), §2.

exercised arbitrarily or beyond the limits set by the Constitution.<sup>288</sup> Specifically, the justices held that the expropriation power cannot be used for purposes of mere speculation or profit, or to increase public revenue, or to carry out public works that are useful and beneficial to the social interest, if they can be completed without resorting to such an extreme measure.<sup>289</sup> Otherwise, they held,

“[...] in order to carry out public works in one extreme of the Republic, it would be permissible to expropriate real property located in the opposite extreme, and to attack *the sacred right of property* arbitrarily and equally in every corner of the country; because if the right to expropriation were grounded not in the [...] concrete application of private goods to services or works done for national public utility, but in the greater or lesser pecuniary convenience [of the taking] or in the discretionary and arbitrary decision of the Legislature, there would be no reason to distinguish between those properties adjacent to the works, or fairly close to them, and those properties located the farthest from them, and all properties could be equally attacked, as long as this was deemed advantageous for the fiscal interest or it was the will of that body [the Legislature]”<sup>290</sup>

Far from generating public outcry or a political backlash, the decision was received warmly by the public. Even newspapers which were extremely supportive of the “Avenida de Mayo” project approved of the Court’s decision. Interestingly enough, and consistent with Jonathan Miller’s interpretation,<sup>291</sup> it seems to have been the fact that the decision was perceived as basically legal, as opposed to political, and grounded in the clear text of the Constitution, that garnered support for the decision, even among those who strongly favored the opening of the avenue. Let us see.<sup>292</sup>

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<sup>288</sup> *Id.*, §5.

<sup>289</sup> *Id.*, §7

<sup>290</sup> *Id.*, §11. Emphasis added.

<sup>291</sup> See above n. 75.

<sup>292</sup> Of the seven newspapers I found for the period, four mentioned the Supreme Court decision, and they are analyzed in the main text. The newspapers *Figaro*, *El Nacional*, and *El Diario* did not publish news related to the ruling.

*La Prensa*, in an article entitled “Avenida de Mayo” welcomed the decision and described it in the following terms: “Remarkable decision of the Federal Court. The right to property, guaranteed. Limitation to the expropriation for the boulevard”. The newspaper recommended “the whole country, and specially its rulers, [to read] the following remarkable document”, and then transcribed integrally the majority opinion.<sup>293</sup>

*La Tribuna Nacional*, a newspaper specially supportive of the opening of the avenue that had been following the course of the matter in courts —to the point of having published, prior to the Supreme Court decision, the advisory opinion of the Solicitor General Eduardo Costa, urging the Court to uphold the law—, said that

“The Supreme Court decision, declaring unconstitutional and, therefore, inapplicable, the law of October, 31<sup>st</sup>, 1884, related to the opening of the Avenida de Mayor [...] is without a doubt the most serious, and for many, unexpected, obstacle this great project, whose urgent necessity is in the conscience of all inhabitants of this capital, could have run into. We are pleased to say, given that it is a decision from the Highest Court in the Nation, that *there is no possible disagreement about the merits and the correctness of the doctrine adopted in it*. Allow us, however, to lament that the strictness of principles has, in the present case, turned out a hindrance to a project that, after one thousand efforts, had deserved the unanimous applause of public opinion, and to express our wish that other means to carry it out are found”<sup>294</sup>

And it went on:

“[...] The Supreme Court’s ruling, it is only fair to say, is *a remarkable document*, as regards both its style and substance, which *stands out especially because of its strictly juridical character, even if it hurts momentarily one of the liveliest aspirations of the neighborhood*. In light of the richness and clarity of its exposition, the strength of the logic by which the reasons that have weighted in the judges’ minds...flow, the science and conscience of the Court shine with qualities that honor our magistrature. Enthusiastic supporters of the boulevard [...] as we are, after reading this legal piece, we would barely dare to repeat the old latin adage: *summum jus, summa injuria*. Meanwhile, fortunately there are still available legal means to carry out the project, modifying it as far as the ways to raise the necessary funds are concerned. The City must trust the progressive spirit of its citizens, who shall offer their unanimous support to establish arrangements that

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<sup>293</sup> “Avenida de Mayo”, *La Prensa*, April, 15, at 4.

<sup>294</sup> “La Avenida de Mayo”, *La Tribuna Nacional*, April 16, at 4. The italics are mine.

promptly make sure that, if legal principles have been saved in all their rigidity, there are still the intention and the possibility of making this great avenue a reality [...]”<sup>295</sup>

*La Nación*, in turn, ran a rather neutral article merely telling the story of the case and the decisions of the different courts, as well as the positions of both parties, but without explicitly taking sides. Neither praising nor criticizing the Supreme Court, *La Nación* limited itself to reporting the details of the litigation and the content of the decision.<sup>296</sup>

There was some criticism as well. *Sud-América*, a particularly passionate and partisan newspaper,<sup>297</sup> criticized the Court and the owners affected by the expropriation in its characteristic sharp style. I will transcribe the article at some length, for the paragraphs are worthy of some attention:

“The recent ruling of the National Supreme Court, on the issue of the Avenida de Mayo, *may be as just as anyone wants*, but certainly, Mr. Walls has hit the nail on the head: *il la blesse a mort*. The great avenue, destined to change radically the looks of our great city, taking off its ancient colonial aspect, will remain a generous aspiration of two municipal administrations. *Under pretext that the right of property —precisely the most secured and guaranteed of all rights— is attacked*, the Supreme Court rules against the Municipality [...] declaring that it cannot expropriate the portion of the private lands that it intended to resell, and with which [...] the works would be funded. Perfectly. *A neighbor of the City gets away with it*, as it is vulgarly said; the many *progressive neighbors suffer a true disappointment* and see how the much-awaited transformation of the Municipality is delayed. And what a great work was projected! Buenos Aires, divided materially in two by a magnificent communication via, where the elegant society would set its rendezvous point in the mornings and in the afternoons, with the great avenue showing its grand buildings, full of everything the arts and industry of a new and lively country have created for making life charming and comfortable. Out, filthy slums in the

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<sup>295</sup> *Id.* The italics are mine.

<sup>296</sup> “Interpretación de la ley sobre apertura de la Avenida de Mayo”, *La Nación*, April, 15, at 2.

<sup>297</sup> *Sud-América* was founded to support Miguel Juárez Celman, then president of the country. As opposed to *La Nación*, which saw itself as representing public opinion, *Sud-América* conceived of its role rather differently: according to its views, newspapers “discuss, illustrate issues, examine them from their own point of view and according to their passions, to form opinion, not to represent it”. See “La prensa. A propósito del mensaje”, *Sud-América*, May 11, 1888, reproduced in Paula Alonso, above n. 185, at 222-223.



Victoria street...! [...] But nothing. It is apparent that our criolla indifference, *our stupid indolence regarding anything that means progress* [...] must trump the projects of other individuals, candid enough to think that in this great capital of the South, the majority of its inhabitants have some attachment to the wonderful transformations of the century [...] The great avenue was dead long ago [...] it was killed for an entirely simple, and uncomplicated, reason: *in this country, unfortunately, there exist the custom of exploiting the State*. The government tries to expropriate a private lot [...] it is worth five cents per square *vara*, two 'nacionales' per *vara* are asked, with incredible self-assurance [...] SUD-AMÉRICA, faithful to its prior *propaganda*, and despite all the Jews, born and to be born, maintains the imperious necessity of proceeding to the opening of the big ways of communication [...]"<sup>298</sup>

There are quite a few interesting remarks in the preceding paragraph. Its style and tone may give us a hint of the editorial line of *Sud-América*, its political positions, and why it may have opposed the generally accepted ruling in *Elortondo*.

The article describes the landowners as selfish, and claims of the type of Mrs. Elortondo's were depicted as nothing but pure hold out speculation. The writer complains about certain collective attitude that, in his view, dominated the nation at the time, and is generally critical of the effects of the ruling on the Avenida de Mayo project. All this may suggest a critical stance towards constitutional property *vis-à-vis* collective progress. But there may be more to the article than meets the eye. First of all, it is important to point out that the newspaper says that the ruling "may be as *just* as anyone wants", thus conceding, *arguendo* at least, that the decision was legally sound.<sup>299</sup> Moreover, the way the phrase is coined points towards a seeming consensus on the correctness of the Court's decision, an idea further supported by the positions taken by *La Prensa*, *La Tribuna Nacional*, and *La Nación*. A second point of interest, when it comes to trying to

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<sup>298</sup> Dirzi, "La Avenida de Mayo. Herida de muerte", *Sud-América*, April, 17, at 1-2. The italics are mine.

<sup>299</sup> Of course, the fact that any given decision may be just does not mean, by itself, that as a legal matter such decision is sound. But in this context, I take the author to be using the word "just" as equivalent to "legally correct", since it wouldn't make any sense to concede that the ruling might be "just" and then to proceed to criticize it on moral grounds that, if anything, seem to point towards the alleged injustice of the decision. Alternatively, the author may be intending to say that the ruling itself was just, but that its consequences were not. Either reading supports my argument in the main text.

reconstruct popular opinion on this matter, is that *Sud-América* does not argue that protecting property is wrong, even if constitutionally mandated. Notice that the article asserts, without a particularly derogatory tone, that property is sufficiently secured and that the alleged attack on it is just a pretext. In its view, the decision goes well beyond protecting the property rights of landowners, since they were in fact exercising their rights in an dysfunctional way, attempting to extract an unwarranted surplus from the State, by holding out. In any case, it must be born in mind that *Sud-América* was not a newspaper particularly respectful of individual rights and that it was openly partisan and non-neutral. It aimed at furthering President Juárez Celman's hegemonic aspirations. As Paula Alonso has pointed out:

“[...] *Sud-América* ignored the issue of representation and electoral fraud, defended the idea of limiting freedom of the press, stood by the idea that a unique party was beneficial, asked for absolute power for the Only Chief of the Nation, and redefined the federal system, emptying it of any content and re-signifying it as a unitary system of provincial administrations [...] one of the main weaknesses of the *juarist* discourse lied in [...] its *reduction of legitimacy to a discourse of progress as an end* [...]”<sup>300</sup>

If all there was to legitimacy was material progress, then it is easy to understand why *Sud-América* did not like the solution in *Elortondo* and, more generally, individual rights, except perhaps if conceived in utilitarian fashion. But more crucially for this inquiry, *Sud-América* attempted not to *reflect* public opinion, but to shape it through the passionate defense of its positions.<sup>301</sup>

All in all, *Elortondo* was generally praised, even if it implied that the great Avenida de Mayo project would be more costly to carry out. This points out to the slow rising of

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<sup>300</sup> See Paula Alonso, above n. 185, at 237 (comparing *Sud-América's* discourse with *La Tribuna Nacional's*, another partisan newspaper, whose focus was on legitimizing Roca, its chief, through a discourse of a the exercise of power within constitutional limits and through the idea that popular sovereignty showed itself through the exercise of power limited by the Constitution). Emphasis added.

<sup>301</sup> *Id.*, at 222-223.

a modern, individualistic conception of rights, because what are rights if not devices that, for some more important moral reason, make effective government costlier?<sup>302</sup> Also, part of the praise seems to be based on the decision's apparent respect for a strong law-politics distinction, and more importantly for my thesis, on a close link between the constitutional text (the property clause), the Court's interpretation, and what a layman could have understood by reading the text. It's the Court's reliance on a clear constitutional text that allowed the justices to be perceived as doing legitimate lawyer's work and, therefore, justified even if the ruling contradicted the majority's preference for an easier way for the project to go forward. Granted, a takings case, with its individualistic nature, it is quite different from emergency cases, which are almost always systemic in character. Thus, the kind of challenges faced by the justices is rather different in both types of cases, and it seems easier to defend property in individual cases that do not involve potential systemic threats. But, taken together, *Gowland* —an emergency powers case in essence, even if the Court did not treat it that way— and *Elortondo* —a takings case— seem to point towards the consolidation of the idea that property rights should be protected even if it meant somewhat hindering collective goals. Let us see what happened during the next big emergency, an event that was to occur shortly after.

1890 was a year of a tremendous economic crisis, a crisis that would bring down a president. I will not delve here into the economic and financial details of the crisis, and I will be content with describing some of the measures taken by the government that could be considered as encroaching on property rights and with trying to survey the public reactions to those measures.

One of the recurrent features of Argentine crises was already there: the high price of strong currencies or, in this case, gold, which was of course a means of preserving

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<sup>302</sup> See Ronald Dworkin, *TAKING RIGHTS SERIOUSLY* 198 (Cambridge, Harvard University Press, 1977) ("The institution of rights against the Government is [...] a complex and troublesome practice that makes the Government's job of securing the general benefit more difficult and more expensive").

value, including the value of savers' and investors' monies. It must be borne in mind that although Argentina did not have a convertibility standard at the time, the gold standard was prevalent among the central nations,<sup>303</sup> and gold played an important role as an alternative to state currencies. As Michael Bordo points out

“Commodity standards based on silver and gold bimetallism and silver and gold monometallism emerged as part of the evolution from barter to a money economy. Primitive monies were commodities. The precious metals because of their special properties —they were durable, easily recognizable, storable, portable, divisible, and easily standardized— ensured their universal adoption as monies [...] *they were also viewed as a good store of value because new production was limited relative to the existing stock and because [...] the money supply would vary with the profitability of gold production, in turn ensuring long-run price stability*”<sup>304</sup>

In 1885 Argentina was heavily indebted, with a mixture of standard national bonds and national and provincial mortgage bonds held by foreign investors. The capacity to repay was in doubt, and the rise of the price of gold was almost unstoppable.

According to Cortés Conde, the unleashing of the crisis resulted, mainly, from monetary causes.<sup>305</sup> The Government had set a system of floating exchange rate, but it still intervened in the market in order to keep the value of the national currency. This was so because the Government saw its revenue fall, as the national money depreciated, while their external debts rose, as the gold price grew. Intervention meant selling the gold reserves that, under the “law of guaranteed banks” of 1887, the State had gotten from the banks in exchange for legal tender notes that the banks issued and gave to the

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<sup>303</sup> See Michael D. Bordo, above n. 105, at 35 (arguing that “[t]he gold standard, a variant of a commodity money standard, was the prevalent money arrangement in the world from 1880 to 1914”).

<sup>304</sup> *Id.*, at 27. The italics are mine. See also Roberto Cortés Conde, above n. 196, at 228 (arguing that since the first suspension of convertibility, in 1826 [prior to the formation of the national state], gold had been a good insurance against the loss of value of paper money).

<sup>305</sup> See Roberto Cortés Conde, above n. 196, at 216-217.

public.<sup>306</sup> This behavior led to the loss of reserves, which undermined public confidence in the administration's ability to keep the exchange rate. This lack of confidence led to the exchange of domestic assets for external assets and to the ensuing further depreciation of the national currency. In sum, the crisis resulted in a devaluation of the currency.<sup>307</sup> Between 1889 and 1891, the national currency depreciated, in terms of gold, virtually 100%.<sup>308</sup>

Devaluations are generally described in the economics literature as leading, at least initially,<sup>309</sup> towards regressive redistributions, and more recent empirical evidence seems to back these theoretical claims.<sup>310</sup> Thus, it has been held that

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<sup>306</sup> Roughly speaking, the “law of guaranteed banks” worked like this: banks were authorized to issue notes against the national public funds issued by the State as a guarantee of the notes. The national public funds, in turn, were bought from the State, with gold, by the banks that wanted to issue. In the event of bankruptcy, the national public funds were to be sold and the notes bought back.

<sup>307</sup> Interestingly, the depreciation of the national currency was not followed, not at least during some time, by a substantial general increase in prices. While prices rose close to 20% between 1889 and 1891, the gold price more than doubled during the same period. See, e.g., Roberto Cortés Conde, above n. 196, at 210, 224-226 (explaining the reasons for this phenomenon). See also Orlando J. Ferreres (editor), *DOS SIGLOS DE ECONOMÍA ARGENTINA* 563 (Buenos Aires, El Ateneo, 2010) (indicating an increase in the consumer prices index of 14,5% for the year 1890, and a total accumulated of 19,5% for the years 1889-1891).

<sup>308</sup> See Orlando J. Ferreres (editor), above n. 307, at 675 (showing an increase of the gold price from a 1.91 parity to a 3.87 parity for the years 1889-1891).

<sup>309</sup> See, e.g., J. B. Knight, “Devaluation and Income Distribution in Less-Developed Economies”, 28 *Oxford Econ. Pap.* 208, 226-227 (1976) (arguing that after a devaluation, and “[o]wing to factor immobility the initial redistribution of income between the pricing sectors (exportables, importables and non-tradables) may stick, or it may be diluted to correspond to the institutional sectors (modern and traditional). Within the tradable or tradable-intensive sector, the initial benefit accrues to the hirers of factors. It subsequently tends to be transferred, depending on the degree of intra-sector and factor mobility and factor price responsiveness to market forces, and on the bargaining position of organized labour. A more likely form of response to the initial sectoral redistribution than market forces is non-market reaction by pressure groups trying to restore their real income. It is possible in certain conditions for such response to set off a spiral of inflation and further devaluations”).

<sup>310</sup> See, e.g., Mohsen Bahmani-Oskooee, “Effects of Devaluation on Income Distribution”, 4 *Appl. Econ. Lett.* 321, 323 (1997) (using cross-country data from 24 countries to show that “indeed devaluations have unequalizing effect on income distribution”); Michael J. Twomey, “Devaluations and Income Distribution in Latin America”, 49 *Southern Econ. J.* 804, 818 (1983) (arguing that “the evidence suggests that devaluations lower real wages and worsen the function distribution of income”).

“[t]he redistribution of income effect is also well recognized. There may be a long lag of wages behind prices, and profits might therefore gain at the expense of wages as a result of the devaluation. Rising prices will transfer income from fixed money income groups to the rest of the economy.”<sup>311</sup>

“Devaluation will raise the price of [a given good] in domestic currency [...] in proportion to the increase in the price of foreign currency. Thus, the impact effect of devaluation will result in an increase of the real income of capitalists [...] and a decrease in the real income of workers [...], since the money wage rate is unchanged”<sup>312</sup>

In early 1890, the incredible expansion in the quantity of money in circulation<sup>313</sup> had reached a point where public opinion was well-aware of its pernicious effects on the wealth of the layman. When the Juárez Celman administration attempted to issue mortgage-backed bonds intended to circulate as money, the reaction was unanimous and extremely energetic. Newspapers accused the administration of acting against the People’s wills and interests, and only in favor of cronies and friends. Public reaction was focused on the depreciation of money, with the ensuing impoverishment of note holders, as well as on an almost primal fear of non-convertible money. Property arguments also appeared in the media.

*El Argentino*<sup>314</sup> criticized the administration heavily, accusing the president of violating the Constitution and contradicting the majority’s will and Congress of being subservient to Juárez Celman and, basically, allowing the administration to enact legislation beneficial to a few allies and friends, and harmful to the many:

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<sup>311</sup> Sidney S. Alexander, “Effects of a Devaluation on a Trade Balance”, 2 *Staff Pap. Int. Monet. Fund* 263, 273 (1952).

<sup>312</sup> Carlos F. Díaz Alejandro, “A Note on the Impact of Devaluation and the Redistributive Effect”, 71 *J. Polit. Econ.* 577, 579 (1963).

<sup>313</sup> See Roberto Cortés Conde, above n. 196, at 209-210.

<sup>314</sup> The newspaper first appeared in 1890, lasted only six years, and it was the journalistic appendix of the then-recently founded *Unión Cívica Radical*.

“Who would have thought that all those great problems that worried the men of the Revolution [...] would come to be reduced to this single humiliating question: on one side, the proud Nation of other times, their flag and their fate; on the other side, Mr. Miguel Juárez Celman, one single man, and what a man! Go look at the sad picture of what was the Republic of Argentina (today it is not a Republic), and you will see that everything revolves around the President, they are all wheels spinning at his will [...] National chambers, provincial governments, judges, banks; where has he not intended to *make things at his entire will*? Where has he not showed up to sow disorder and *tread upon the laws*? [...] *What is Congress for? To pay homage to him and enact anything he wishes* [...] *It can be asserted with no hesitation that wherever there is a public interest, the hand of the President is in the opposite side* [...] *Perennial violator of the Constitution*, [Juárez Celman] has turned our fundamental law into the regular terrain for his [schemes]. From the Preamble to article 110, there is no constitutional prescription that has not received serious injury from him [...] we are under the gentle dictatorship of a usurer [...]”<sup>315</sup>

“[...] this anti-parliamentarian and suspicious procedure [...] which demands from Congress the immediate dispatch and instantaneous sanction of bills of the highest importance [...] has been repeated many times during the Juárez administration [...] thus, in countless cases the discussion in Congress is suppressed, *in order to achieve the instantaneous enactment of unconstitutional, if not immoral, measures* [...] And it is not the case that the Executive fears a contrary vote in the Chamber, for it is composed of all staunch supporters who approve by acclamation anything the Executive proposes [...] *the country receives with remarkable repulsion this new ‘papering’*, because there is no minimum of confidence in the capacity of the government, or in the equitable distribution of these mortgage-backed bonds; because there is the certainty that these hybrid notes will be swallowed by the avarice of the political circle around the President [...]”<sup>316</sup>

Criticizing the attempt of the Ministry of Finance to get a loan from private English bankers the same newspaper stated that “only two embarrassments are yet to be born by the Republic: bankruptcy and non-convertibility”<sup>317</sup> and that:

“[...] once the loan has failed, *the most disastrous of all financial expedients —the issue of inconvertible notes—* is the panacea that the Minister offers to the country [...]

<sup>315</sup> “Un hombre contra un pueblo”, *El Argentino*, July, 3, at 1. See also “La Cámara de Diputados”, *El Argentino*, July, 7, at 1 (arguing that Juárez Celman exercised some sort of despotism over Congress and that congressmen were not, and could not be, the People’s representatives).

<sup>316</sup> “Caos financiero”, *El Argentino*, July, 8, at 1.

<sup>317</sup> “La honra nacional está en peligro”, *El Argentino*, July, 12, at 1.

inconvertibility appears to the eyes of our rulers as the supreme law on which argentine finances and the economic system of the country must rest”<sup>318</sup>

Other media coincided in the complete rejection of new issues of inconvertible notes or financial instruments that were functionally equivalent. The desperate economic measures were perceived as instantiating a regressive redistribution and, at the same time, “class legislation”. Thus, *La Prensa* said that

“We must rush all and any efforts in defense of the social interests threatened by the bill of issue of mortgage-backed notes, as long as there is even a remote hope of reaction by *the public authorities to whose arbitrary judgment the questions concerning the life and fortune of the people are left* [...] any increase of issue [of notes] will be nothing but more fuel thrown to the bonfire that burns the credit of the nation [...] *so that the crisis is deepened, and that a small number of privileged or favorites of fortune gamble and prosper at the expense of the People* [...] *To assume that the administration faces the general protest in order to [protect] [...] small owners is a naivety*, even more so when *such small owners have not lobbied to deserve such a diligent protection. The intention of the bill and its result would benefit big speculators*, those who make efforts to get official favors [...] [the bill] sacrifices the social interest, the interest of the owners and of those who are not owners [...] to the relatively small numbers of possessors of lands and debtors of the bank to whom the one hundred million of the new issue will be distributed”<sup>319</sup>

*El Argentino*, discussing a project by a Congressman aiming at expanding the issue, said:

“We are already down that road, let the one hundred million of Mr. Minister and the three hundred million of Mr. Deputy come and soon we will have come all the way and we will not have to worry about gold reserves, reserve funds [...] anymore. *Complete and absolute demonetization will free our rulers of any concern about the possibility of returning to convertibility at some point* [...] Undoubtedly, *that road will not be traveled across* without the country being impoverished, the commerce and industries being ruined, and *without the savings accumulated by the constant work of the modest workman disappearing* [...] *Instead [the measures] will enrich a few privileged and, meanwhile, the same people who already took the millions of the official banks will swim in a sea of wealth again. The financial ideas of Mr. Minister, perfected by those of Mr. Deputy, amount to nothing but the spoliation of the many in favor of the few* [...] The issue of three hundred million, sponsored by Mr. Deputy, will take paper money to utmost

<sup>318</sup> “Cómo se manejan las finanzas argentinas”, *El Argentino*, July, 11, at 1. The italics are mine.

<sup>319</sup> “Los cien millones. El derecho de petición”, *La Prensa*, July, 15, at 5. The italics are mine. See also “Elasticidad financiera”, *La Prensa*, July, 13, at 1 (describing the mortgage-backed bonds bill as “monstrous”).



limits of depreciation. The aforementioned twenty and thirty percent of loss for their current holders will become sixty or seventy percent, and *bond holders will be deprived of their capitals*, which were entrusted to the rectitude of public administration guaranteed by the honor of the Nation [...] *we cannot find a moderate word or term to describe it* [the government's behavior]. Moreover, the proper word is already in everybody's mouths and we do not need to write it down here"<sup>320</sup>

*"Inconvertibility today [...] would be nothing but a swindle, carried on by public authorities, in favor of a few insolvent debtors. A swindle, because debtors would have defrauded their respective creditors as to the substance, the quality, and the quantity of the things they were bound to deliver in accordance to their obligations [...]"*<sup>321</sup>

*El Nacional*, in turn, held that the financial policy of the government instilled "fear in all social classes",<sup>322</sup> that inconvertibility would imply that by virtue of "a tyrannical and abusive law, gold became simple paper money, depreciated by a 70% or 80% off its face value",<sup>323</sup> that the issue of the bonds would cause political friends and allies of the President to increase their wealth to the detriment of the People's,<sup>324</sup> and described Juárez Celman's presidency as "an unchecked administration, who respects neither law nor opinion".<sup>325</sup>

Explicit property-based arguments, as well as constitutional arguments, also made an appearance in the debate. *El Nacional* thought that "property itself would be the first

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<sup>320</sup> "Cómo se manejan las finanzas argentinas", *El Argentino*, July, 11, at 1. The italics are mine.

<sup>321</sup> "Crisis de descrédito", *El Argentino*, July, 16, at 1. The italics are mine.

<sup>322</sup> "Cien millones", *El Nacional*, July, 8, at 1.

<sup>323</sup> "Actualidad financiera", *El Nacional*, July, 12, at 1. See also "Finanzas pampas", *El Nacional*, July, 3, at 1 (arguing that the country was drowning in a flood of paper money); "Sin rumbo", *El Nacional*, July, at 1 (arguing that the administration had illegally "papered" the country).

<sup>324</sup> *Id.* See also "La emisión es la ruina", *El Nacional*, July, 11, at 1 (arguing that political allies of the president favored additional issues of paper money to enrich themselves while sinking the country).

<sup>325</sup> "La farza del empréstito", *El Nacional*, July, 5, at 1.

to benefit from a financial plan that aimed at revaluating the currency”<sup>326</sup> and that, if the new, circulating, mortgage-backed bonds had a higher market value than the old —also circulating— notes, then the government —in order to redeem the bonds in accordance with the projected amortization scheme— would have to either pay the premium for the bonds or “resort to the *arbitrariness* of demonetizing them, to return them to the State’s vaults [...] [this] would be an *spoliation*, forcing people to turn over good money in exchange for bad money”.<sup>327</sup> *La Prensa* dedicated considerable space to discussing the constitutionality of granting legal tender status to notes. Approving the arguments of those who thought it to be beyond Congress’ powers, the newspaper held that

“To Moreno [...] *the doctrine of the written value of inconvertible notes [...] infringes upon the principles of our political Constitution [...] Such a doctrine implied the supremacy of force and absolute power [...] ‘national law [...] based upon free institutions, does not grant public authorities any more powers and duties over money than those provided for by the laws [...] in accordance with constitutional limitations that guarantee property and freedom of contract’ [...] Brilliant defense, without a doubt [...] Moreno proved that [...] legal tender does not mean imposing paper at face value [...] Moreno’s doctrine, grounded upon history, our legislative and judicial precedents, as well as American case-law has constantly gained ground, and we could invoke in its favor new laws and new judicial rulings that confirm it. But before continuing, we are going to recall some ideas and statements made within the Constitutional Convention of 1853, which we have not seen cited in [...] the debates on the issue. When the subject of Congress’ power regarding the establishment of a national bank empowered to issue notes came for discussion, one delegate requested an explanation on whether the bank included the power to issue paper money, the reporting member of the committee stated that: ‘the bank would issue notes, but not legal tender notes’. When, after enacting the Constitution, the Convention took up [...] the project of the establishment of the national bank, important statements were made. Referring to the notes that the bank would issue, Mr. Gorostiaga stated that they would represent the obligation or debt of the Nation, but that their actual value would be ‘the one they had in the market’ [...] Mr. Bedoya asked whether the notes would be legal tender or freely-circulating notes. He recalled that ‘there would be prior obligations, payable in different currencies, and that such obligations would have to be secured and respected, so that everybody rests assured that this law in no way harmed vested rights or altered the nature of contracts’ [...] *These are precedents that confirm the doctrine of freedom of**

<sup>326</sup> “Actualidad financiera”, *El Nacional*, July, 12, at 1.

<sup>327</sup> “De los cien millones”, *El Nacional*, July, 14, at 1. The italics are mine.

*contract, which moreover enjoy the prestige of their origins, because they come into existence as an interpretation of our constitutional provisions on matters of banks and issue of money [...]*<sup>328</sup>

Moreover, the same newspaper emphasized that this time was different from the previous crisis (1885), where unforeseen circumstances might have forced the administration to act swiftly and, thus, might have excused a breach of the fundamental law.<sup>329</sup> This time the public authorities were trying to carry out deliberate acts, previously discussed and freely decided, which “were contrary to the constitutional system and to the uniform intentions and aspirations that drove our constituents”.<sup>330</sup>

One of the measures supported by some legislators and debated in Congress was the retroactive “papelization” of all contracts: instead of repaying obligations in gold, as per their original terms, which was sold at over 3 paper pesos at the time, “papelization” would permit repayment in paper money, at a conversion rate clearly below par.

Representative Molina, a supporter of the idea, argued that obligations in gold should be converted to paper pesos, at a parity of 2,50 paper pesos per gold peso of the original contract, and that there should be a fixed term of six months for all obligations to be settled.<sup>331</sup> This would have meant that creditors lost some 50 cents for every gold peso, around twenty percent of the value of their credits. Notice that the effects of such

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<sup>328</sup> “El curso forzoso”, *La Prensa*, July, 11, at 1 (quoting approvingly Moreno’s doctrine on the unconstitutionality of legal tender). The italics are mine. José Benjamin Gorostiaga, whose opinions on the character of the notes to be issued by the national bank are quoted in the article, was a very prominent member of the 1853 Constitutional Convention, and partially responsible for drafting the text. See also “Los cien millones. Derecho de petición”, *La Prensa*, July, 15, at 5 (arguing that the Constitution intended the notes issued by the national bank to be convertible, not inconvertible).

<sup>329</sup> It must be noted that *La Prensa* admitted the exceptional possibility of justifying the 1885 decrees establishing non-convertibility on grounds of necessity, but clearly approved of Congress’ later intervention, where the doctrine that distinguished between contracts with no designation of special currency and those with one such clause was set. See “El curso forzoso”, *La Prensa*, July, 11, at 1. This was, basically, the same position adopted by other media, such as *La Nación* and *La Tribuna Nacional*, in 1885.

<sup>330</sup> “Los cien millones. Derecho de petición”, *La Prensa*, July, 15, at 5.

<sup>331</sup> See Pablo Gerchunoff, Fernando Rocchi & Gastón Rossi, above n. 203, at 118.

a measure are similar to granting legal tender status to bank notes, but they are not quite the same. The idea, similar to what the U.S. Congress did in 1933, did not take off but it would be applied, in much more brutal fashion, during the latest great crisis, in 2002.

In early 1891 a bank run seemed inevitable. Despite the fact that Juárez Celman had been thrown out of power, the economic situation had reached an extreme point. We cannot forget that the administration was attempting to keep the gold price under control, in order to avoid the deleterious effects of getting revenue in depreciated money and having debts in gold. Thus, the *Banco Nacional* sold gold to individuals. But this gold, contrary to the government's expectations, did not return to the system. At least, it did not go to the official banks.<sup>332</sup> According to Cortés Conde, this was due, partially at least, to the fear the 1885 decrees that suspended convertibility and granted legal tender status to bank notes, as well as the later law that granted limited retroactive effect to legal tender notes, had instilled in depositors.<sup>333</sup> At the same time, we cannot leave out of the picture the generalized rejection observed in regard to legal tender, non-convertibility and, mainly, excessive issues that depreciated the money each time, thus impoverishing the layman. Public perception pointed towards public ownership of the main banks as the cause of uncontrolled issues. The monetary system was at the center of the criticisms. Therefore, when both the *Banco Nacional* and the *Banco de la Provincia* were up for a bankruptcy declaration, followed by the promise of a broad reorganization of the banking system, under private hands, the public reaction was way milder than one could have expected, given that depositors were to suffer serious encroachments on their rights. One could say that there were mixed emotions: while the debate in the press hints at broad sympathy for depositors, it also points toward the thought that there was no

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<sup>332</sup> See Roberto Cortés Conde, above n. 196, at 234.

<sup>333</sup> *Id.*

way out without cutting off uncontrolled issues. And the way to do it was, in all likelihood, by reorganizing the system and keeping the governments' hands off the money-printing machine.<sup>334</sup> Issuing more money to pay the depositors would not save the banks. Also, and not less importantly, there seems to have been an awareness of the dubious constitutionality of the emergency measures that were taken. Yet, as it had been the case with the 1885 decrees, necessity seemed to be a powerful justification for what was perceived, at most, as a temporary breach of the Constitution. Even more so, when the restrictive emergency measures, which suspended payment of bank deposits, were supposed to be temporary. Let us cover the debate, as it was held in the main newspapers.

On April, 4<sup>th</sup>, *El Nacional* warned that the situation was becoming desperate and that “the crisis that is deepening everyday increases social unrest, as it drags everybody to the ruin”.<sup>335</sup> According to the same paper, the crisis was neither financial, nor economic, nor political. It was caused by “our vicious monetary system”.<sup>336</sup> The situation was grave enough to put in danger the very same existence of the Argentine Nation.<sup>337</sup> Such “do-or-die” arguments would become common in later crises.

At the same time, *La Prensa* argued for the liquidation of the banks, as the only measure to put an end to a crisis that had already lingered on for way too long.

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<sup>334</sup> See, e.g., “La reforma bancaria”, *El Nacional*, April, 9, at 1 (arguing that official interference with the management of banks was an evil, as it generally aimed at “liberticide and corrupting ends”). See also Pablo Gerchunoff, Fernando Rocchi & Gastón Rossi, above n. 203, at 344 (reprinting then-Vice President Carlos Pellegrini’s letter to Presidente Juárez Celman, where the former defends the “law of guaranteed banks” and argues that its failure was due, among other causes, to the “pernicious influences that always affect state banks”).

<sup>335</sup> “Actualidad financiera”, *El Nacional*, April, 4, at 1.

<sup>336</sup> “La fuente del mal”, *El Nacional*, April, 6, at 1.

<sup>337</sup> “Actualidad financiera”, *El Nacional*, April, 4, at 1. See also “La fuente del mal”, *El Nacional*, April, 6, at 1 (arguing that the crisis put at risk the stability of institutions and public order).

Importantly, the paper emphasized that no country was viable without a banking system, but that *those* banks had to be done away with and replaced by a healthy system.<sup>338</sup> They had lost the trust of the public, without which no bank could work, and the media saw no way of saving them.<sup>339</sup> In its view,

*“[...] creditors cannot, and should not, demand the integrity of the right warranted by their papers, because the situation of the bank is as it is, and because the Province lacks the means to satisfy their credits. But neither can the State deprive its creditors of that which is possible to pay them and which [...] is legally and morally their due”*<sup>340</sup>

Necessity seemed to call for shared sacrifices: creditors could not get all they were legitimately entitled to, but they should get as much as possible, given the circumstances. Thus, the newspapers suggested that the State should declare the debts as its own, accordingly with the status of “guaranteed banks” the entities enjoyed under the 1887 law, and that it should issue three-year amortization bonds to cover the debts of the banks.<sup>341</sup>

Interestingly, the paper emphasized that the restriction to property rights would be temporary, an idea that would be picked up later by the Supreme Court itself to build the doctrine of economic emergency, and that it would be in the best interest of depositors themselves. Legal tender was once again repudiated as otiose.

*“The suspension of payment of deposits of public banks is an event of great significance [...] the disturbances that it is bound to cause are multiple and far-reaching, both in the conduct of general business and in life’s most intimate needs [...] In any other situation, this event would mean the dislocation and ruin of the country, with the*

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<sup>338</sup> “El punto negro. Ventajas e inconvenientes de la liquidación”, *La Prensa*, April, 5, at 4. See also “En plena orden del día”, *La Prensa*, April, 7, at 4 (arguing that liquidation procedures were the only way out of the crisis).

<sup>339</sup> “En plena orden del día”, *La Prensa*, April, 7, at 4.

<sup>340</sup> “El punto negro. Ventajas e inconvenientes de la liquidación”, *La Prensa*, April, 5, at 4. The italics are mine.

<sup>341</sup> *Id.*

*ensuing loss of money for depositors and creditors of the banks.* But in this occasion, it is but a *transient disturbance* upon depositors' interests, *for the sake of their own interests* and the most firm principle of mending the Nation and saving those same creditors [...] *The depositors in the public have no reasonable grounds to be alarmed: the suspension of payment of the deposits will last no longer than 50 days, and they are guaranteed by the Nation.* It is the time necessary to elaborate the bill that will establish the new Bank of the Republic, owned and run exclusively by private parties, with no interference whatsoever from the State. With that bank, *all deposits will be secured, and not one cent will be lost* [...] And for those in an urgent need of money, national public bonds at a 6% interest rate are offered at a 75% of their nominal value, which means getting a profit of 7% —papers that are negotiable in the stock market— [...] *Public opinion will sympathize with the decree, because it shares [the administration's] longings of honesty*"<sup>342</sup>

The Government's decree remarked that a judicial liquidation of the banks would be ruinous for everybody, especially for depositors, and thus it had to be avoided at all costs. In its own view,

*"The Government has the duty to avert the danger, not only as an acknowledgement for the services rendered to the Nation by those banks, but also in defense of the private interests that may be compromised, especially those of the most interesting classes of the population, who made those banks their savings banks and where they deposited the fruits of many years of labor"*<sup>343</sup>

Generally speaking, the measure seems to have been well-received.<sup>344</sup> The business community and the stock market reacted very favorably to the Government's measure,<sup>345</sup> and —according to *La Prensa*— the decree "caused a deep and lasting

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<sup>342</sup> "En plena reparación. La primera medida fundamental", *La Prensa*, April, 8, at 5. The italics are mine.

<sup>343</sup> See the full text of the decree, including its *whereas* clauses', in "Boletín del día", *La Prensa*, April, 8, at 5-6. The italics are mine.

<sup>344</sup> See Pablo Gerchunoff, Fernando Rocchi & Gastón Rossi, above n. 203, at 196 (arguing that "the impressive decision of April, 7<sup>th</sup>, aroused the alarm of some and the joy of many. With Congress in recess, the commotion caused by the situation was palpable in the streets of the city [Buenos Aires] and in the agrarian cities of the province of Buenos Aires").

<sup>345</sup> See, e.g., "Boletín del día", *La Prensa*, April, 9, at 7 (arguing that in the stock market most people were in favor of the decree and that some three hundred people gathered to show their support to the President).

impression upon [...] the social conscience”.<sup>346</sup> In this paper’s view, the government could have left banks to go bankrupt and to be liquidated judicially, for that was the procedure provided for by the laws, but it chose a more benevolent path, attempting at “reconciling public and private interests, causing the lesser possible disturbances and harms to each other”.<sup>347</sup> However, *El Nacional* warned,

“The national government must bear in mind at all times that if the public opinion has not spoken vigorously against the decree...from the first instant, it has been due to the [government’s] promise to carry on a deep and complete reform to our monetary regime”<sup>348</sup>

“The considerable fall in the price of gold experienced yesterday seems to indicate a *favorable opinion towards the Governments’ sensational decree regarding the future reorganization of the republic’s banking system. This is, undoubtedly, what makes the Executive Branch’s attitude sympathetic to [public] opinion in this case, to the point of disregarding an examination from the constitutional standpoint.* Because it cannot be overlooked that, even in the context of this abnormal situation, the government is stepping into Congress’ powers too much”<sup>349</sup>

There are some hints that the media was in fact reflecting accurately a widespread public view. An anonymous depositor and reader of *La Prensa* wrote

“Mr. Director of *La Prensa*: I am a long-time depositor of *Banco de la Provincia*, and despite the fact that the decree suspending payment of deposits affects me deeply, I am the first to celebrate the decree [...] thinking that it is a necessary step [...] The day that the bank of issue of the Nation is an entity independent of public authorities [...] that the right to issue money is not influenced by political necessities, civic corruption will disappear [...] Let the new bank be born, in spite of the pains that its birth will inflict us, but let it be serious, incorruptible, bound exclusively to its own conservation for the benefit of the people and the commerce, absolutely free from any political and official interference that may

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<sup>346</sup> “Los tiempos de la verdad”, *La Prensa*, April, 8, at 5.

<sup>347</sup> “Las grandes líneas de la reforma”, *La Prensa*, April, 10, at 4.

<sup>348</sup> “La reforma bancaria”, *El Nacional*, April, 11, at 1. It must be noticed, however, that the newspaper’s statements are made in the context of an argument that seems to point more towards the salvation of *Banco de la Provincia* (the bank of Buenos Aires) than towards the depositors’ fate as a central concern.

<sup>349</sup> “La reforma bancaria”, *El Nacional*, April, 9, at 1. The italics are mine. The fall in the price of gold lasted only a few days. See Pablo Gerchunoff, Fernando Rocchi & Gastón Rossi, above n. 203, at 197.



disturb the integrity of its operation. Otherwise, the sacrifices that begin today will be completely fruitless. Signed: a subscriber.”

The decree acknowledged the public pressure for a reform and laid out the bases of a new bank, but in vague and ambiguous terms.<sup>350</sup> Article 5 provided that as soon as Congress gathered the Executive Branch would enter a bill proposing the consolidation of both banks under suspension of payments in a new bank of the republic and would ask Congress to provide the means to repay the deposits. It was not clear that the bank would not be under official control, as much as the public would have liked it to be so.<sup>351</sup> Article 3 allowed depositors to exchange their deposits for national bonds a twenty-five percent below the nominal value, and article 4 allowed the banks to repay in cash small deposits.

It seems to me that four points must be made in the analysis of the public reactions to the early 1891 emergency measures: first, at the time of the decree, the measure appeared as a short-term suspension of payments —an essentially transitory move— and there were assurances that deposits would not be lost; second, depositors could opt for receiving bonds of the Federal government at a seventy-five percent of their nominal value, which —according to *La Prensa*— meant a profit of seven percent;<sup>352</sup> third, the virtual declaration of bankruptcy was seen as more or less a simple acknowledgement of an irrevocable fact, and bankruptcy, which was also a constitutional

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<sup>350</sup> The full text of the decree was published in “Boletín del día”, *La Prensa*, April, 8, at 5-6.

<sup>351</sup> See, e.g., Pablo Gerchunoff, Fernando Rocchi & Gastón Rossi, above n. 203, at 209 (arguing that the administration was deliberately ambiguous and did not express clearly what kind of bank it had in mind due to the unpopularity of public financial institutions).

<sup>352</sup> See “En plena reparación. La primera medida fundamental”, *La Prensa*, April, 8, at 5

institution,<sup>353</sup> as an opportunity to reorganize from scratch a banking system that was largely considered as inefficient and as a cause of generalized crisis due to its submission to political urgencies; last, because the only perceived alternative was to keep issuing paper money, with the ensuing further depreciation and no real gains for anybody.<sup>354</sup>

Later, the problem extended from official banks to private banks.<sup>355</sup> In June, they were demanding the application of moratoria under the Commerce Code. The administration pressed Congress to modify the Commerce Code quickly in order to include in its moratorium provisions private banks. Congress chose a different path, enacting a law that provided for a ninety-day moratorium of all obligations. The Executive vetoed it, but Congress insisted, and the bill became law. The bank run eventually stopped for a number of reasons. The Bank of London brought to the country money from England and started repaying its debts, thus restoring depositors' confidence. Other banks suspended payments during the time of moratorium and, with the help of their respective communities of immigrants, they opened their doors back some months later. Once again, the solution involved temporary restrictions of the use of property, not permanent loss. And this is something to be kept in mind.

In the meantime, another front of the financial war was open. The battle was certainly smaller, but it is interesting nonetheless to complete the broader economic emergency picture and the public perception of what was going on. The province of

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<sup>353</sup> Article 67 section 11 of the Constitution enumerated among Congress' powers, the power to enact a general bankruptcy law.

<sup>354</sup> Pablo Gerchunoff, Fernando Rocchi & Gastón Rossi, above n. 203, at 197 (arguing that "porteños" — the citizens of Buenos Aires— had become financial experts and that they had learned that, in a situation of extreme lack of public confidence, in order to pay back depositors it was necessary to pay the price of an uncontrolled increase in gold prices). This kind of argument would appear much later in judicial decisions dealing with similar issues in the late twentieth century. See CSJN, *Peralta v. Estado Nacional*, 313 *Fallos* 1513 (1990).

<sup>355</sup> Here I follow the narrative in Pablo Gerchunoff, Fernando Rocchi & Gastón Rossi, above n. 203, at 215-216.

Buenos Aires had decided to stop payment of the April bond coupon on its mortgage-backed bonds, due to the seeming insolvency of its issuer, the *Banco Hipotecario*. Bondholders tried to organize collectively to claim for their property (contractual) rights. On April, 1<sup>st</sup>, there was a meeting of the assembly of bondholders. According to *La Prensa*, between 3,500 and 4,500 people gathered in the national theater.<sup>356</sup> There, the Committee of the Conservative Center, which had been commissioned to conduct negotiations, on behalf of the bondholders, with the local government to try to find an acceptable solution, reported that they saw no alternative but to resort to courts.<sup>357</sup> It filed a suit before the Supreme Court, in original jurisdiction, which had gotten to a slow start due to trouble constituting the court: three of the justices excused themselves as they were holders of the same bonds, and so was the first judge appointed to stand in for the excused justices.<sup>358</sup> What it is important for our present purposes is how the bondholders saw the situation, in both legal and economic terms. In somewhat pamphlet-like style, the Committee stated that

“Given that *the legal question is so clear that there can be no doubt as to the success we must obtain* and given that, on the other hand, *it is necessary to demoralize the creditor in order to induce him to burn his values and sell them at any price to the benefit of the debtors, who will then be able to cover their frauds against the bank*, it is possible that we are threatened with suspension of payments and insolvency [...] We [...] have conducted the necessary investigations [...] and we have come to believe that [...] *the situation of the bank is not such that it cannot pay its creditors some 80 percent of the debt* [...] if the bank is administrated regularly and *if its debtors are subjected to foreclosure procedures, slowly and with the prudence and discretion required by the state of crisis* we are going through [...] Justice will be done —and it will be done soon. Federal courts [...] will not take long to pronounce their decisions, inspired by the respect of law, the sane principles of morality, and the patriotic zeal of the Argentine good name. *The Judiciary, imbued with its high mission of protecting the life, liberty, and fortune of every inhabitant of this country, will restore the bread to the orphan, the shelter to the widow, the*

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<sup>356</sup> See “Boletín del día”, *La Prensa*, April, 9, at 7.

<sup>357</sup> *Id.*

<sup>358</sup> *Id.* I have not been able to find out what decision, if any, was handed down in the case. A search in the Argentine Supreme Court’s website does not return any decisions dealing with such bonds.

*estate to the underage heir, the savings to the day-laborer, all of which they are today deprived of, due to a belief in impunity and in the supremacy of force over law”*<sup>359</sup>

Creditors seem to have been well aware of the need to sacrifice part of their *expected returns* upon their investments.<sup>360</sup> They were sensitive to the need for prudence and discretion to be applied in deciding whether to instate foreclosure procedures. It is not the case that they thought all debtors to be deserving of the same treatment. However, the idea that the insolvency situation obeyed, at least partially, to fraudulent maneuvers by some debtors who, in fact, benefitted illegitimately from the crisis, is once again present. Remember that in 1885 public opinion seems to have believed that a substantial cause of the crisis was corrupt lending and speculation.<sup>361</sup> And the same happened in 1890, when the administration planned to issue mortgage-backed bonds that would circulate as currency.<sup>362</sup>

There seems to have been a perception of regressive redistribution in the measures. That’s why the bondholders emphasized that if the Judiciary protected their rights—which they trusted it would—, courts would be helping the “orphan”, the

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<sup>359</sup> *Id.* The italics are mine.

<sup>360</sup> Notice that the article talks about the possibility of payment of eighty percent of “the debt”, not of the capital. Thus, one can infer that most of the unpaid portion of the debt, in the Center’s estimates, may have been interest. This is important, as it marks a line between the capital and the interest, regarding what can be legitimately sacrificed in situations of necessity, in the People’s views. More on this perception, and its explanatory power as regards the Supreme Court caselaw on property rights, in the second part of this dissertation.

<sup>361</sup> See, e.g., “Quiénes van a manejar el curso forzoso”, *La Pampa*, January, 12, 1885, at 1 (arguing that the national bank lent money to debtors who would pay back “late, badly, and never”, among other criticisms of the bank’s operations); “La obra del Banco Nacional”, *La Pampa*, January 11 & 12, at 1 (arguing that “rogues benefitted from immoral agio”); “Chillidos destemplados”, *El Nacional*, January, 8, at 1 (explaining the mechanics of agio in the crisis); “La inconversión”, *La República*, January, 6, at 1 (mentioning agio and stock market speculation among the causes of the crisis”

<sup>362</sup> See, e.g., “Los cien millones. El derecho de petición”, *La Prensa*, July, 15, 1890, at 5 (arguing that the administration’s intention was to benefit a relative small number of speculators); “Cómo se manejan las finanzas argentinas”, *El Argentino*, July, 11, at 1 (arguing that a privileged few, who had already taken the money from official banks, would benefit from the bill, at the expense of the People).

“widow”, the “underage heir”, the “day-laborer”. This is a very important, and quite often overlooked, point: protecting property rights does not necessarily mean protecting the rich and powerful against the poor, as Madison may have erroneously thought,<sup>363</sup> and being deferential to elective branches does not necessarily entail helping the poor and powerless. In fact, it may often be quite the opposite. The people knew this.<sup>364</sup>

Roberto Cortés Conde assessed the distributive effects of the 1890 crisis in the following terms:

“After the 1885 suspension of convertibility until the 1890-91 crisis, there were several attempts of [sic] stabilization. All of them failed mainly because there was no solution to the distributional conflict on who was going to bear the burden of fiscal and monetary adjustments, given the debt incurred by the national and provincial governments. *A solution was reached* several years after [sic] *in 1892-96, when there was a definition in favor of external creditors, provincial governments and some privileged domestic creditors.* In some cases, they obtained more than full satisfaction for their claims (financial and commercial); in others they passed the debt incurred on to the government (as provincial governments and debtors of the banking system). Finally, *there were others left to bear the burden. Who were they?* One was the national government that undertook private and provincial debts. However, even when the debt arrangement ended with [sic] and enormous increase in its stock, [the national government] [...] rescheduled it in a way that financial charges were reduced. *Money holders, mainly wage earners (that were [sic] an important mass of the population this time [sic]) [...] suffered its consequences. Why did they accept the losses [...]?* *Primarily, they had no other escape but migration, which was not an easy thing. However, they did it [migrate] in 1891-92. Secondly, because they may have thought that it was a circumstance that would change in a short time. In fact, after a few years wages had conditions improved [...]*”<sup>365</sup>

As it had happened before, the crisis seems to have shifted wealth from the hands of the politically weak to those of the well-connected and informed.

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<sup>363</sup> See Jennifer Nedelsky, above n. 83, at 145 (arguing that James Madison’s view on property rights focused on protecting the necessarily few propertied against the inevitable poverty of the majority).

<sup>364</sup> Of course a critic could argue that the bondholders’ group must have surely included at least some wealthy individuals and that they made those statements to appeal to the broader public’s sensibilities in order to bring sympathy to their own cause. True as it may be, this argument does not undermine my point: statements linking the protection of property with helping relatively powerless and needy people need to have had resonance in the public to make sense. These statements must have been perceived as plausible at least.

<sup>365</sup> Roberto Cortés Conde, above n. 204, at 17-18. The italics are mine.

One last episode is worth our attention, before turning the page and moving well into the early decades of the twenty century: the *Hileret* case of the Supreme Court, our own paradigm of *Lochner*-type, laissez-faire constitutionalism. Let us see what happened, what the Court said, and how it was received by the public.

In June 1902 the province of Tucumán, invoking a situation of economic distress in the sugar industry—an industry of vital importance in the region—, enacted a tax law that established an additional tax on the sale of sugar within the Argentine Republic. Basically, it was thought that due to overproduction sugar prices would fall considerably, thus harming the industry and, indirectly, the large sectors of the population of Tucumán whose livelihood depended of the sugar industry. The official estimates pointed towards an excess of supply over demand of some fifty thousand tons. Hence, the local legislature decided to set a tax of half a cent per kilo of sugar sold, up to a maximum quota allocated to each sugar mill, and a tax of forty cents per each kilo sold above the quota. The quotas were allocated unequally among sugar mills, and together they amounted to some seventy one thousand and five hundred tons of sugar—the expected equilibrium quantity—. The forty-cent tax aimed at discouraging sales of sugar that would bring down its price. As a matter of fact, the collected taxes were destined to indemnify sugar producers who could not sell their production and who agreed to destroy the product or to apply it to any use other than sugar or alcohol production.<sup>366</sup> And the market price of sugar never reached forty cents per kilo, which made sale of excess quantities uneconomical.<sup>367</sup>

Some producers thought the law violated the provisions of the Constitution that established the right of equality before the law and the principle of equality in taxes as well as the right to exercise any licit industry and demanded that the Province paid back

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<sup>366</sup> CSJN, *Hileret y Rodríguez v. Prov. de Tucumán*, 98 Fallos 20 (1903), introductory section (“Vistos”).

<sup>367</sup> *Id.*, §7.

the sums collected upon the allegedly unconstitutional law. The Court agreed with the plaintiffs and handed down a decision that portrays laissez-faire constitutionalism in as strong a face as it would ever have in Argentina. Predating *Lochner* by almost three years, *Hileret* is perhaps the most elaborate judicial statement of the liberty to work—which, in a different context, could be understood as freedom of contract— as a pillar of liberty and a bulwark against communism ever made in the country.

Although the Court claimed that it could only analyze the law under its juridical, and not economic, aspect, the justices could not hold their tongues and said:

“[...] the law’s goal was to limit the production of sugar in the province to the quantity of 71,500 tons [...] thus preventing, by means of the forty cent tax, the overproduction of the item in the quantity of 50,000 tons, quantity estimated as the surplus over the necessities of consumption that the 1902 harvest would yield [...] [the law’s] immediate effect had to be to eliminate from the sugar industry, which was regarded as employing between sixty thousand and eight thousand workers, at least a third of them, because such is the proportion that corresponds to the reduction in the total production. It can also be said that the law has harmed the trade in Tucumán and other neighbor provinces for the portion whose commercialization the forty-cent tax made impossible; it has harmed in the same way the business of transportation by railroad through the suppression of thousands of tons of cargo represented by the overproduction restricted by [the law]; graver still, *it has inflicted damage upon the thousands of consumers for whom sugar is a first-need article, making them pay almost one hundred percent more than the price sugar had before the enactment of the law [...] therefore sacrificing the interests of almost the totality of the Nation’s inhabitants to the benefit of a score of sugar producers, who are already beneficiaries of the national government’s policies of premiums on the exportation of sugar and especially of the high import tariffs on foreign sugar [...] if this protection [...] had not been enough to avert the crisis and the ruin that allegedly threatened sugar producers in the province of Tucumán, as a consequence of overproduction [...] it would always be true that those very same producers would be to blame, for they would have made calculations that did not match their expectations of a munificent profit, as it ordinarily happens in business life, but this does not make fair at all that those who took no part in such mistakes, or fault, of speculators have to provide at the expense of their own interest [...] a positive utility for these tradesmen [...]*”<sup>368</sup>

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<sup>368</sup> *Id.*, §3. The italics are mine.

The Court was on the lookout for “class legislation”, and was not willing to be force-fed a public interest façade too easily.<sup>369</sup> Arguments about equality as regards taxation are present in the decision, but more interesting for my present purposes are the justices’ ideas of police power and the proper role of the State in the economy. Argentina’s highest court was not ready to accept “broad and plenary” police power to direct economic affairs, even if emergency arguments were at play:

“[...] *neither is this case an instance of legitimate regulation of domestic commerce, aiming at protecting the rights of third parties or of the community, for there is nothing [...] in the production of sugar, or in the way it is carried out, that is contrary to the good order, morality, health and welfare of the province. Far from it, it is evident that such production is but the exercise of a licit industry, as it has been regarded by the province and by the Nation that count it among its sources of revenue and that has enacted several measures for the development of such industry [...]*”<sup>370</sup>

The dangers of giving too ample a room to the State seemed all-too-evident for the Court:

“[...] the law, fixing the quantity of sugar to be produced by each mill, under penalty of payment, for any excess, of a tax that amounts to something more than the very *confiscation* of such excess of production [...] *cannot be considered in any way as conforming to the prescriptions of articles 16 and 14 of the Constitution, nor to any of the principles of liberty and governance contained therein [...] if the regulation imposed on sugar were acceptable, it could be extended to every industrial activity, and the economic life of the Nation, with the liberties that promote it, would be confiscated in the hands of Legislatures or Congress that would usurp, by means of ingenious regulations, all individual rights. Administrations would consider themselves free to set the quantity of grapes the vintner can legally grow, the quantity of cereals allowed to the farmer, or the number of goods the stock-breeder may produce, and so on and so forth, until we fell into a communism of state where governments are the regents of industry and commerce as well as the arbiters of capital and private property [...]*”<sup>371</sup>

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<sup>369</sup> It may well have been true that the law was enacted upon shaky factual predictions. On the aftermath of the *Hileret* decision, *La Nación* reported from Tucumán that “the sugar stock from last year is very small and the surplus of this year’s harvest will not be as much as it is believed, due to the exportation of large quantities to England prior to the closure of the ports”. See “Tucumán. Otro proyecto sobre Azúcares. Stock del artículo. Nuevos impuestos”, *La Nación*, September, 8, at 4.

<sup>370</sup> *Id.*, §21. The italics are mine.

<sup>371</sup> *Id.*, §24. The italics are mine.



The issue was generally considered as an important one and the ruling was met with approval. *La Nación*, for instance, considered the decision a “transcendent” one and, approvingly, stated that it recorded “with pleasure” the opinions it had collected. An anonymous and “distinguished jurist and professor of law”, who was also a member of the bar, was quoted saying:

“[...] in this economic question that is of so much interest to the country, I can say that for the last several years the Court had not handed down a decision as transcendent as this one, both for the industrial problem that so bravely resolves and for the thorough study of the constitutional questions involved it makes in defense of national production encumbered by capricious laws enacted upon protectionist purposes, but which in fact turn out to be gabelles upon the poor consumer”<sup>372</sup>

*La Tribuna* went even further, embracing the decision most explicitly. It reprinted arguments from the Court’s decision without quoting them, thus making them its own arguments.<sup>373</sup> It praised judicial review as “one of the Judiciary’s most precious powers [...] to secure and realize the supremacy of the Constitution and the individual guarantees and rights”.<sup>374</sup> It considered that the Court had done precisely so in the *Hileret* case.<sup>375</sup>

“No system more contrary to the principles of the Constitution that guarantee all inhabitants the right to work and perform any lawful industry, stating that equality is the basis of taxes and public charges, could be imagined [...] That law, which was the most blatant violation of the constitutional principles, claimed to be based upon economic arguments, as overproduction of the item would have threatened to ruin the sugar industry. While no actual fact supported such hypothesis, it was evident that, by limiting production, [the law] harmed trade in Tucuman and the neighbor provinces [...] The most serious consequence was the hardship that

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<sup>372</sup> “Notas Judiciales. Asuntos de Interés General. Un fallo de trascendencia”, *La Nación*, September, 5, at 3.

<sup>373</sup> See “Leyes inconstitucionales”, *La Tribuna Nacional*, September, 7, at 2.

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

such measure imposed on thousands of consumers [...] *The Court has put an end to such a system*, by declaring that the law violates articles 14 and 16 of the constitution and by stating, in a clear and precise way, the fundamental principles of juridical and economic liberty. *Decisions of this kind greatly elevate the dignity and prestige of the national judiciary. Thanks to [the Court's] intervention, to its rectitude and firmness, the restrictions imposed on public authorities or the rights ensured to all inhabitants by the constitution, will not be dead letter in the future [...]*<sup>376</sup>

*El País*, *El Pueblo*, and *La Prensa* took a more neutral stance, reporting the case in rather objective terms. All three of them covered the decision, summing up the arguments of the parties, as well as the gist of the Court's ruling, but without endorsing or criticizing the decision.<sup>377</sup> However, a couple of days later *La Prensa* reported on the reactions in Tucumán to the Court's decision. According to it, a local newspaper had received "countless congratulations on the Supreme Court's decision that strikes down the law" and that "it is almost unanimous the opinion that the Governor [...] must resign his position, as a consequence of the fateful mistake made in signing the law".<sup>378</sup>

I could find no negative reaction to the ruling in the mainstream press. Of course, one could say that the case involved a local, very circumscribed, problem and, therefore, that it was of scarce interests for national (or Buenos Aires' newspapers). But most likely the situation was different. Even the newspapers that took a neutral position towards the decision seem to have regarded the issue as important, and the titles of their stories on the ruling appear to assume the reader's awareness of the topic. The legal issue raised by the case clearly transcended the question of sugar. What was at stake was the scope of

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<sup>376</sup> *Id.* The italics are mine.

<sup>377</sup> See "La Cuestión Azucarera. Sentencia de la suprema corte contra la Provincia de Tucumán", *El País*, September, 6, at 4; "La ley azucarera de Tucumán declarada inconstitucional", *El Pueblo*, September, 6, at 4; "El impuesto a los azúcares en Tucumán. Declarado inconstitucional. Tres sentencias de la Suprema Corte", *La Prensa*, September, 6, at 4.

<sup>378</sup> "Tucumán. La inconstitucionalidad de la ley azucarera. Sus consecuencias en las finanzas", *La Prensa*, September, 7, at 5 (also stating that in some sectors there was discontent and that the law had turned out to be innocuous as to the problem it aimed to solve).

the State intervention in the economy, as the Court made clear in its final remarks in the decision. To overstate things a little bit (but only a little bit), *Hileret* was about free markets and private property vis-à-vis communism of state. Whatever the lack of nuances one may attribute to such a blunt way of framing the issue, it is clear that the justices saw the problem of an interventionist state as a slippery slope with no foreseeable stopping point. For the most part and to the extent that debate in the press reflected public opinion, the Court's position was not regarded as untenable. Even more, it was not even criticized, and some newspapers applauded the justices for upholding the Constitution and resisting pressures. Once again, as in *Elortondo*, the key point may have been the perception that the Court was acting legally, not politically. In the context of the times, the Court's decision must have looked as squaring perfectly with the Constitution's letter: "All inhabitants will have the [...] rights: [...] to work and perform any lawful industry". Sugar production must have been perceived, naturally, as a "lawful industry". And the suspicion of interest groups taking over the (local) political process was an apparent explanation for the advances of the economic-emergency regulatory state.

What can we learn, from the perspective of constitutional property, from the ups-and-downs of the first fifty years of Argentina's constitutional history? One could make a few points. First of all, that public debate was not dominated by a discourse of rights, even if rights-based arguments did appear on occasion. The focus seems to have been on state powers. Even when what was being argued was largely who had to bear what burden in a crisis, and rights were clearly at stake, the debate was mostly framed in terms of whether the President could do one thing or another or, eventually, whether Congress could pass retroactive laws or enter the realm of private agreements (a space considered as largely beyond the reach of public law). Eventually, rights discourse started to gain ground. In any event, arguments that could be considered as protecting rights (either by

direct invocation of a right, or indirectly by denial of the state power to advance over the private sphere) did appear in public debates. The morality of promising was certainly appreciated and, slowly, freedom of contract and private property —as constitutionally protected rights— made their appearances in the stage. Necessity was recognized as a legitimate limitation on rights, but not beyond what was strictly indispensable to tame crises and only insofar as the measures were, to anachronistically import a terminology, “narrowly-tailored” to the ends pursued. Insolvency and virtual bankruptcy were realistically deemed as facts of life, but this did not mean that anything could be done under the cloak of “bankruptcy justice”. One important consideration in many people’s minds seems to have been the perceived injustice of emergency redistributions. Friends-of-power and well-connected people were perceived as frequent beneficiaries of State measures and sometimes even as factors in unleashing crises. Day-laborers, wage earners, and more generally, the least well-off were considered as defenseless against economic measures. Private property, thus, was appreciated not as a right the rich and wealthy specially treasure, but as a right every person has a deep stake in. But what did it mean “property is inviolable”? One important element that appears in the early crises is that the inviolability of property does not mean absolute protection. Temporariness of the restrictions is the key. The full and free exercise of property rights (including rights arising from contracts) could be postponed, but their content could not be completely destroyed in a definitive manner. The rise of the substance-of-obligations (rights) versus remedies distinction was near.<sup>379</sup> In a way, this idea appears to have been regarded as the lesser evil in situations where exact fulfillment of obligations was simply impossible.

Congress felt these pressures, alongside all kinds of other, usual, pressures, and did what it could not to stray too far from public ideas on the sanctity of contracts and

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<sup>379</sup> The distinction would play an important role in the landmark case of *Avico v. De la Pesa*, 172 Fallos 21 (1934), a decision where the Argentine Court followed closely *Home and Loan Building Association v. Blaisdell*, 290 U.S. 398 (1934).

property rights. Surely, not all congressional products were in accordance with the ideals, but there is a trend to avoid pushing too far against the popular conception of constitutional property. Whenever it could, it cut off short more ambitious and rights-restricting presidential policies.

And what about the Supreme Court? The Court was not a central political player yet, in the sense of being too comfortable in deciding large questions that touched upon economic policies. In the instances in which it could not avoid passing judgment on emergency measures, it took a decidedly minimalist approach, basically following Congress' policies. No national emergency measures—they were so, even if the name had not come up yet—were struck down. Cases involving economic problems of a systemic character were not the kind of cases the Court would use to push whatever ideas on property rights the justices had. It is clear, though, that they shared the broad outlines of Alberdi's view. When more circumscribed problems came to the Court—e.g., *Elortondo* and *Hileret*—, the justices were keen on defending “the sanctity of property” and “the right to work” unencumbered by an intrusive and redistributionist state. Interestingly, the cases where the Court vindicated property rights and relative freedom from state regulation were generally praised and created no backlash. And cases where the Court followed the somewhat constrained Congress were not strongly criticized either.

Summing up, laissez-faire constitutionalism was not dominant, but it was not a pariah either. Strong property rights, even if sometimes inconvenient, were appreciated.

To put it in contemporary political philosophy terms, the most extended conception of constitutional property seems to have had a strong classical liberal grounding, with a dose of consequentialist-utilitarian inspiration (e.g., Alberdi), as well as

some occasional libertarian overtones, emphasizing the utmost importance of property rights (e.g., *Elortondo*, *Hileret*).<sup>380</sup>

The twentieth century would tell a slightly different story.<sup>381</sup> On to it, then.

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<sup>380</sup> See John Tomasi, above n. 71, at 53 (“Classic liberals affirm a thick conception of economic liberty [...] Many thinkers in this tradition [...] take a broadly [...] consequentialist, or ‘end-directed’ approach [...] Their political position rests on a view of the person as a utilitarian agent [...] Libertarians affirm economic liberty as the fundamental ordering principle of political life. They treat economic liberties as the most weighty of all basic liberties and perhaps even as moral absolutes”).

<sup>381</sup> This was not a phenomenon exclusive to Argentina. See, e.g., Richard Pipes, above n. 7, at 209 (arguing that, for both political and economic reasons, “[o]f all ages in history, the twentieth century has been the least favorable to the institution of private property”).

## **A New Century: Masses Democracy, Economic Emergency, and the “Softening” of Property Rights.**

### **a. The Beginnings of the Economic Emergency Jurisprudence.**

The turn of the century would bring about quite a few substantial changes in Argentina’s political system. Importantly, after 1912 suffrage would become secret, mandatory, and universal, opening up a new world of possibilities and allowing for the advent of a democracy of masses.<sup>382</sup> This would not imply, however, the disappearance of fraudulent electoral practices.<sup>383</sup>

The new century would also be witness to a historic period of extraordinary economic growth. Between 1902 and 1913, the nation’s production grew an average of seven per cent a year, resulting in the highest gross product per capita Argentina has had yet.<sup>384</sup> Material progress conduced to better living standards:<sup>385</sup> However, “the phenomenal economic climate [...] created a concentration of wealth and social inequality much more pronounced than had existed before”.<sup>386</sup> The combination of the

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<sup>382</sup> Law 8,871, also known as “Sáenz Peña” Law for the President who promoted its enactment, was enacted in 1912 and applied for the first time in the 1916 national elections.

<sup>383</sup> Thus, newspapers still played a significant role as proxies for public opinion. Additionally, the turn of the century saw a democratization of the access to cultural goods. This implied a considerable expansion of the newspapers’ readership, which in turn justifies paying close attention to newspapers as means to survey public opinion.

<sup>384</sup> See, e.g., Pablo Gerchunoff, Fernando Rocchi & Gastón Rossi, above n. 203, at 286.

<sup>385</sup> See, e.g., George L. Priest, “Poverty...”, above n. 26 (arguing that “[m]ost obviously, economic growth is responsible for the most basic improvements in the quality of the lives of citizens, such as increases in life expectancy and reductions in infant mortality, among others” and that “[t]he empirics are clear and dramatic”); see also Pablo Gerchunoff, Fernando Rocchi & Gastón Rossi, above n. 203, at 288 (stating that life expectancy in Argentina jumped from 33 years in 1869 to 48 and a half years in 1914, and that the number of pupils attending elementary school more than doubled between 1902 and 1913).

<sup>386</sup> Leandro Losada, above n. 187, at 130.

opening of the political process to large numbers of people and an increasing material inequality could only result in growing tensions between aspirations for a more widespread distribution of property and the protection of entitlements. This tension, which had less dramatic ways of working itself out by means of a combination of taxation and an economy with more opportunities for all, would reach peaks in situations of objective crises.<sup>387</sup> A “softening” of the conception of protected property entitlements could be expected. But as property became more widely distributed, and more individuals became owners, a more widespread appreciation of its worth as an individual right could also be expected. What exactly did it happen?

As Eduardo Zimmermann has pointed out

“The institutional structure set up by liberalism, which played the role of an unifying principle in the political debate from the second half of the nineteenth century on, began to receive strong attacks [...] in the political-institutional level, the dissatisfaction with political practices of which liberal governments took advantage generated strong demands on the part of excluded groups [...] the raise of this social question sparked a debate about the capacity of classic liberal institutions to solve the new problems [...]”<sup>388</sup>

This enlarged role for the masses did not mean, however, that property rights were rejected nor that the entire economic order pre-arranged by the liberal Constitution was repudiated. Argentina progressively became a country characterized by the presence of a large middle-class.<sup>389</sup> This social structure would be very influential in the construction of our collective identity. One scholar claims that “[...] the middle classes

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<sup>387</sup> *Id.*, at 223 (arguing that the new democracy established a different social frame, one in which while social mobility was still one of its features, “social frontiers became sharper, and tense, when the economic situations were critical”).

<sup>388</sup> Eduardo A. Zimmermann, *LOS LIBERALES REFORMISTAS* 13 (Buenos Aires, Editorial Sudamericana & Universidad de San Andrés, 1995).

<sup>389</sup> See, e.g., Leandro Losada, above n. 187, at 155 (arguing that at the turn of the century, social mobility found a new expression in the birth of a broad middle class).



[...] [have] an identity that blends with that of the entire nation. Argentina has learned to think of itself as a ‘middle-class country’<sup>390</sup> Thus, in the early part of the century, the movement for reform tried to find a middle ground. The Argentine Socialist Party, for instance, supported free trade and the gold standard and condemned both protectionist policies supported by local industrialists and inconvertible paper money as attacks on the workers’ purchasing power.<sup>391</sup> Ernesto Quesada, one the fathers of sociology in Argentina and someone worried by the ‘social question’, criticized the “red international” for “attacking liberty, *property*, and concurrence, the three pillars on which every civilized social organization must necessarily rest”.<sup>392</sup> Marxism was judged as not viable in the country, because

“Each new day the terms of Marx’s Manifest are reverted in a more favourable sense: capital is not concentrated, but *property is democratized instead*, to the point that *it is incalculable the proportion of proletarians that have become members of the bourgeoisie*”<sup>393</sup>

Nineteenth century liberalism, however, was not a tension-free, dominant alternative and its supposedly natural connection with the protection of property rights did not escape such internal strains. As in other Latin American countries, the liberal thought encompassed much more than economic *laissez-faire*: it brought under the same umbrella the preoccupation with establishing strong guarantees for individual constitutional rights and the ensuing limitation of State power as well as the concern with

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<sup>390</sup> Ezequiel Adamovsky, above n. 187, at 9.

<sup>391</sup> See Eduardo A. Zimmermann, above n. 388, at 59.

<sup>392</sup> *Id.*, at 88 (quoting Ernesto Quesada).

<sup>393</sup> *Id.*, at 90 (quoting Enrique Ruiz Guiñazú). The italics are mine. See also Leandro Losada, above n. 187, at 147 (using the province of Mendoza as a study of regional elites in Argentina at the time and arguing that the development of a wine industry shook the *status quo*, “fostering a fairly diversified property structure”, upon which a significant middle class arose).

the consolidation of the national states, which arguably needed a strong central government.<sup>394</sup> In Argentina, faith in markets seemed compatible with a more complex role for State than that of “demolishing the legal barriers inherited from the past”.<sup>395</sup> Interventionism did not appear, as one may be led to think by the *Hileret* case and the reactions it got, as an inevitable enemy of the well-to-do. In fact, it may have even appealed to broad audiences:<sup>396</sup> the wealthy and well-connected may have seen it as a way to protect themselves in various instances in which market laws were not tender with their interests; those relatively worse-off may have seen it as a way of ameliorating their situation in ways the market would not even let them dream of. Obtaining individual or, more precisely, group advantages seems to have justified the abandonment of any orthodoxy, quite independently of where each group stood, either ideologically or economically.

An early instance of the use of the idea of economic emergency to protect the well-off and the politically connected appeared when, after a sudden fall in the international prices of meat, meat-packing companies —mostly, foreign-owned— were in a position to impose conditions that the breeders judged disadvantageous. *La Sociedad Rural Argentina*, a powerful interest group that represents the interest of rural producers, resorted to the public authorities. In 1921, a proposal to fix a minimum price a meat-packing company had to pay was introduced in Congress. *La Nación*, a newspaper often

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<sup>394</sup> See Eduardo A. Zimmermann, above n. 388, at 41. This tension between individual rights and liberties and strong governmental powers is clear in Juan Bautista Alberdi’s thought. See above n. 159 and accompanying text.

<sup>395</sup> *Id.*, at 46 (quoting Tulio Halperín Donghi).

<sup>396</sup> See, e.g., Roberto Cortés Conde, *THE POLITICAL ECONOMY OF ARGENTINA IN THE TWENTIETH CENTURY* 76-77 (New York, Cambridge University Press, 2009) (arguing that during the 1920’s interest groups “finally started to garner power” and that “[e]ntrepreneurs as well as wage earners began to realize that their income no longer solely depended on productivity [...] In sum, they learned that it was worthwhile to pressure the government to effect changes”).

close to the interests of proprietors, supported the measure. As Ricardo Sidicaro has put it

“[...] it would have been hard to propose a greater restriction to the free market. However, *La Nación* welcomed the initiative. The unquestioned faith in *laissez-faire* gave way to the most diverse arguments, when it was necessary to find reasons to protect the profits of the breeders”<sup>397</sup>

The resort to the emergency rhetoric to cover redistributive struggles under the cloak of the general welfare was becoming increasingly common. That is not to say, mind you, that emergency powers could not be exercised in a way that actually benefited the general public, nor that they never were exercised in such a way. But their all-powerful, far-reaching arms were flexing their muscles to subordinate all individual rights to the “superior interests of the Nation”. A discourse of rights had barely been born when it was about to be crushed by an increasingly sophisticated discourse driven by the sectors that were fighting to capture the State —or its favour—, drawing upon the language of the existential threats that the world was so plentiful of at the time and importing it into the economic realm.

In rebuilding the story of constitutional property in the early twentieth century, I am going to focus on two very important episodes involving what could be, somewhat loosely, called “economic emergency”. Both episodes are part of larger problems, not limited to Argentina’s national borders, which with small differences repeated themselves in many countries around the world: the housing crisis (which would linger on for a few decades, perhaps due in part to political mismanagement) and the mortgage crisis in the early 1930’s. In both instances, the national Supreme Court would look to the U.S. Supreme Court for inspiration and, in the mortgage case, even for authority. These two events would be perhaps the last time in the twentieth century in which Argentina and the United States would endure similar kinds of emergencies. It would not be the last

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<sup>397</sup> Ricardo Sidicaro, above n. 217, at 68.

time Argentina's Court would, perhaps too confidently and blind to important textual and contextual differences, take a leap of faith and follow in the footsteps of its U.S. counterpart. Let us see.

The first episode involved the shortage of housing in the early twenties. The problem was not new: since the beginning of the twentieth century, the situation had steadily deteriorated, and tenants in numerous tenement houses had declared themselves "on strike" in 1907, refusing to pay their rents unless the landlords granted substantial reductions on the rent prices.<sup>398</sup> By 1921, the problem had reached significant proportions. It was a socially-salient, controversial issue. Whether the State, itself submerged in a process of slow transformation, should do anything to remedy the problem was in itself a polemic question. But, even granting that it should, what was the constitutionally-permissible remedy was an even more divisive topic. The housing crisis, then, signalled the first time in Argentina's history when an economic crisis polarized public opinion in two clearly defined groups. Owners and tenants would both organize themselves and prepare to fight the war over rents in Congress, in the courts and, sadly, occasionally even in the streets.<sup>399</sup> In my view, this social polarization would influence the way the Supreme Court would ultimately handle the issue.

Two newspapers would assume the defence of each side to the contest. *El Diario* would side with the landlords and *El Pueblo* would carry the flag of the tenants from the very beginning and in very intense terms. The tone of the articles and reports was one of

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<sup>398</sup> For an interesting account of "the rent strike", see James A. Baer, "Tenant Mobilization and the 1907 Rent Strike in Buenos Aires", 49 *The Americas* 343 (1993).

<sup>399</sup> See, e.g., "Por una cuestión de alquileres", *El Diario*, October, 11, 1921, at 11 (reporting that, faced with the offer by the tenant to pay the rent at the lower price set by the emergency law, a sub-lessor attacked the tenant with a knife, hurting him in the head and groin). For different stories on the retorts by landlords, see also "La ley electoral de alquileres", *El Diario*, October, 6, at 1 (reporting the case of the owner of an apartments building that, faced by the refusal of tenants to keep on paying the agreed upon rent, suspended payment of utilities and the doormen services, forcing tenants to have to take out garbage by themselves and leaving them without electricity and, as a consequence, also without water supply and elevator services; also the case of a landlord who brought four german shepherd dogs into his apartment and played music quite loudly to make neighbors—who happened to be his tenants—uncomfortable).

open confrontation. Other newspapers would later join one or the other side as events developed and judicial decisions were handed down.

In September, 1921, Congress passed the 11,157 law, also known as the Rent Act, providing, among other things, that from the promulgation of the law on, and during two years, rents were to be frozen at the prices they had in January, 1920. This provision served both as a cap for rents that had not risen since that date and as a cut-off for leases in which raises had occurred. The law stirred a great controversy, and the people clearly divided over the issue. Tenants rebelled against what they perceived to be unjust increases in rents and owners showed a clearly confrontational attitude towards what they took to be an unjust deprivation of their property rights.<sup>400</sup> The topic dominated conversations in the streets.<sup>401</sup>

*Caras y Caretas*, a magazine aiming at political humour, published quite a few cartoons reflecting the different feelings the law had sparked in the public. In one of them, graphically entitled “Out War”, depicted in a set of wordplays the feelings of the owners: “The public all of a sudden gets irritated and begins to sing this way: The rent is denied. The house is ravaged. And the tenant wins. And the tenant enjoys. Belligerent, he makes fun of our grief. Oh, infamous tenant; Oh, otiose tenant.”<sup>402</sup>

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<sup>400</sup> See, e.g., “Los alquileres”, *Crítica*, September, 24, at 1.

<sup>401</sup> *Id.* See also “La ley electoral de alquileres. La protesta pública...”, *El Diario*, September, 20, at 1 (stating that the law “has been, and will be for many days to come, the topic of all conversations and comments”).

<sup>402</sup> “Guerra sin cuartel”, *Caras y Caretas*, Number 1201, October, 8 (the Spanish version is playful and the words rhyme, making up a credible mock song; there is far more content in the same tone in the issue). More cartoons in fairly the same line can be seen in “Comentarios”, *Caras y Caretas*, number 1204, October, 15 (where an owner is depicted complaining that a person cannot be a *radical*—a supporter of the then governing party— and an owner anymore).

In the owners' camp, the organization was almost immediate.<sup>403</sup> They got together in meetings and found legal counsel fairly quickly, even if many of them did not want to look like a union or to entrust the defence of their interest to a common body.<sup>404</sup> They seemed to believe that their cause was morally and legally sound, and were very optimistic about the chances of winning an eventual constitutional case in the Supreme Court.<sup>405</sup> They seemed to have lobbied for a presidential veto,<sup>406</sup> without success. The province of Buenos Aires, in its capacity as owner of the *Rambla de Mar del Plata* —a nice commercial boulevard by the sea in the touristic city of Mar del Plata—, immediately raised the rents it charged to existing tenants of the premises, under various pretexts, searching to protect itself from the new law.<sup>407</sup>

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<sup>403</sup> See, e.g., the advertisement of the *Asociación de Propietarios de Bienes Raíces* —Real Estate Owners' Association— in *El Diario*, September, 29, at 1 (informing that the association had changed its address and that “to become a member is a duty”). See also “El asunto de los alquileres. Algunos casos producidos”, *Crítica*, September, 26, at 1 (asserting that the excitement produced among owners by the law had resulted so far in meetings and the formations of “resistance centers”); and “La ley de alquileres. El día terrible...”, *El Diario*, September, 29, at 3 (reporting that the *Asociación de Propietarios de Bienes Raíces* was “setting in motion its campaign for justice” and that it was expected that almost every owner would enroll in the association).

<sup>404</sup> See “La ley de alquileres ante la Suprema Corte. Esperando la promulgación. Los abogados defenderán la inviolabilidad de la propiedad”, *El Diario*, September, 16, at 1. Also see “La ley electoral de alquileres”, *El Diario*, September, 20, at 1 (mentioning that the *Asociación de Propietarios* —Owners' Association— was calling a meeting and that the venue was going to be too small to fit the large turn out that was expected). There was also a *Corporación de Propietarios y Subarrendadores* —Owner's and Sublessors' Corporation— formed largely by owners of *casas de inquilinato* —buildings destined to be nothing more than tenements—. See “La ley electoral de alquileres”, *El Diario*, September, 24, at 1.

<sup>405</sup> See “La ley de alquileres ante la Suprema Corte. Esperando la promulgación. Los abogados defenderán la inviolabilidad de la propiedad”, *El Diario*, September, 16, at 1. See also “Primeros efectos de la ley de alquileres”, *El Diario*; September, 17, at 1 (arguing that the lawyers that were advising the *Asociación de Propietarios* “did not hide their optimistic impression” about the chances of winning the case before the Supreme Court).

<sup>406</sup> See “Los alquileres, ¿por qué no promulga la ley el Presidente?”, *Crítica*, September, 19, at 1 (affirming that the owners were preparing themselves to lobby the President to veto the bill).

<sup>407</sup> See “Un caso oportuno para la ley de alquileres”, *El Diario*, September, 24, at 3.

For their part, tenants were “getting ready for the resistance”,<sup>408</sup> and the state of agitation threatened “to degenerate into a real brouhaha”.<sup>409</sup> *El Diario* accused the administration of turning the law into an instrument of political propaganda, by sending attorneys to the *conventillos* —tenement houses— and offering tenants to cover the expenses of the litigation necessary to force the landlords to receive the payments under the new law.<sup>410</sup> In these meetings, the official party attorneys would also incite the crowds to support the administration. The law had given politics the chance it was waiting, and the Socialist and Radical parties did not pass on it: “[...] every Radical and Socialist committee has turned into a legal clinic, in order to make more diabolical, if at all possible, the relationship between owners and tenants”.<sup>411</sup> A more sympathetic view of the facts was offered by *El Pueblo*, which reported that an executive decree had ordered that the National Department of Work lent its help to those employees and workers that so required, by means of preparing legal documents and providing assistance.<sup>412</sup>

In any case, it was pretty clear that public opinion was sharply divided in two camps. Which of them was more numerous, and what implications their positions had for the conception of constitutional property is what I will try to find out now.

*El Diario* made a clear, though not fanatical, case on behalf of property rights:

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<sup>408</sup> “La ley electoral de alquileres”, *El Diario*, September, 24, at 1.

<sup>409</sup> *Id.*

<sup>410</sup> See “La ley ‘electoral’ de alquileres. En base a ella se inicia la propaganda política...”, *El Diario*, October, 9 & 10, at 1. See also “La ley ‘electoral’ de alquileres. Protesta pública...”, *El Diario*, September, 20, at 1 (stating that the housing problem had been turned into a mere electoral question, a manipulation aiming at gaining the sympathies of the popular sectors and a mocking of the institutions).

<sup>411</sup> “La ley electoral de alquileres. Un consultorio jurídico en cada comité político...”, *El Diario*, October, 12, at 3.

<sup>412</sup> “La ley de alquileres. Cooperación oficial”, *El Pueblo*, October, 10, at 1.

*“We have fought the abuse of the owners, taken to really objectionable extremes, but always thought that the means chosen to combat such scarcity was not only the least suitable, but also the most inconsistent, due to the nullity that would affect the new law. In order to induce the fall of prices, which in the current situation are ruled by the uncompromising necessity of supply and demand, there was no other resource but to promote edification, and to do so, the last thing that could be done was to scare capital with an extortionist and [rights-]violating law. Now, with the accomplished facts, it only remains to wait for the judicial decision, which will necessarily have to rule on the unconstitutionality of the law [...]”*<sup>413</sup>

In the newspaper’s view, the new law

*“[...] attacks freedom of contract and alters the ownership of real property, ignoring everything that the Constitution enshrines as inviolable [...] it grieves to think that such a swill has passed the Senate because it suggests the lightness with which [...] the arduous and momentous legislative issues are addressed”*<sup>414</sup>

According to *El Diario*, the passing of the law—which it deemed as “absolutely bad” and a “disastrous precedent”—generated public protest.<sup>415</sup> In its view, the law’s effects would be anything but the ones intended, bringing about the paralysation of the building industry and the immediate retraction of the available units for rent, with the ensuing harm to workers and tenants alike.<sup>416</sup> Moreover, the law provoked an “irritating injustice” as it deprived owners of part of their properties’ profits while the State raised

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<sup>413</sup> “La ley de alquileres ante la Suprema Corte. Esperando la promulgación...”, *El Diario*, September, 16, at 1. The italics are mine.

<sup>414</sup> “La ley ‘electoral’ de alquileres. Protesta pública...”, *El Diario*, September, 20, at 1. The italics are mine.

<sup>415</sup> *Id.*

<sup>416</sup> See, e.g., “La nueva ley de alquileres. Sus efectos prácticos...”, *El Diario*, November, 5, at 3 (interviewing a well-known real estate investor and developer, whose views were that the law was not producing its intended effects and that those most harmed were the tenants themselves); “La ley ‘electoral’ de alquileres. Sus efectos en las transacciones inmobiliarias...”, *El Diario*, October, 8, at 1 (stating that the intended beneficiaries of the legislation, the tenants, would be its “final victims” and that after a brief fall in the rents, the tenants would find themselves in a much more precarious situation, due to the lack of incentives to both Guild new houses and to rent them; this paralysis of new constructions would, in turn, leave thousands of workers unemployed).



the taxes on the very same properties.<sup>417</sup> And, not less importantly, it created opportunities for “rapacious behaviour” on the part of some sectors with possibilities of capturing the political process or making it work to their particular benefit.<sup>418</sup> None of these noxious effects could be erased by an eventual declaration of unconstitutionality by the Supreme Court, as the “memory of the most extraordinary aggression on private wealth” would linger on forever.<sup>419</sup>

*Caras y Caretas* printed a cartoon that attempted to depict the different views the various sectors of the population had on the rent law. There must have been a clear public perception of the opportunities for self-interested, and perhaps abusive, behavior that the enactment of the law opened, as the magazine illustrated the views of the *delinquent tenant* in the following terms: “Property does not exist. Everything there is on Earth belongs to its inhabitants. *These two houses are mine*”.<sup>420</sup> Even more clearly, in the same vignette, a character by the name of Goyo Sarrasqueta expressed his views on the law in the following terms: “That the law is *just*, because *with the refund he will get on the overcharge paid since 1920*, he will *purchase a house*, in order to rent it at *high prices*”.<sup>421</sup> It is clear

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<sup>417</sup> “La ley ‘electoral’ de alquileres. Protesta pública...”, *El Diario*, September, 20, at 1. See also “La ley ‘electoral’ de alquileres. Sus efectos en las transacciones inmobiliarias...”, *El Diario*, October, 8, at 1 (insisting on the idea of the irritating injustice of the situation and claiming that municipal taxes had been raised by 70% and that the then-national taxes on water service to the property and sewage had been raised by a 45% and a 60%, respectively); “La ley ‘electoral’ de alquileres. Los propietarios ante el Banco Hipotecario Nacional”, *El Diario*, October, 18, at 1 (reporting that mortgagors were complaining to the bank that while their property’s profits had fallen by 30% due to the law, taxes rates had been raised and a new fiscal valuation would make taxes on property even higher, thus making it difficult to comply with repayment schedules).

<sup>418</sup> “La ley ‘electoral’ de alquileres. Protesta pública...”, *El Diario*, September, 20, at 1.

<sup>419</sup> “La ley ‘electoral’ de alquileres. Protesta pública...”, *El Diario*, September, 20, at 1.

<sup>420</sup> Redondo, “Dicho y Hecho. Impresiones sobre la Ley de Alquileres”, *Caras y Caretas*, Number 1202, October, 15 (depicting a tenant with two multi-storey buildings under his arms). The italics are mine.

<sup>421</sup> *Id.* (depicting the character nicely dressed and standing in front of a tenement house of his property, with a sign reading “Rooms for rent” on it). The italics are mine. According to Giunta, “Goyo Sarrasqueta” was the first character ever in the history of Argentine comic. Created by Manuel Redondo, “Goyo

that both Sarrasqueta and the delinquent tenant speculated with the benefits they could get from the law, which would not merely alleviate their supposedly difficult situation, but would put them in an advantageous position. *El Diario* denounced such attitude by decrying that “a large majority of tenants are decided to *take advantage* of the *yrigoyenist* [referring to then-President Yrigoyen] absurdity”.<sup>422</sup>

The possibility of self-seeking, abusive attitudes on the part of at least some tenants is proved by a small poll done by *Crítica* —a pro-tenants newspaper— in 1925, when it was being debated whether the emergency law should be extended (once more). The poll was very peculiar, since all respondents were tenants. Nonetheless, it is useful to analyze the answers given, in order to see that it must not have been too infrequent that tenants were seeking to take advantage, and not mere temporary shelter, through the emergency powers. The question was whether the emergency law should be extended for another couple of years. One respondent argued that further reductions in the rents “would be ideal” and that he would prefer that the law was prorogated “forever”.<sup>423</sup> Another respondent held that he “would like to pay less” for his rent, and when the journalist replied that such a decision would be for the landlord to make, the tenant said that “it could also be a matter for the law”.<sup>424</sup> In many cases, an attitude of enviousness towards the owners was explicit.<sup>425</sup>

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Sarrasqueta” routinely faced situations that corresponded to hot topics in the news. Generally, Sarrasqueta took a critical stance towards the situations he faced in the cartoons. See Néstor Giunta, “Historia del cómic en Argentina”, available at [http://www.todohistorietas.com.ar/historia\\_argentina\\_1.htm](http://www.todohistorietas.com.ar/historia_argentina_1.htm) (last visited July, 27, 2011) (building up on a text by Oscar de Majo, published in *29 Signos Universitarios* (1996)).

<sup>422</sup> “La ley de alquileres. El día terrible...”, *El Diario*, September, 29, at 3. The italics are mine.

<sup>423</sup> See “La pregunta del día: ¿Debe o no ser prorrogada la ley de alquileres?”, *Crítica*, August, 29, 1925, at 6 (transcribing the reply of one José López Rodríguez).

<sup>424</sup> *Id.* (transcribing the reply of one Andrés Ferreyra).

<sup>425</sup> *Id.* (replies by one Matías Martí and one Andrés Ferreyra).

*La Fronda* also took a critical stance towards the emergency law, which considered as “fatidical”.<sup>426</sup> It criticized President Yrigoyen, who apparently had a long history as a tenant and had just issued a decree establishing how the rent of public offices located in private premises should be paid, by asking ironically:

“What is the presidential decree’s goal? That rents are paid at the value they had in January, 1<sup>st</sup>, 1920, as prescribed by the law, or that *no rent is paid at all*, as hints the precedent set by the well-known case of *El Quemao* [President Yrigoyen] himself? [...] *There have always existed in our legislation strict legal rules that oblige tenants to pay their rents punctually, and such rules have been observed only by the prudish citizens, those who have even believed in the apparition of widows and of the deceased. But men pure, austere, energetic, and providential have passed over such despicable scruples and over any statutory provision whatsoever in order not to pay any amount in concept of rent and to make appear the leased house and field as their own.*”<sup>427</sup>

Meanwhile, the tenants’ defenders saw the issue differently and had their own complaints. *El Pueblo* thought the law to be a “plausible idea” that benefitted the less affluent,<sup>428</sup> and printed a set of “interesting instructions on the rent laws” whereby it gave tenants advice on how to proceed to vindicate the rights created by the emergency law.<sup>429</sup> It also denounced maneuvers by some owners who wanted to circumvent the law by invoking the need to introduce improvements in the rented unit to regain possession of it and then making a list of those tenants who were intending to take advantage of the law.<sup>430</sup> After being dispossessed, tenants were in grave danger of not finding a place to

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<sup>426</sup> “Los alquileres y El Quemao”, *La Fronda*, October, 6, at 2.

<sup>427</sup> *Id.*

<sup>428</sup> See “Las leyes de alquileres. La verdad en su lugar...”, *El Pueblo*, September, 18, at 1.

<sup>429</sup> See “Instrucciones interesantes sobre las leyes de alquileres”, *El Pueblo*, October, 16, at 1.

<sup>430</sup> “Contra el espíritu de la ley”, *El Pueblo*, October, 21, at 1. See also “El asunto de los alquileres. Algunos casos producidos”, *Crítica*, September, 26, at 1 (reporting the same kind of cases as *El Pueblo* and informing about a seeming intention to resist and circumvent the law on the part of some owners). For a different take on the same issue, but one that hints strongly at the actual existence of such “Black” lists, see “La ley

live, as landlords were not likely to rent their property to anyone in the “black” list. According to this newspaper, owners who resorted to this kind of maneuvers suffered from

“...[an] *utilitarian blindness* that makes them forget [...] what our fundamental law ordains in a very explicit way for all inhabitants, without distinction of social hierarchies or monetary conditions: [...] that the laws made in pursuance thereof [...] are the supreme law of the land, to which all must conform, whether they are to our benefit or not [...]”<sup>431</sup>

The law, in the view of *El Pueblo*, was “a beneficial solution, demanded by the interests of the community”, which also meant a departure point from the “today anachronistic concept of private property”.<sup>432</sup> Interestingly enough, the gist of the critique concerns a particular conception of private property, but not the concept itself, despite the somewhat misleading language.<sup>433</sup> What underlies *El Pueblo*’s position is a rejection of the “reprehensible attitude of many unscrupulous owners”, who were scheming to frustrate whatever protection the law was aiming to provide tenants. It was the owners’ “utilitarian blindness”, their obsessive focus on profit, and their lack of sensitivity that led them to disregard completely whatever valid claims tenants might have had. The point is nicely illustrated in *Caras y Caretas*, where a large landowner is depicted as being hit in the back of the neck by a rock falling from the sky —with the legend “rent

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electoral de alquileres”, *El Diario*, October, 6, at 1 (reporting that the *Asociación de Propietarios* claimed that the agreed-upon terms of contracts were to be respected by businessmen of honor and that the invocation of the rights granted by the emergency law should have an immediate impact on the trustworthiness of any person, and informing that the banks would take such information into account when conducting their business).

<sup>431</sup> “Contra el espíritu de la ley”, *El Pueblo*, October, 21, at 1. The italics are mine.

<sup>432</sup> *Id.*

<sup>433</sup> It is easy to see that a popular newspaper is not a philosophical journal and that, thus, a certain degree of terminological inaccuracy is to be expected. What should matter in an analysis of the sort I am trying to carry out is what the news reflected more generally, more than whether they used philosophically-accurate, as well as anachronistic, technical words.

law” on it—. The impact forces the greedy character to throw out of his mouth a large number of gold coins. His impression on the law is that it is “a cataclysm”, and that “the world falls upon him, depriving him of all his *profit*”.<sup>434</sup> Both the exaggeration in the perception and the fact that the measure, whatever its real extent, was taken to have an impact only on profits —as opposed to the capital that is the source of profit— seem to be important points to bear in mind. The same comic depicted a small owner has having different feelings regarding the emergency law: he was concerned by the intrusion upon the allegedly freely-celebrated contracts.<sup>435</sup>

The newspaper *Crítica* also supported the law. In its view, the Senate had been forced to pass the bill due to “popular demand”,<sup>436</sup> and the situation could be framed in terms of class struggle. *Crítica*’s initial reactions were a mix of skepticism about the law’s ability to remedy the situation and depiction of a surely exaggerated contrast between rich, opulent and somewhat parasitic owners and poor, dignified tenants:

“We bet that the law will not resolve anything. We bet that it will be made to be broken, and that a tramp will be invented, so that the tenant is annoyed and the capitalists [...] smile. We will soon see that the law is useless when the parties to the contract are one weak and the other strong; that is, a poor *pater familiae* [...] and a rich person who owns a house that [allows] to live like a prince [...]”<sup>437</sup>

Roughly painted, this was the social situation when the Supreme Court was called on to decide. The Court ruled on the issue of the constitutionality of the freezing of rents

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<sup>434</sup> Redondo, above n. 420, at 15. The italics are mine.

<sup>435</sup> *Id.* (depicting the owners, generally, as claiming that the free operation of the market, by means of the law of supply and demand, was the only way to solve the question).

<sup>436</sup> “Los alquileres. El Peludo no promulgó la ley ayer”, *Crítica*, September, 12, at 1 (also arguing that the law should have been passed two years earlier).

<sup>437</sup> “La ley de los alquileres”, *Crítica*, September, 22, at 1. Italics in the original.

on several occasions. The most surprising, perhaps, was its first decision, *Ercolano*,<sup>438</sup> when the justices admitted, by a three-to-one vote, the emergency rationale for the law, albeit in a very restricted fashion. The majority said that

“There are restrictions to property rights and to individual activities whose legitimacy cannot be discussed as a matter of principle, but only as to their extent. Such are the limitations aimed at ensuring the collective order, health, and morals; and there are also *other restrictions*, such as *those aiming at the protection of the economic interests* [of the community], which *cannot be accepted without a careful scrutiny*, for they could contravene the principles of economic liberty and individualism professed by our Constitution [...].”<sup>439</sup>

The justices argued that while in principle the power to set the price of a rental unit was proper of the owner, the law could intervene, exceptionally, when the object of the rent was imbued with an “intense public interest” and there was a situation of monopoly over the object. The majority thought that the extraordinary situation created by the shortage of housing erased the “common regulator of the market”, the concurrence, and determined that there was a “virtual monopoly” that allowed landlords to oppress the community by asking for prices that would not be possible but for the artificial lack of concurrence in the market. There was a market failure that had in fact suppressed freedom of contract. Such circumstances justified the State’s intervention on the market. Moreover, the restriction was temporary—which dispelled the suspicion of partiality—, it was not proved that the rents paid in January, 1920, were not reasonable at the time the law was enacted—which implied that there was not a confiscation of property—, and—a seemingly irrelevant detail that would later play a key role in reversing the trend— there was no written contract, so there was no question of whether vested rights had been violated. Thus, the law passed the “careful scrutiny” the majority had established as proper for such regulations.

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<sup>438</sup> CSJN, *Ercolano, Agustín v. Lanteri de Renshan, Julieta*, 136 Fallos 161 (1922).

<sup>439</sup> *Id.*, ¶3. The italics are mine.

*Ercolano*, for all it came to mean later as a first instance of a strong doctrine of economic emergency powers, was a rather cautious departure from *Hileret*. It did not open the door to unbridled state regulation of the economy, nor did it mean that the judiciary would step back and take a second seat in all constitutional economic rights. Rather, its language suggests that the justices were quite conscious of both the changes in society that demanded a re-conceptualization of the rhetoric of property and the perils of admitting the emergency rationale for peculiarly invasive restrictions upon property rights. Thus, they tried to walk a middle way but, as it happens, it was not as effective a move as they might have hoped. Time would push constitutional safeguards for property rights over the brink.

In any case, the decision was met with enthusiasm by *Crítica* and other supporters of the law. *Crítica*, in its characteristic combative style, thought the decision to be “a battle won by the large oppressed majority against the capital”<sup>440</sup> as well as “one of the most solid juridical pieces of the recent times”.<sup>441</sup> It exalted Justice Figueroa Alcorta’s figure, whose position in the issue was suspected to be contrary to the validity of the law, by highlighting his “solid legal background” and his “favorable disposition to march in accordance to the historical times, its necessities, and the aspirations of the masses”.<sup>442</sup> Interestingly, the newspaper was praising former President, and then Supreme Court justice, Figueroa Alcorta for favoring what the paper thought to be a dynamic interpretation of the law, driven by class-needs. In other words, the justice was praised for being politically conscious and ruling in accordance with such perceptions. This was, for *Crítica*, what being a remarkable jurist meant. As we will see shortly, this kind of

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<sup>440</sup> “El dictamen que declara constitucional la ley de alquileres”, *Crítica*, April, 29, 1922, at 1.

<sup>441</sup> *Id.*

<sup>442</sup> *Id.*

disregard for traditional legal factors in constitutional adjudication and their substitution for more openly political considerations was not something that all supporters of the emergency law appreciated. They would find out quite quickly that openly political considerations cut both ways and that with everything up-for-grabs at every juncture, it was far from clear that “the masses” were to be protected ultimately.

*El Pueblo* reported that the ruling caused “a great feeling of relief and satisfaction among the public”, specially when there had been speculations as to the likelihood of an adverse decision by the Court.<sup>443</sup> In the newspaper’s view, “the law was perfectly constitutional” and the majority of the people thought so.<sup>444</sup> Interestingly, *El Pueblo* elaborated both on the new contours of the conception of property that it was advancing and on the dangers of letting the “new spirit” that animated such redefinition break loose completely unrestrained:

“The right of property, so broad and so absolute in days gone by, to the extent, unconceivable today, of permitting the owner ‘to degrade and destroy’ his things, that right [...] can be subject, by virtue of *new concepts* that the circumstances and the pace of life have formed in the minds of healthy men, to *restrictions that upon closer inspection are no restrictions at all*. And they are not restrictions *because they do not alter the essence of the right* and, in this case of the rent law, have only a *temporary character* [...] It is a new spirit that escapes a little bit from narrow moulds, from a pigeonhole built some fifty years ago, from the rigidity of texts that are beginning to become moldy [...] *It should not be rejected without understanding it, not should it be encouraged without reining it conveniently*. Because it is a new spirit, a docile spirit, [that is] easy to mould and to guide too [...] without taking away a bit of its fertile creative force. *Let there be no fear, then*. The decision of the Supreme Court ends the discussion on an issue that has been debated very intensely during the last few months, in accordance with the opinion of the popular majority [...]”<sup>445</sup>

*El Pueblo* emphasized that the emergency law was constitutional because it did not alter the essence of the right and the measures taken were temporary. This rhetoric of

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<sup>443</sup> “La ley de alquileres. Reafirmación de su constitucionalidad”, *El Pueblo*, April, 30, at 2.

<sup>444</sup> *Id.*

<sup>445</sup> *Id.* The italics are mine.



temporariness and respect for the “essence” of the right would take a hold in the case law.

*La Época* reported that that the ruling was “of paramount importance”, awaited eagerly by the people, and that “it brought to an end an almost despairing anguish that was felt intensely throughout the country”.<sup>446</sup> *La Fronda*, which had been critical of the law, decided to move beyond the discussion of the constitutionality or unconstitutionality of the law, because “the Highest Court in the Republic has ruled for the former, and we are not allowed to cast doubt on the expertise or seriousness of the Court” and considered that, legally speaking, the constitutional validity could not be put in doubt any longer, any arguments to the contrary notwithstanding.<sup>447</sup>

*El Diario*, a persistent foe of the law, criticized the Court’s ruling for being “incomplete” and “late”.<sup>448</sup> The newspaper acutely noticed that the particulars of the case limited the holding: in *Ercolano* there had been no written contract, a fairly atypical case, and thus, the ruling could not be said to solve the pressing question wholly.<sup>449</sup> In a large majority of cases there were written contracts. The Court, somewhat disingenuously, preferred to pass on the issue, as the facts of the case did not present a written contract. *El Diario* was critical of such an attitude, hinting that the Court might come to decide the rest of the cases when the issue no longer mattered.<sup>450</sup> In any event, as *La Fronda* did, *El Diario* chose not to repeat its arguments against the validity of the law, accepting the legal

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<sup>446</sup> “La Suprema Corte Nacional declaró constitucional la ley de alquileres”, *La Época*, April 29, at 3 (also transcribing the long decision in its entirety).

<sup>447</sup> See “El problema de la vivienda”, *La Fronda*, April, 29, at 1.

<sup>448</sup> “Tardía e incompleta”, *El Diario*, April, 29, at 3.

<sup>449</sup> *Id.*

<sup>450</sup> *Id.*

force of the ruling but considering it wrongly decided, as the law could be recognized as legally-binding, for authority's sake, but it "would never be constitutional".<sup>451</sup>

As a matter of fact, the Court would not take long to rule on a case that did involve a written contract celebrated before the enactment of the emergency law. Less than four months after *Ercolano*, in what was perceived as an inconsistent step backwards from the previous decision, the justices ruled the emergency law unconstitutional. In *Horta*, the justices held that the doctrine of legislative supremacy, grounded upon the "supposed will of a majority of the people", could not be accommodated within a system whose essence consisted in the limitation of governmental powers and the supremacy of the Constitution.<sup>452</sup> When the parties had agreed upon a price and a term, there was a vested right that could not be taken by the legislature:

*"Be it much or little what is taken from the owner by action of the law, it is no longer possible to reconcile the law with Article 17 of the Constitution, which protects property against actions by private individuals as well as against actions by public authorities [...] The act of depriving the landlord of a portion of the price he has the right to demand, in accordance with the contract, to benefit the tenant, is as grave a violation of such guarantee as it would be to deprive the owner of a fraction of the leased property to be donated to the tenant [...]"*<sup>453</sup>

In addition to the argument of "conceptual severance",<sup>454</sup> the Court resorted to the alleged higher importance of respecting the sanctity of contracts and dispelling any fears of exceptional legislation:

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<sup>451</sup> *Id.*

<sup>452</sup> CSJN, *Horta, José v. Harguindeguy, Ernesto*, 136 Fallos 59 (1922), (majority opinion, ¶16).

<sup>453</sup> *Id.*, ¶10.

<sup>454</sup> Conceptual severance is commonly defined, following Margaret Jane Radin's work, as the idea according to which, once property is defined as "a bundle of sticks" (rights) as opposed to things, every stick in a property bundle itself counts as property. This thesis has important implications for takings, as the Argentine Supreme Court passage in n. 453 shows: if each stick is property, then removing a stick from someone's bundle must be a taking regardless of what other sticks remain in the person's bundle (if any). See, e.g., Leif Wenar, "The Concept of Property and the Takings Clause", 97 *Colum. L. Rev.* 1923, 1928 (1997).

“It is inconceivable, moreover, that the public order may demand [...] that contracts be altered without the consent of the parties, because it is easy to see that if there is anything that concerns a society based upon the recognition and respect for private property, and upon the strengthening of justice, it is the stability of economic rights; it is that contracts are faithfully executed; and it is, in short, that it is not possible to even entertain the fear that exceptional laws can be enacted and enforced [...]”<sup>455</sup>

Unsurprisingly, the decision was well-received by *El Diario*, and criticized by *Crítica* and *El Pueblo*. Other papers, such as *La Fronda*, covered the decision without taking sides explicitly.

*Crítica* advised “the owners *not to claim victory*” because due to its own arguments, the decision was not to have retroactive effects and it only reached the allegedly “very few cases” in which, at the time of the decision, written contracts made before the passing of the law were still in force.<sup>456</sup> However, the newspaper did not miss the opportunity to chastise the Court with its characteristic forceful style. In *Crítica’s* view, the Court took the chance to “sign hymns to the ‘inviolable, sacred, all-powerful, immune and sovereign property, essence and substance of every right and legislation’”; in its “efforts to safeguard the unlimited rights of the owners”, the justices ignored the emergency law and omitted to establish limits to the “omnipotence” of the owners, such as setting a cap to the profits any property can yield in a certain percentage of its tax valuation.<sup>457</sup> The ruling was deemed as “reactionary” and the paper wondered whether

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<sup>455</sup> 136 *Fallos* 59 (1922), (majority opinion, ¶11) (quoting John Marshall’s opinion in *Dartmouth College* immediately after).

<sup>456</sup> “La ley de alquileres en la Corte. La propiedad ‘inviolable y sagrada’”, *Crítica*, August, 22, at 1. The italics are mine.

<sup>457</sup> *Id.*

“[...] the Court, erected a champion of the inviolability of *a property that nobody is violating*, ignores that above the inviolability of property is the general good, the social tranquility, and thus, property itself [...]”<sup>458</sup>

*Crítica* argued that if the ruling were to have any effects, they would be disastrous, for it would leave the “pocket and welfare and tranquility of the many” to fall prey to the “insatiable jaws of the avarice of the ‘inviolable, intangible, immune...owners’”.<sup>459</sup> It also beat the Court for the zeal it showed when property was infringed, a zeal that—in the newspaper’s opinion—the justices had not displayed when other rights were at stake.<sup>460</sup>

*El Pueblo*, in turn, stated that the ruling was surprising. Quoting extensively from a lower court decision that had recently upheld the law as applied to written contracts, the paper attacked the majority of the Court for its seeming lack of consistency: Since the contract is not born out of the written paper, which only proves the existence of the agreement, it was imperative to admit that the law was either constitutional in all cases or unconstitutional in all cases.<sup>461</sup> Thus, the decision suffered “from a rather important lack of logic”.<sup>462</sup> Interestingly, the newspaper excludes from the criticism the lone dissenter in *Ercolano*, Justice Antonio Bermejo, who concurred in the judgment in *Horta* and whose coherency the paper praised. *El Pueblo* clearly dissented from Bermejo on what was the proper conception of constitutional property. It thought the justice’s views were “a bit outdated”, as had been proved by evidence “both in Argentina and in the rest of the

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<sup>458</sup> *Id.* The italics are mine.

<sup>459</sup> *Id.*

<sup>460</sup> *Id.*

<sup>461</sup> See “Cuando es inconstitucional la ley de alquileres. El fallo de la Corte Suprema. Una falta de lógica a simple vista”, *El Pueblo*, August, 23, at 2.

<sup>462</sup> *Id.*

world”, but nonetheless the newspaper found his opinion “more satisfactory than the majority’s, in which a lack of logic is apparent”.<sup>463</sup> The idea that the Court was supposed to apply the law in a principled way, rather than engage in politically-driven decision-making pervades the article. Bermejo, whatever the shortcomings of his legal views, was preferable to a majority that was willing to engage in complicated legal acrobatics to justify their varying preferred outcomes.

*El Diario* thought that the ruling “returns constitutional guarantees, hurt by the devastating action of the [...] presidency [...] their entire force”.<sup>464</sup> Despite its long and unwarranted delay, itself a cause of “severe moral and material disturbances”, the Court’s decision was very important because

“[...] it annulled [...] a law that is repugnant to the spirit of justice and to one of the basic principles of organic democracy. The right of property and the obligations of contracts have been spared the depredations to which the rent law subjected them; a baseless law [...] that knocked down secular winnings to the benefit of banal and transitory electoral interests and destroyed the foundations of the National Constitution in the struggle to win voters”<sup>465</sup>

According to *El Diario*, the arguments embraced in *Horta* had been first advanced by the press, “almost without exception”, when the law was debated in Congress and had been “repeated by the man in the street, bewildered by the fact that such respectable principles were trampled for those lowermost interests”.<sup>466</sup>

Three years later, in August of 1925, the Court would be faced with the issue of whether successive extensions of the emergency law were constitutionally-acceptable. In

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<sup>463</sup> *Id.*

<sup>464</sup> “La ley de alquileres. Repugna a la Constitución”, *El Diario*, August, 22.

<sup>465</sup> *Id.*

<sup>466</sup> *Id.*

*Mango*, all five justices ruled they were not.<sup>467</sup> They emphasized that *Ervolano* rested heavily on the transitory character of the measures, a character that had been progressively distorted by the extension of the law, to the point where landlords had been “deprived of the free disposal of the properties during a term...of four years” despite the fact that, in the case, the leases allowed the landlord to regain possession of the property after the first term had expired.<sup>468</sup> Moreover, an emergency regime, “tolerated in view of the time of extreme economic oppression faced by tenants due to the lack [...] of housing supply”, could not become permanent,<sup>469</sup> especially when there were clear signs that the worst part of the crisis was over, as a “steady increase in the supply of premises for living” could be noticed through a reading of the newspapers and a rise in the taxes over urban property pointed in the same direction.<sup>470</sup>

Unsurprisingly, *Crítica* attacked the ruling for being grounded “in the old and retrograde concept of private property” which created “an absurd privilege” and was out of sync with the “new social concept, dominant in the spirit of” the country’s modern institutions.<sup>471</sup> The decision was an instance, in its view, of “how one of the three branches of the Nation annuls the drafting and enactment of a law that is the People’s and for the People” in opposition to the view of the other two branches.<sup>472</sup> There are

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<sup>467</sup> CSJN, *Mango, Leonardo v. Traba, Ernesto*, 144 Fallos 220 (1925).

<sup>468</sup> *Id.*, ¶8.

<sup>469</sup> *Id.*, ¶10.

<sup>470</sup> *Id.*

<sup>471</sup> See “CRÍTICA provocó la definición de la Corte”, *Crítica*, August, 27, at 2 (quoting in part from Doctor Bornchill, the lawyer that had represented the defendant in *Mango* and as a part of the newspaper’s legal clinic).

<sup>472</sup> *Id.*

overtones of what we know today as the “countermajoritarian difficulty” in *Crítica*’s criticisms.<sup>473</sup> The newspaper insisted that a new adjudicative paradigm was in order; thus it was

“[...] very important to know whether our courts of justice interpret the laws in accordance with the social and humane content Parliament gives them. *The times when the cold and rigid application of legal rules prevailed are gone.* To reject, on behalf of the free exercise of property rights, laws aiming at protecting the masses while saving the constitutional anathema when the free trade of meat is restricted [...] because the restriction favors the interests of powerful landowners, is to interpret the Constitution with a class-spirit [...]”<sup>474</sup>

However, not all the supporters of the original emergency law were in complete disagreement with the justices, and even those who were opposed to the ruling seemed to have perceived that the idea of the “remarkable jurist” that *Crítica* had pushed forward when praising *Ercolano* had its limits. Politically, it was far from clear that allowing the Court to ground its decisions in what were considered as openly-political considerations would advance the cause of the worse-off (whatever this might mean).<sup>475</sup> A certain appreciation of the value of a clearer institutional division of labor between courts and legislatures, and of a degree of separation of law and politics began to re-emerge. The

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<sup>473</sup> See, e.g., “Hay que votar la prórroga...”, *Crítica*, August, 28, at 5 (arguing that the Court had ventured into a terrain that was beyond its proper function and that only Congress had a say in the matter); and “La prórroga de la ley de alquileres es imprescindible”, *Crítica*, August, 31, at 6 (arguing that Congress would have the final word on the issue).

<sup>474</sup> “Hay que votar la prórroga”, *Crítica*, August, 27, at 2. See also Ricardo Sidicaro, above n. 217, at 68 (arguing that restrictions on free trade of meat benefitted powerful local breeders).

<sup>475</sup> *Crítica* itself, showing once more the extremely partisan character of its interventions, seemed to back off from its previous position about what being a “remarkable jurist” meant. Echoing Representative De Tomasso, the newspaper criticized the Court for using “false arguments” based upon unwarranted factual assumptions about the actual situation in the rental market, arguments proper of a discussion in “Parliament”. See, e.g., “Hay que votar la prórroga”, *Crítica*, August, 27, at 2. See also “Hay que votar la prórroga”, *Crítica*, August, 29, at 4 (arguing that the disagreement of the Supreme Court with Congress would not be legal, but social instead, and that would make the ruling essentially illegitimate) and “Hay que votar la prórroga...”, *Crítica*, August, 28, at 5 (arguing that the Court had ventured into a terrain that was beyond its proper function and that only Congress had a say in the matter).

legitimacy of judicial decisions, to many people, was closely tied to these ideas.

Consistency was also perceived as a valuable judicial trait.

Representative De Tomasso, interviewed by *Crítica*, stated that:

“I believe strongly that the Court ruling is a *serious legal mistake*, because it is grounded, mainly, in *considerations that are not legal-judicial in nature* and that are, thus, improper in a court of strict law. This sort of considerations put the Court in a terrain that is beyond its constitutional and legal orbit, so much that when I read the decision this morning I thought that *it looked rather like a discourse by a legislator* in opposition to the extension of the law that is being debated. The Supreme Court is a body created to guard the constitutional provisions [...] *Its characteristic, much more than any other judicial body in our country, is to be a court of law. It already has enormous powers [...] three men (a majority over five) in each concrete case [...] annul the decision of the unanimity of the two Chambers in Congress, by proclaiming that a legislative text violates the Constitution.* For that reason, it is inadmissible that the Court wants to enlarge its powers by claiming for itself, as it has in the instant case, the power to evaluate the appropriateness or inappropriateness of the laws [...] *the Supreme Court says that it has ‘tolerated’ the emergency law and its second extension; that the situation [...] has changed, as demonstrated by the advertisements in the papers and the tax increases [...] and that it is no longer reasonable to ‘tolerate’ such an abnormal regime. Such language is improper for the Court; it is the language of a political body, not of a court of law [...] the judges have no role but to apply the law and, if any interested party claims that the law violates a constitutional principle, the Supreme Court must only examine and say, with a legal and juridical criterion and by examining the text and the spirit of the law and of the constitutional text, whether the law conforms with, or is in opposition to, the constitution. If there was a constitutional violation in the Rent Law, it existed from the very first moment, and I cannot understand this puzzle that arises from the Court’s argumentation: the Rent law (that fixed prices) was constitutional, for transitory reasons, and the extensions are not [...]*”<sup>476</sup>

In a certain sense, De Tomasso, a reformer, was demanding that the Court be more formalist, so to speak. If three men had the power to overrule the decisions of the people’s representatives, such power could only be exercised legitimately if it was constrained by the text of the Constitution and the established rules and methods of the legal profession. De Tomasso was chastising the Court not (only) for ruling against the law, but for the reasons it used to do so. As it had been the case before with *Elortondo*, in 1888, opponents of particular decisions of the Court were prepared to accept them as

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<sup>476</sup> “Es un grave error, dice De Tomasso. Lenguaje político”, *Crítica*, August, 27, at 2. The italics are mine. See also “La situación es la misma, dice Bard”, *Crítica*, August, 27, at 2 (quoting Mr. Bard, in the same sense).



legitimate as long as they were the product of legal, as opposed to political, reasoning, and the Court could be perceived as an impartial applicator of laws.<sup>477</sup>

Representative Bas, another original supporter of the emergency law, thought that the decision was “perfectly logical” and grounded in solid arguments.<sup>478</sup> Recalling his own intervention in Congress, Bas told *Crítica* that he had warned his fellow congressmen that they should worry about the permanent solution of the problem, that was, increasing the supply of housing, and that the law could only be temporary in character, for otherwise it would imply

“[...] the establishment of a regime of arbitrariness, by granting Congress the power to fix by itself the prices of all things, thus ignoring indisputably categorical prescriptions of our fundamental law [...] there would be no court that would not rule [the law] unconstitutional [...] the day that Congress implant such policy of fixing by itself the value of things, without any rule or criterion whatsoever, there will be nobody who dares to invest their money or savings in buildings [...]”<sup>479</sup>

The passage of time and the “normalization” of the emergency were also raising alarm. *El Pueblo*, a staunch supporter of the original emergency law, thought that it was high time to resolve the issue definitely: “what was originally an emergency law is becoming, as a matter of fact, a permanent situation”, a situation that was always disturbing because of the uncertainty it created among owners and tenants.<sup>480</sup> *La Frontera*

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<sup>477</sup> See above n. 291-294 and accompanying text.

<sup>478</sup> “Es lógico el fallo, nos dice el Dr. Bas”, *Crítica*, August, 27, at 2.

<sup>479</sup> *Id.*

<sup>480</sup> The newspaper was all for State interventionism, though: it argued that the permanent solution should come by establishing the fair price of leases, which should bear an appropriate relation with the land tax paid by each property. See “La ley de alquileres”, *El Pueblo*, August, 26, at 3.

thought that the only criticism that could be leveled at the Court was that it had taken so long to hand down “the decisive and definitive ruling”.<sup>481</sup>

*La Prensa* published a lengthy summary of the decision and emphasized that the passage of time<sup>482</sup> and the change of the circumstances deprived the emergency law of the rationale that had justified it in the first place:

“As the extensions of the emergency law followed one another, the *arbitrariness inherent in that procedure* has increased, because the *public order reasons that originally justified the suspension of the right of property* as regards the right to dispose of houses in accordance with the civil code, progressively disappeared”<sup>483</sup>

The newspaper thought that the emergency law was a sort of “legal violence” exerted over the owners that would be self-defeating, as it created incentives both for the owners to find legal loopholes to evict their tenants and for general increases in the rental prices once the emergency regime was over.<sup>484</sup> The partial suspension of the constitutional guarantee of property “becomes its negation, when it loses its character as an exceptional measure demanded by the public order and turns into the routine of renewing leases by the will of Congress”.<sup>485</sup>

*El Diario* stated that the Court’s ruling rested on “incontrovertible reasons”.<sup>486</sup>

The law had been enacted “under exceptional circumstances and catered for the public

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<sup>481</sup> “La Corte y los alquileres”, *La Frontera*, August, 31, at 1.

<sup>482</sup> “La Suprema Corte declaró que la prórroga de la ley de alquileres es contraria a la Constitución y afecta el dominio”, *La Prensa*, August, 27, at 1, 15.

<sup>483</sup> “La prórroga de los alquileres”, *La Prensa*, August, 28, at 9. The italics are mine.

<sup>484</sup> *Id.* See also “Los perjuicios de la ley de alquileres”, *El Diario*, August, 25, at 3 (reporting the large number of houses on offer for rent and the high prices asked for as a consequence of the emergency law) and “¡Hay que votar la prórroga!”, *Crítica*, August, 28, at 5 (reporting a large number of houses on offer for rent and the high prices asked for).

<sup>485</sup> “La prórroga de los alquileres”, *La Prensa*, August, 28, at 9.

<sup>486</sup> “La ley de alquileres”, *El Diario*, August, 28, at 3.

interests [that were] affected by factors rightly considered as an emergency”.<sup>487</sup> Those reasons were no more. The law had always been a transitory measure and the interests of the owners, “as respectable” as those of the tenants, were not consulted at all by the successive extensions of law. To the contrary, taxes on property had been raised and a new extension would be clearly unfair.<sup>488</sup>

The waters were clearly divided. The views on the constitutionality of regulating property in what could be considered relatively unheard-of ways were starkly different. But which of these opposing views were prevalent? Were *Crítica* and *El Pueblo* reflecting the view of a majority of the people? Or, contrarily, did *La Prensa*, *El Diario* and others pro-property papers have the more accurate reflection of such opinions? What did it mean, in the context, that property was constitutionally inviolable?

The answer to these questions may have not been immediately apparent to the Supreme Court. The justices embarked on a jurisprudential zigzagging that may have reflected more the divisive nature of the issue and the undeniable importance of the matters at stake than their deep juridical conviction about what the Constitution meant. In a way, the Court may have been doing what Robert Burt would suggest them to do: if it was not possible to leave every disputant equally satisfied, then it may have been constitutionally commendable that all were left similarly unhappy.<sup>489</sup> The justices seem to have navigated the rough waters of the housing crisis by doing some sort of conflict management, leaving open to both parties the possibility of prevailing in an on-going

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<sup>487</sup> *Id.*

<sup>488</sup> “La ley de alquileres”, *El Diario*, August, 28, at 3. Interestingly, the newspaper did not seem to consider that some of the justices’ arguments, dealing with the allegedly unfair consequences of the successive extensions of the law, were beyond the realm of legal argumentation.

<sup>489</sup> See Robert A. Burt, above n. 64, at 368.

struggle that clearly transcended courts. The process would re-shape the meaning of constitutionally-protected property.

But going back to the popularity of the different views on constitutional property, if sheer numbers say anything on this matter, *La Prensa* was the newspaper with the largest daily print run by far, with an average of 230,000 copies, followed by *La Nación*, with some 188,835 daily copies.<sup>490</sup> *Crítica* was quickly positioning itself in a third place, with 166,385 daily copies.<sup>491</sup> *El Diario* and *El Pueblo*, whose positions were, respectively, against and in favor of the emergency law, seemed to have played a relatively minor role in terms of circulation, at least when compared to *La Prensa*, *La Nación*, and *Crítica*.<sup>492</sup> In any case, it seems clear that a substantial part of the readership of the times chose to read papers that considered that property was being treated in constitutionally-problematic ways.

But what was the real disagreement between these groups? Is there any common ground between them, as to what constitutional property meant? Let us see.

*El Diario*, perhaps the staunchest supporter of owners, explicitly stated that it had “fought the abuses committed by owners”, abuses that sometimes reached “censurable extremes”.<sup>493</sup> It even admitted the initial justification of a temporary emergency measure

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<sup>490</sup> See Sylvia Saitta, *REGUEROS DE TINTA* 73 (Buenos Aires, Sudamericana, 1998) (quoting numbers for September, 1924).

<sup>491</sup> *Id.*

<sup>492</sup> According to the *Guía Periodística Argentina*, in 1913 —10 years before the time of the facts analyzed in the main text— *El Diario* had the fourth largest daily print run, with some 60,000 copies, while *El Pueblo* came at a distant seventh place, with some 18,000 copies per day. By way of reference, at the time *La Prensa* had a print run of 160,000 copies. Also, in 1920, the year of *El Diario*’s thirty-nine anniversary, *Crítica* thought it to be part of the old tradition of “noble and chivalrous journalism belonging to the old Buenos Aires”. See Sylvia Saitta, above n. 490, at 33 (reproducing a table from *Guía Periodística Argentina* and quoting *Crítica*).

<sup>493</sup> See “La ley de alquileres ante la Suprema Corte. Esperando la promulgación...”, *El Diario*, September, 16, 1921, at 1.

that could, for a short time, privilege the interests of one of the parties to the problem.<sup>494</sup> The paper was worried by what it thought to be unfair distributive effects of the law, which made “small owners” tremble and tenants rejoice.<sup>495</sup> And it thought that a bright line could be drawn between owners who, either directly or through a sub-lessor, ran tenement houses, and the “true owners”,<sup>496</sup> who —presumably— were not prone to commit abuses.<sup>497</sup> The paper was not defending an absolute conception of property.

*El Pueblo*, in turn, defended the constitutionality of the emergency law by emphasizing that the restrictions imposed on property, being *temporary* as they were and preserving the “essence” of the right, were not really restrictions.<sup>498</sup> The “new spirit” of the times, which mandated a new conception of property, should be neither rejected without being understood nor encouraged with being conveniently restrained.<sup>499</sup> A middle ground seemed to be needed.

Lay supporters of the law may have framed the issue as one in which the owners were not really deprived of anything but extra profits that could not be regarded as a loss. Thus, in a poll conducted by *Crítica*, one tenant by the name of Andrés Ferreyra was quoted as saying “no owner is going to be *poorer or less rich* because of the *prudential*

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<sup>494</sup> See “Los perjuicios de la ley de alquileres”, *El Diario*, August, 25, 1925, at 3 (arguing that the emergency law, as any laws that give excessive weight to the interests of one of the parties to the problem, could only be accepted temporarily, while the right way to tackle the issue was studied).

<sup>495</sup> See “La ley electoral de alquileres. Agitación pública”, *El Diario*, September, 23, 1921, at 1.

<sup>496</sup> See “La ley electoral de alquileres. Reunión esta tarde...”, *El Diario*, September, 24, at 1 (arguing that the *Corporación de Propietarios y Subarrendadores* was a “special guild” which had nothing to do with the “true” owners).

<sup>497</sup> *Id.* (arguing that there were “plenty of tenants” who thought their rents to be acceptable and that in many cases the raises had been modest and acceptable).

<sup>498</sup> See “La ley de alquileres. Reafirmación de su constitucionalidad”, *El Pueblo*, April, 30, 1922, at 2.

<sup>499</sup> *Id.*

reduction of his profits”.<sup>500</sup> But wait a minute. The emergency law *did* make landlords poorer, didn’t it? After all, not only did it suspend evictions, but it also cut off rent prices down to the level they had in January 1920, some 20 months before its passing. That’s true. But one should not lose sight of one important element: the actual value of money. While 1920 showed a level of inflation of 17,1 percent,<sup>501</sup> the two subsequent years were clearly deflationary. In 1921 the general level of prices fell by a 11,1 percent, while in 1922 it did so at a rate of 15,8 percent.<sup>502</sup> Thus, rent prices agreed upon in late 1919 or early 1920 may well have retained their prior purchasing power,<sup>503</sup> as the Court had suggested in *Ercolano*.<sup>504</sup>

In any case, the idea that deprivations of gains are permissible, while inflictions of actual losses are more problematic is present in Ferreyra’s testimony<sup>505</sup> and, I will hold

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<sup>500</sup> See “La pregunta del día: ¿Debe o no ser prorrogada la ley de alquileres?”, *Crítica*, August, 29, 1925, at 6. The italics are mine.

<sup>501</sup> See Orlando J. Ferreres (editor), above n. 307, at 564.

<sup>502</sup> *Id.*

<sup>503</sup> See Roberto Cortés Conde, above n. 396, at 72 (arguing that, “at the beginning of the 1920s, although the peso devalued against other foreign currencies, its purchasing power in terms of goods did not diminish in equal measure, because since the postwar period, prices of manufactured goods and especially those of foodstuff had decreased”). One could certainly argue that the emergency law itself, with its compulsory reduction of rent prices, had an impact on the deflationary statistics used in the main text. While this is true, it is hard to argue that the whole gap between the inflation in 1920 and the deflation in 1921 and 1922 was brought about by a reduction in rent prices.

<sup>504</sup> 136 *Fallos* 161 (1922), (majority opinion, ¶12) (arguing that “it had not been proved [...] that the rent payable in January 1920 [...] was not reasonable at the time of enactment of the law”).

<sup>505</sup> Of course, the testimony’s reference to the owners not becoming “less rich” fits uneasily with the idea that deprivations of gains are impermissible, because they lead people to be less rich *than they could otherwise be*. But the testimony may also be read in a different fashion: as pointing out that the measures were permissible because they did not make the owners less rich *than they already were*. This reading, which seems to be the more plausible one given the use of “poorer” as a partial synonym of “less rich”, makes the fit much tighter.

later, is a central and more-or-less stable part of the popular conception of constitutional property, one that has survived the mood swings of the twentieth century.<sup>506</sup>

It is clear, then, that the old vision, embedded in the Civil Code's rhetoric, of property as an almost absolute right whose occasional abusive exercises were to be tolerated as the price to avoid the dangers of an overzealous regulatory state,<sup>507</sup> had fallen out of favor, if it ever existed in such an extreme form at all. But it was also clear that, while state interventionism was on the rise,<sup>508</sup> the people were not quite ready to accept unbounded governmental authority over private property. It had become apparent that the idea of economic emergency was a powerful tool for realizing potentially unjustified transfers of wealth, transfers that might be way beyond any rationales supporting the need for governmental action in the first place.

Recent empirical research shows that "ordinary adults are acutely sensitive to the moral dimensions of breach of contract, especially the perceived intention of the breaching party".<sup>509</sup> The risk of abuses was perceived clearly, and it is illustrated quite nicely with examples from both sides of the emergency rent law divide.

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<sup>506</sup> It is also unsurprising, given that people seem to have a different psychological perception of losses vis-à-vis gains. I will use this evidence in the second part of the dissertation to try to explain the Supreme Court's otherwise hardly explainable caselaw.

<sup>507</sup> Vélez Sársfield, the author of the 1869 Civil Code, wrote that while the laws did not approve of the abusive exercises of property rights, they were "the unavoidable consequence of the absolute right of property [...] we must recognize that to be the absolute property, confers the right to destroy the thing. *Any preventive restrictions would pose more dangers than the advantages it might offer.* If the government were to be the judge of the abuses of property, said a philosopher, it would soon become the judge of the uses, and *any true idea of property and liberty would be lost*", note to article 2513, Civil Code. The italics are mine.

<sup>508</sup> See, e.g., "Hay que votar la prórroga...", *Crítica*, September, 1, 1925, at 4 (transcribing a project for a municipal ordinance, filed by the Communist Party, according to which the State would set maximum rent prices and individuals who owned houses in which the number of rooms was higher than the number of persons who inhabited the house would be forced to rent such extra rooms at the State-fixed prices). See also "La ley de alquileres", *El Pueblo*, August, 26, at 3 (arguing that the "real price" of houses had to be "secured in the law", thus preserving it from the "speculative capital").

<sup>509</sup> See, e.g., John Mikhail, "Moral Grammar and Human Rights: Some Reflections on Cognitive Science and Enlightenment Rationalism", in Ryan Goodman, Derek Jinks & Andrew Woods (editors), *UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS* (Oxford University Press,

*La Prensa* argued in 1925 that there was no true “claim for protection anymore” and that the extension of the emergency law was nothing but “the greedy desire of the privileged”, a group that was becoming smaller by the day, as the natural rotation of tenants plus the incentives for owners —created by the emergency regulation— to get the restitution of their houses by any legal means suggested.<sup>510</sup> The informal polls carried out by *Crítica* show how the intention to take advantage of the law, well beyond its purported rationale, was present in many tenants.<sup>511</sup> And *Caras y Caretas*’ cartoons on the topic point in the same direction.<sup>512</sup>

Thus, the new, softened but still-appreciated, conception of property opened the door cautiously to regulation that was essentially temporary and that did not affect the object of property —or the capital— in itself, but allowed for a reduction on property’s profit-making potential. In truly dire situations, patience and a diminution of profits could be demanded from owners. But they could not be subject to inflictions of actual losses, considered against a baseline consisting of what they previously had.

Two questions pop up at this point. First, what were the main redistributive effects of the housing crisis and the emergency law? Second, what were the effects of the jurisprudential turn towards a broad conception of the regulatory powers of the State in the people’s view of the Court? Let us see.

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forthcoming 2012) (draft available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1924915](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1924915); last visited November, 7, 2011).

<sup>510</sup> “La prórroga de los alquileres”, *La Prensa*, August, 28, at 9.

<sup>511</sup> See above n. 423.

<sup>512</sup> See Redondo, above n. 420, at 15 (depicting a tenant with two multi-storey buildings under his arms).



Some commentators have argued that the lack of the most elemental economic analysis in the *Ercolano* decision made the whole plan backfire,<sup>513</sup> generating one of the well-known “paradoxes of the regulatory state”.<sup>514</sup> Some evidence points in that direction. Right after the enactment of the emergency laws many building projects were halted<sup>515</sup> and, as a consequence, the demand for masons’ work declined noticeably.<sup>516</sup> The potentially paradoxical effects of the regulation were anticipated by people in the building industry: the most prejudiced by the law would not be the owners, but the “tenants of limited economic resources; the workers, who will not find it so easy to command today’s high wages”, among others.<sup>517</sup> And in 1925, after successive extensions of the emergency regime, rent prices had not decreased, despite the fact that large numbers of homes were unrented and vacant.<sup>518</sup> In *La Fronda*’s view whatever benefits the law was

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<sup>513</sup> See Eduardo Stordeur (Jr.), “Eficiencia, Poder de Policía y Decisiones de la Corte Suprema de Justicia de la Nación”, in Martin Krause (editor), *ANÁLISIS ECONÓMICO DEL DERECHO: APLICACIÓN A FALLOS JUDICIALES* 115-189 (Buenos Aires, Editorial La Ley, 2006) (arguing that the Court, by upholding the capped rent prices below the market prices, could only achieve the opposite effect to the one pursued by the legislation, that is, increasing the supply and lowering the prices). *Contra* Stordeur (Jr.) one could argue that the law did not aim at lowering the prices by increasing the supply. It did so by legislative fiat. Whether that’s a feasible, effective, means, is a different question.

<sup>514</sup> See, e.g., Cass Sunstein, “Paradoxes of the Regulatory State”, 57 *U. Chi. L. Rev.* 407, 422 (1990) (defining “paradoxes of the regulatory state” as self-defeating regulatory strategies and highlighting rent control laws as usual examples of such paradoxes).

<sup>515</sup> See, e.g., “Primeros efectos de la ley de alquileres”, *El Diario*, September, 17, 1921, at 1 (reporting that a building company, *Compañía Sud América de Edificación*, had resolved to stop a project involving the building of 22 “high” and “low” houses, and that one important entrepreneur in the building business thought the emergency law to be equivalent to an order to stop building); “La ley electoral de alquileres. Sus funestas consecuencias...”, *El Diario*, October, 17, 1921, at 3 (reporting the withdrawal of a large number of building permit requests, as reported by architects, owners, and builders, and the indefinite suspension of the building of a whole block of two-and-three-storey houses by the *Compañía Edificadora de Buenos Aires*).

<sup>516</sup> See “La edificación y la ley ‘electoral’ de alquileres. Constatando hechos”, *El Diario*, October, 26, 1921, at 1 (reporting the increasing number of masons roaming near building sites and offering their work).

<sup>517</sup> See “La nueva ley de alquileres. Sus efectos prácticos...”, *El Diario*, November, 5, 1921, at 3 (interviewing Rodolfo Peracca, a real estate developer).

<sup>518</sup> See, e.g., “¿Hay que votar la prórroga!”, *Crítica*, August, 28, 1925, at 5 (arguing that in spite of the large number of unrented houses in the market, the rent prices did not fall); “Hay que votar la prórroga”,

expected to bring about, in fact they had been “only minimal and uncommon”, and it could not have been otherwise.<sup>519</sup>

So couldn't one just be content with the predictable fact that the emergency regime had not achieved its objectives of protecting the weak and poor? There could be more to the facts than meets the eye. What began as a measure to attack an undeniable problem, turned into a golden cage, which was ever harder to leave. The longer the regime was in force, the less incentives to build new houses and expand the supply there were. So prices were unsurprisingly high. But, as owners eventually managed to recover their property, less and less people were benefitting from the law. Were these ever fewer beneficiaries in need of the State's protection? It is far from clear.

Real wages increased continually from 1918 until 1928.<sup>520</sup> Taxes on property also saw significant rises.<sup>521</sup> Many small owners who had borrowed money using the rental housing units as collateral faced difficulties to make the payments, once the emergency

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*Crítica*, September, 1, 1925, at 4 (interviewing a communist party member who emphasizes that there are many vacant homes and that the prices were “very high”).

<sup>519</sup> “El problema de la vivienda”, *La Fronda*, April, 29, 1922, at 1.

<sup>520</sup> See Roberto Cortés Conde above n. 396, at 73-74 (showing index figures and explaining that “there was a significant increase in real wages in Argentina in the 1920s”, due both to wages increasing more than the cost of living between 1918-1920 and the cost of living decreasing from 1920 on). See also “La prórroga de los alquileres”, *La Prensa*, August, 28, 1925, at 9 (arguing that Congress had raised public employees' salaries, and that the general level of salaries had risen as a consequence of the appreciation of the national currency).

<sup>521</sup> See, e.g., “Hay que votar la prórroga”, *Crítica*, August, 27, 1925, at 2 (criticizing the Court's ruling in *Mango* because of its assumption that normalcy had returned and that rent prices were to fall and arguing, instead, that the ruling almost announces new rises, based upon the new taxes on property); “La prórroga de los alquileres”, *La Prensa*, August, 28, 1925, at 9 (arguing that owners were subject to increased taxes); “La ley ‘electoral’ de alquileres [...] La renta de la propiedad y las hipotecas”, *El Diario*, October, 8, 1922, at 11 (informing that municipal taxes on real property had increased by 70 percent that year and that the national services of sewage and water supply —also due by virtue of owning real property— had seen rises of between 45 and 60 percent); “La ley ‘electoral’ de alquileres [...] Algunos datos interesantes”, *El Diario*, October, 18, 1921, at 1 (mentioning the new fiscal valuation of real property that would nearly double the property tax).

law had cut down their profitability.<sup>522</sup> Under the light of such evidence, it is possible that by 1925 the emergency regime was redistributing wealth from owners under increasing fiscal pressure to tenants with a favorable economic situation, without attacking the causes of the housing shortage problem. The use of the economic emergency doctrine as a cloak for distributive struggles was ready to take off, as the “legal violence exerted over [...] owners” became “irritating” and “institutionally harmful”.<sup>523</sup>

However, for all the lack of economic soundness in the emergency scheme, an apologist of the Court could well invoke the institutional division of labor to argue that it was not for the Court to see that the emergency law was economically-sound, and that such a task fell squarely on Congress. Whatever the merits of this argument, the Court would prominently fail in enforcing *legal*, not economic, rules. Specifically, its own rules announced in *Mango*, and supported by the majority of the population: restrictions on property were to be temporary and could not linger on forever. Different emergency regimes would come to regulate leases, of both urban and rural properties, for some forty years more.<sup>524</sup> Emergency regimes of different sorts would be enacted to deal with new exigencies. Thus, the Court would depart slowly and somewhat surreptitiously from the core, more stable, aspects of the popular understanding of constitutional property. This would later have an impact on the erosion of its sociological legitimacy. But let us not fast-forward. First, we need to analyze 1930’s mortgage crisis, an important step for the Court and the anteroom for the advent of the “social function” of property, through the

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<sup>522</sup> See “La ley ‘electoral’ de alquileres [...] Algunos datos interesantes”, *El Diario*, October, 18, 1921, at 1 (explaining the situation of small owners who had taken loans on the houses on the basis of a profitability some 30 percent higher than the one set by the emergency law).

<sup>523</sup> See “La prórroga de los alquileres”, *La Prensa*, August, 28, 1925, at 9.

<sup>524</sup> See, e.g., 264 *Fallos* 344, 348 (1966), (Boffi Boggero, J., dissenting, §11 and §13) (summarizing the emergency regime for leases of both urban and rural property since 1943 and emphasizing that it had lasted for more than 22 years).

Peronist Constitution of 1949. A few words about the world context are in order to better understand Argentina's mortgage crisis.

The 1930s saw the world immersed in the most profound and long-lasting recession of modern times. While there are disputes as to what the causes of the Great Depression were,<sup>525</sup> and as to when and where it began,<sup>526</sup> its effects in the U.S. and in many countries of the world were heavily felt throughout the 1930s. The Great Depression is an extremely complex historic event, which can be divided in different phases for each country, with a multiplicity of causes at play in each of them. It is beyond the scope of this work to explore such a vast field of economic history. For my present purposes it will be enough to provide a brief description of the situation in the U.S. and to draw some parallelisms with Argentina.<sup>527</sup>

Despite the scholarly debate, it is now believed that the stock-market crash cannot be blamed exclusively for the depression.<sup>528</sup> Still, the crash of 1929 severely affected the value of assets generally, as demand for them plummeted.<sup>529</sup> By the summer of 1931, the United States was in the grip of a severe recession. When in 1931 the Germans and the British went out of the gold standard, investors figured that the dollar

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<sup>525</sup> See, generally, Peter Temin, "The Great Depression", *NBER Historical Working Paper No. 62* (1994) (available at <http://www.nber.org/papers/h0062.pdf>; last visited 12/18/2013) (discussing several different factors as causes of the Great Depression in the United States).

<sup>526</sup> See also Roberto Cortés Conde above n. 396, at 78 ("There is no real consensus regarding when and where the financial crisis began. For some, it is the moment when the New York Stock Exchange crashed [...] Others point to the bankruptcy of Credit Anstaldt in Austria [...] According to Sauvy, the crisis began in France, yet Kindleberger asserts the origin of the crisis can be found in the agricultural depression of the mid-1920s").

<sup>527</sup> I base my extremely compressed account of the Great Depression in the United States in Peter Temin's work. See, generally, Peter Temin, above n. 525.

<sup>528</sup> See *Id.*, at 6 ("Time has not been kind to the school of thought that blames the Depression on the stock-market crash").

<sup>529</sup> *Id.*, at 14.

would be devaluated shortly and rushed to sell them. The Federal Reserve reacted rising interest rates sharply, which further restricted credit and consumption. According to Peter Temin, the Federal Reserve's commitment to preserving the value of the dollar — and the gold standard— at any rate played a decisive role in turning the already grave recession into the Great Depression.<sup>530</sup> Contractionary monetary policy fueled depression and hindered recovery. The rest of the decade saw partial recoveries and renewed downfalls, until the trend seemed to stabilize in a positive direction by the time the World War II unleashed.<sup>531</sup>

Gerardo Della Paolera and Alan Taylor have examined Argentina's performance during the Great Depression very carefully. In their view, there are some remarkable differences when compared to the United States:

“The Great Depression began in Argentina in the late 1920s, even before the traditional date for the onset of the Depression in the core, the Wall Street crash of 1929. Like many countries of the periphery, Argentina was exposed to the commodity lottery [...] this exposure led to macroeconomic fortunes collapsing as the terms of trade worsened through the 1920s. By December 1929, the balance of payments crisis was severe, and the exchange rate was allowed to float [...] Recovery began in 1931, as output grew for the first time in several years, and by 1934-35, output had regained its 1929 level [...] From 1929 to 1932, Argentina imported the severe deflationary pressures in the international economy. However, it is astonishing is that the Argentine Great Depression was so mild and short-lived by international standards”<sup>532</sup>

According to these scholars, the key to Argentina's relative success in dodging the worst effects of the Great Depression was the decision to part ways with the United

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<sup>530</sup> *Id.*, at 17.

<sup>531</sup> *Id.*, at 20-45.

<sup>532</sup> Gerardo Della Paolera & Alan M. Taylor, “Steering through the Great Depression: Institutions, Expectations, and the Change of Macroeconomic Regime”, in Gerardo Della Paolera & Alan M. Taylor (editors), *STRAINING AT THE ANCHOR: THE ARGENTINE CURRENCY BOARD AND THE SEARCH FOR MACROECONOMIC STABILITY, 1880-1935* 188-190 (Chicago, The University of Chicago Press, 2001).

States and other core countries and leave the monetary orthodoxy behind —at least, partially. Argentina abandoned the gold standard early on, and this helped protect the country from deflationary pressures. The destruction of deflationary expectations, through the permanent lowering of previously high real interest rates, was the recipe to overcome the crisis.<sup>533</sup> This is something that must be born in mind when assessing the caselaw on the 1930's economic emergency measures. We can move now to reconstructing constitutional property conceptions in this era.

Property ownership was fairly extended in the Argentina of the 1920s and 1930s. Many owners had resorted to credit, using their real estate property of collateral for the loans. Some loans were destined to different productive activities, mainly agricultural. When the world crisis hit the country, many debtors could not afford their debt payments anymore, and an ever-increasing number of foreclosures took place. Congress enacted temporary suspensions of the foreclosures procedures, and debated more substantial measures to tackle the problem of the owners who were at risk of losing their property. The situation, in many respects, was similar to the one that gave rise to the Minnesota moratorium law that prompted the *Blaisdell* decision of the U.S. Supreme Court.

Once again, property rights were in the center of public debate. This time, however, they were on both sides of the dispute. While in the 1920's housing crisis property rights were claimed only by landlords, this time the issue was further complicated by the fact that not only creditors had property rights at stake (the right to be paid in accordance to the contractual agreement) but, in a different but yet equally direct way, the property of many arguably innocent debtors was at stake. There was also the risk of a collective action problem, where generalized foreclosures could lead to a

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<sup>533</sup> *Id.*, at 189. Notice that Della Paolera's and Taylor's position is consistent with the theoretical bases of Temin's account of the Great Depression in the United States.

(further) dramatic fall in the prices of houses and the ensuing loss of property for both creditors and debtors. Congress would ultimately decide, against strong opposition from the Executive Branch, to enact Law #11,741, establishing —among other measures— a three-year moratorium on mortgage-backed loans, with a reduction of interests to a maximum rate of 6% annually.<sup>534</sup> It also passed a similar special regime for debtors of the *Banco Hipotecario* (the Mortgages' Bank), a state-owned credit institution, which reduced the financial cost of the debt from 8 to 6% per year.

It is interesting to analyze the public debate around these laws, in order to appreciate how the concept of property, as well as the very idea of what justified state intervention was changing, in tune with developments in the U.S. Interventionism was, first, no longer limited to emergency reasons. The discourse shows that it had arrived to stay.<sup>535</sup> Second, it was not circumscribed to the alleged the protection of the weak and vulnerable. It could be used openly for the protection of certain owners.<sup>536</sup> Still, both sides of the debate claimed to be arguing for measures respectful of property rights and the Constitution. Let us see how this conception of property took shape.

It was a fairly widespread idea that owners who were facing trouble in paying their debts were suffering from a very special economic context. The economy made most of them unable to pay in a timely manner.<sup>537</sup> Thus, it was not to be expected that

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<sup>534</sup> See Law #11,741 (available at <http://www.infoleg.gob.ar/infolegInternet/verNorma.do;jsessionid=020DBFDD0ED55117C9DF11CA5D39A80B?id=42965>; last visited 04/01/2013).

<sup>535</sup> See, e.g., “La Cámara de Senadores inició la consideración de los despachos sobre moratoria hipotecaria”, *La Frontera*, September, 13, at 3 (quoting Sánchez Sorondo, hinting that the crisis was the basis for a “new world order, created upon the ruins of the liberal world economy”).

<sup>536</sup> *Id.* (quoting Sánchez Sorondo, admitting that the “defended” rural property owners as well as rural workers).

<sup>537</sup> See exposition of Minister Federico Pinedo before the Senate, arguing that the Senate’s bill aimed at the “laudable goals” of bringing relief to argentine producer and ending the situation of injustice that, “due to nobody’s willingness”, is done to one part of the population in “La Cámara de Senadores inició la

official credit institutions did not contribute to the relief of the existing situation and to the better development of the “industrious peoples of the country, who were hampered in fulfilling their commitments”.<sup>538</sup> The reduction of interests for the debtors of the *Banco Hipotecario*, the same newspaper argued, would “be received with delight by *the millions of owners* who have operated with the institution”.<sup>539</sup>

Senator Sánchez Sorondo was one of the firmest supporters of the moratorium regime that was eventually enacted. He argued that it was “necessary to tackle the issue thoroughly, [and] issue emergency laws, regardless of what has been agreed [upon by the parties] and what has been legislated before” and posed the question in the following, dilemmatic, terms: “either we keep the legal structure and perish, or we reform it and try to save ourselves”.<sup>540</sup> In view, the crisis was so deep and pervasive that it was a true public calamity for which “the remedy is not to be found within the existing legal order; it is not to be found in the fulfillment of obligations; it is not to be found in the respect of contracts”, all of which was nothing but “legal scruples”.<sup>541</sup> As far as the substance of the measures is concerned, he argued that the “happy capitalist” was the only one who wouldn’t have suffered losses in a crisis that imposed large losses among the

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consideración de los despachos sobre moratoria”, *La Fronda*, September, 13, 1933 at 3 (quoting then Minister of Finance Federico Pinedo). See also “Una ley oportuna”, *La Fronda*, September, 26, at 1 (arguing that the crisis had put many debtors in the impossibility to repay their mortgages),

<sup>538</sup> “Se disminuirá la tasa hipotecaria”, *Crítica*, September, 16, 1933, at 11 (praising the bill proposed by the Executive branch).

<sup>539</sup> *Id.* The italics are mine.

<sup>540</sup> See, e.g., “Resolvió ayer el Senado postergar hasta el martes la consideración del proyecto sobre moratoria hipotecaria”, *El Mundo*, September, 6, at 19 (quoting Senator Sánchez Sorondo).

<sup>541</sup> See, e.g., “La Cámara de Senadores inició la consideración de los despachos sobre moratoria hipotecaria”, *La Fronda*, September, 13, at 3 (quoting Sánchez Sorondo); see also “Comenzó a considerar proyectos de moratoria hipotecaria”, *La Vanguardia*, September, 13, 1933, at 1 (same).



population.<sup>542</sup> Still, Sánchez Sorondo claimed not to be against property rights of the creditors. He wondered what was the sacrifice that the law demanded from them, when the bills he had introduced only aimed at allowing the debtor to keep on working so that in time he would be able to pay back his debts, while providing no debt forgiveness at all.<sup>543</sup> He insisted that the legislation imposed no losses on creditors and that it “only asked from them that they cease to collect the difference between the 3 percent interest rate which the bill would impose upon them and the 7, 8, 9, 10, 11 percent they would have collected from their debtors”.<sup>544</sup>

Notice that Sánchez Sorondo was appealing to the conception of constitutional property that had been gaining ground from the 1920s: impermissible violations did not occur if capital losses were not imposed; profits could be reduced under exceptional circumstances. This appeal to an increasingly accepted notion of what was the core of the protection of private property under the Constitution may account for the relative lack of harsh criticism of the law.

In an interesting shift from its positions in the previous decade, the newspaper *Crítica* did attack Sánchez Sorondo, calling his position “nihilistic demagoguery” and accusing him of almost proposing “the abolition of private property”,<sup>545</sup> and *El Mundo* reported that the bill had been “consistently opposed by the most diverse sectors of opinion” while expressing the view that the Executive’s opposition to the bill was “well

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<sup>542</sup> See “Expresó en el Senado su disconformidad con la moratoria hipotecaria el Ministro de Hacienda”, *El Mundo*, September, 13, at 10 (quoting Sánchez Sorondo).

<sup>543</sup> See, e.g., “La Cámara de Senadores inició la consideración de los despachos sobre moratoria hipotecaria”, *La Frontera*, September, 13, at 3 (quoting Sánchez Sorondo).

<sup>544</sup> *Id.*, at 3-6 (quoting Sánchez Sorondo).

<sup>545</sup> See “Se disminuirá la tasa hipotecaria”, *Crítica*, September, 16, at 11.

justified”.<sup>546</sup> *La Nación*, contrarily, supported the measures,<sup>547</sup> as did *La Fronda*. This smaller newspaper thought the “shaken law” to be constitutional, due to its “emergency nature” and the “fundamental interests, bordering in a social problem, that [...] have been protected fairly through the measures”.<sup>548</sup>

What does all this hint at? It is not easy to say conclusively, but it seems clear that the idea of interventionism under the cloak of economic emergency rhetoric had been acquired by powerful sectors to use it in their favor.<sup>549</sup> Minister Pinedo argued as much in the Senate, accusing Senator Sánchez Sorondo of defending the interests of the privileged few. In the Minister’s words,

“There is a certain quality of debtors who do not pay and who claim the need to enact the moratorium. These are *the largest borrowers*, i.e. those who have received the most credit [...] What Mr. Senator wants is *to save the small, privileged class* [...] before Mr. Senator wanted measures to be taken against the leftist demagogues because their preaching could alter the constitutional order, now he advocates for the breaking of the legal order because that’s what men who lead the right want”.<sup>550</sup>

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<sup>546</sup> See “La moratoria hipotecaria y el Poder Ejecutivo”, *El Mundo*, September, 17, at 4.

<sup>547</sup> Admittedly, *La Nación* acknowledged the difficult and controversial character of the constitutional issue at stake. In its view, the very essence of the Constitution was being debated. Whether it should be interpreted as a rigid, unchanging text, or as a flexible instrument that can accommodate new circumstances, was at the heart of the moratorium litigation. Still, the newspaper argued that as “progress stresses the economic character of the social relations”, the importance of determining the limits of the state’s power to intervene and regulate freely agreed contracts was increasingly important. *La Nación* supported a dynamic approach to constitutional interpretation by citing the example of the U.S. caselaw and citing an unnamed author who argued for the same interpretive approach. See “Natural expectativa”, *La Nación*, December, 5, 1934, at 6. Moreover, when the Court handed down the *Avico* decision, *La Nación* argued that Justice Repetto’s dissent would “keep encouraging those who always thought there was an inadmissible encroachment [of constitutional rights] in the rule that reduced contractual interest [rates][...] the debate should be considered over, in spite of the sacrifice of individual interests”. See “La moratoria hipotecaria”, *La Nación*, December, 8, 1934, at 6.

<sup>548</sup> See “La moratoria hipotecaria ante la justicia”, *La Fronda*, April, 12, 1934, at 1.

<sup>549</sup> See Jonathan M. Miller, above n. 75, at 144 (holding that from the 1930s on, “[T]he Argentine Supreme Court supported essentially all the changes favored by the economic elite”).

<sup>550</sup> “Comenzó a considerar proyectos de moratoria hipotecaria”, *La Vanguardia*, September, 13, 1933, at 1 (quoting Pinedo). The italics are mine.

Whether Pinedo was right or not, I cannot say. It is suggestive, though, that *La Frontera*, a newspaper of profoundly conservative origins,<sup>551</sup> and *La Nación*, in its new, pro-intervention, phase, supported the measures. But beyond the issue of who were the beneficiaries of the emergency regime, one can point out two things. First, the new, softened, yet still meaningful conception of property had consolidated. Second, there was more to the new attitude towards State's regulation of economic affairs than just the emergency discourse: the welfare state was on the rise in Argentina, as was in the rest of the world, and emergency circumstances slowly meshed with structural, permanent situations.<sup>552</sup>

It may well be that property had been “downsized”, constitutionally speaking, not because the people had abandoned the original principles supported by Alberdi's ideas, but because they were faithful to his most basic ideas on the topic. Remember that Alberdi was a strong supporter of property rights and freedom of contract. But his commitment to both ideas relied on a belief in property's fundamental role as the engine of progress. Alberdi wrote a constitutional draft that granted strong protection to private property, most likely, for instrumental reasons. The people of the 1930s had lost their faith in the “invisible hand” that had seduced Alberdi so much and, in tune with the rest of the world, were starting to believe that state interventionism could improve upon

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<sup>551</sup> See, e.g., José Luis Carnagui, “La ley de represión de las actividades comunistas de 1936: miradas y discursos sobre un mismo actor”, *Revista Escuela de Historia* (2007) (available at: <http://www.unsa.edu.ar/histocat/revista/revista0608.htm>; last visited 01/23/2012).

<sup>552</sup> See, e.g., 171 *Fallos* 349, 360 (1934) (adopting a broad conception of the police power beyond emergency situations, by arguing that the promotion of the general convenience and welfare was a legitimate exercise of the police power and that the legitimate extension of the regulation in any given case would depend on the importance of the interests and public principles to be protected). See also Jonathan M. Miller, above n. 75, at 146 (holding that “when *Avico* is read alongside a case decided several weeks earlier that upheld accounting and reporting requirements imposed on the meat packing industry, it does not appear that the Court's newly flexible approach toward economic regulation is limited to emergency situations”).

*laissez-faire* economics. It would still be some time until the dangers of state intervention began to be more evident to the masses. Therefore, the interpretive turn regarding constitutional property may have represented a deeper continuity with Alberdi's thought, despite the apparent opposition of new and old ideas. Argentina's mild departure from strong property rights may well have been due to an underlying foundational commitment to the idea of doing whatever it was needed to foster economic development. Given that state interventionism was on the rise, and that many people believed that, if properly used, interventionism could be an instrument for prosperity, a relativization of individual rights —especially property rights— began to seem natural even for those who strongly cared for economic development. These ideas seem to have enjoyed increasing support, for different reasons, among both the lower and upper classes. Still, private property was not repudiated —it wouldn't be repudiated by the more populist Peronist movement either—, but only adapted to new dominant economic and political ideas.

In the judicial front, opinions were divided. Based upon the restrictive attitude towards the emergency powers taken by the Supreme Court in *Horta* and, especially, *Mango*, some lower courts ruled the moratorium unconstitutional.<sup>553</sup> But the Court, with one partial dissent, upheld the law as a valid exercise of emergency powers. To support its conclusions, it drew heavily upon the then-recent decision of its U.S. counterpart in the *Home & Loan Building Ass'n v. Blaisdell*,<sup>554</sup> quoting at length paragraphs of Chief Justice

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<sup>553</sup> See, e.g., “La moratoria hipotecaria ante la justicia”, *La Frontera*, April, 12, 1934, at 1 (reporting the uncertain constitutional status of the emergency law, as courts were divided on the issue); “Declara inconstitucional la moratoria un fallo de la Cámara Civil Primera”, *El Pueblo*, April, 12, 1934, at 1, 11 (reporting a decision by one of the Chambers of Appeals in civil matters, striking down the moratorium); “Por ser retroactiva y afectar los derechos de propiedad ha sido declarada inconstitucional la ley de moratoria por la C.C. 1a.”, *El Mundo*, April, 12, at 34 (reporting the same decision and stating that the Second Chamber had previously handed down a similar ruling)

<sup>554</sup> 290 U.S. 398 (1934).

Hughes' majority opinion, and taking the distinction between obligation and remedy from the U.S. Supreme Court case law:

“The distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct [...] The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them [internal citations omitted] and impairment, as above noted, has been predicated of laws which, without destroying contracts, derogate from substantial contractual rights [...]”<sup>555</sup>

The justices equated the case of the moratorium to that of the rent laws upheld in

*Ercolano*:

“Undoubtedly, the 11,741 law that reduces the interest and extends the deadline for payment of the loan to the mortgagor, is, from the constitutional point of view, identical to the 11,157 law that reduced the rent of houses and extended the term of their occupation in favor of tenants”<sup>556</sup>

Still, the Court felt obliged to argue that although interests had been reduced, there was really no loss to the creditor, due to the valorization of the currency and the generalized deflation.<sup>557</sup>

“This economic disaster is so deep and it has so abruptly changed the value of all property and agricultural products and livestock, and consequently the price of the lease of fields and houses, that if Congress had not been resolved to establish the moratorium and especially the lowering of mortgage interest, mortgage lenders would have received during these years their capital in a currency

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<sup>555</sup> 290 U.S. 398, 430-431 (1934), translated and transcribed in *Avico v. De la Pesa*, 172 Fallos 21 (1934), §8, majority opinion. The distinction also played a central role in the partial dissent of Justice Repetto (see Repetto, J., concurring in part and dissenting in part, §5). For a discussion of the reluctance of some of the justices in the *Blaisdell* majority to embrace giving the distinction an important role in the opinion, see John A. Fliter & Derek S. Hoff, above n. 75, at 135-138 (discussing Justices Cardozo and Stone's lack of support for the distinction and their opposition to Chief Justice Hughes' initial draft on the ground that it gave too much weight to an artificial doctrinal distinction).

<sup>556</sup> 172 Fallos 21 (1934), §9, majority opinion.

<sup>557</sup> For an argument explaining the U.S. Supreme Court *Gold Clause Cases* in terms of the impact that deflation would have had in the purchasing power to be received by creditors, see Kenneth W. Dam, “From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law”, 50 *U. Chi. L. Rev.* 504, 520-525 (1983).

extremely valued due to the emergency, and would have acquired a much higher purchase power than what was lent. And the same would happen with interests, because a 6% rate represents effectively, given the fall in the prices of the products and properties in the country, a 9, 10% or more percent”<sup>558</sup>

The decision was received with cautious approval or neutrally. No signs of harsh rejection are found in the press of the time. *Crítica* reported the decision in the front page, elaborating on the details of the litigation and the previous decisions of the lower courts, all with a neutral tone.<sup>559</sup> *El Mundo* followed a similar trend.<sup>560</sup> *La Fronda*, in turn, approved of the decision, emphasizing that the regime established only a temporary restriction.<sup>561</sup> *La Vanguardia*, a the newspaper of the socialist party, also applauded the decision for having embraced “novel principles”, abandoning its prior attitude of adjusting to “the principles of the cold, rigid and immutable law, without addressing the needs dictated by a reality that is produced each day”.<sup>562</sup> In short, *La Vanguardia* was praising the Court for embracing a “dynamic” interpretative attitude or, in other words, a model of “responsive adjudication”. It is far from clear that such a model would end up advancing the cause of progressive reform. But we will analyze that topic later.

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<sup>558</sup> 172 *Fallos* 21 (1934), §12. See also Gerardo Della Paolera & Alan M. Taylor, above n. 531, at 211 (“Real interest rates were high in 1929-31, at about 10 percent. Although nominal rates were much lower [...] ex post deflation and ex ante expected deflation contributed to high real rates. [...] The turning point was the start of rediscounts. Absent this action by the Conversion Office the real interest rate would have risen dramatically to between 20 and 30 percent in the years 1931-34, largely as a result of worsening deflation and persistence in the forecasting equation”).

<sup>559</sup> See “La Corte declaró constitucional la ley de moratoria hipotecaria”, *Crítica*, December, 7, 1934, at 1, 6.

<sup>560</sup> See “Sobre la constitucionalidad de toda la ley de moratoria hipotecaria falló la C.S.”, *El Mundo*, December, 8, at 6.

<sup>561</sup> See “Constitucionalidad de una ley”, *La Fronda*, December, 8, at 1.

<sup>562</sup> See “Moratoria hipotecaria. El fallo de la Corte”, *La Vanguardia*, December, 10, at 1.

For the time being, suffice it to say that *Avico*, as predicted by the dissenters in the U.S. Supreme Court case *Blaisdell*,<sup>563</sup> would pave the way for the arrival of a much more intrusive regulatory state, beyond the allegedly narrow confines of the emergency doctrine. *Avico* would bridge the gap between *Ercolano* and our own “New Deal”: Peronism and the “social function of property”.

### **b. Our Own “New Deal”: Peronism, Constitutional Reform, and the Social Function of Property.**

With the advent of Juan Domingo Perón to the presidency, a new era for Argentine politics dawned. A certain brand of populism,<sup>564</sup> coupled with an increasing instability of property rights took over the political scene. Peronism was —and still is— a very complex political phenomenon and, accordingly, several theses have been advanced regarding the reasons why Juan Domingo Perón could rise to absolute prominence and end up dominating Argentine politics, directly or *in absentia*, for decades to come.

Lee Alston and Andrés Gallo provide a good summary of the main causes of his political ascent:

“[...] it was the confluence of the Great Depression, a military coup, electoral fraud, and the countenance of electoral fraud by the Supreme Court and the Executive which paved the way for the populist policies and institutional reforms of Juan Perón”<sup>565</sup>

The 1912 Electoral Law (the so-called “Sáenz Peña” Law) greatly enlarged the

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<sup>563</sup> 290 U.S. 398, 448 (1934) (Sutherland, Butler, Van Devanter, McReynolds, JJ., dissenting).

<sup>564</sup> See Joel Horowitz, “Industrialists and the Rise of Perón, 1943-1946: Some Implications for the Conceptualization of Populism”, 47 *The Americas* 199, 213 (1990) (stating that “many commentators see Peronism as an archetypical example of populism”).

<sup>565</sup> Lee J. Alston & Andrés A. Gallo, “Electoral fraud, the rise of Peron and demise of checks and balances in Argentina”, 47 *Explor. Econ. Hist.* 179, 180 (2010).

franchise, and it was followed by intense, mainly middle-class, social mobilization. The lower classes, while formally enfranchised, were largely ineffective in the political arena. The Radical Party embodied the new political winds, and ruled the country between 1916 and 1930, when Radical caudillo Hipólito Yrigoyen was ousted from power by a putsch led by General Urriburu, a conservative military man of fascist inclinations. It is generally agreed that the ineptitude of the aging President Yrigoyen in the face of the drop into the Great Depression was the main factor leading to the military coup.<sup>566</sup>

Power was eventually returned to civilian authorities in 1932, but democratic procedures would be nothing but a mere façade for a decade to come. The 1930s were dominated by a series of conservative administrations (under the *Concordancia* banner) that got to power, and managed to remain there, by electoral fraud. For this reason, many scholars have called it the “infamous decade”. In 1943, the second *coup d'état* of the century would bring the “infamous decade” to an end and open the doors of power to then-Colonel Perón. He occupied several important positions in the *de facto* government. He was Vice-Minister of the Ministry of War and Head of the newly-created Secretary of Labor (from which he built his ties with the Labor movement),<sup>567</sup> and then went on to become Minister of War and Vice-President. He kept his post as Head of the Secretary of Labor while being Vice-President.

Perón had never been an activist for the rights of the lower classes that would be his core constituency.<sup>568</sup> He was, first and foremost, a military man with ambitions. How,

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<sup>566</sup> *Id.*, at 180, esp. fn. 7.

<sup>567</sup> Peter H. Smith, “Social Mobilization, Political Participation, and the Rise of Juan Peron”, 84 *Pol. Sci. Quart.* 30, 44 (1969) (“Openly courting the laborers, using both the carrot and the stick, Peron used this office to establish a political base which eventually helped carry him into the presidency”).

<sup>568</sup> See Joel Horowitz, above n. 564, at 214 (“Clearly, Perón's urban base became the working class. He did receive backing from other elements, the Church, major portions of the military, some disaffected Radicals and nationalist groups, but no true urban-based multiclass coalition can be found. Perón did draw



then, did he gain the favor of the urban lower class masses?<sup>569</sup> Basically, by establishing himself as the only credible means for lower classes to have effective political participation. His stance was not particularly respectful of democratic and republican institutions —after all, he was a putschist— nor did it display particular concern with constitutional niceties. Perón was mostly concerned with effective political action. It may well be that Perón's supporters might have accepted his eventually undemocratic political procedures because of their unfortunate experiences with democratic institutions as the Municipal Council and the Congress.<sup>570</sup> According to Peter Smith,

“[i]n the late nineteen-thirties and early forties, leaders of this sector [...] sought to promote urban mass interests through established and constitutional political institutions. Before 1943 these leaders, mostly Socialists, were stopped at every turn by the ruling Concordancia; and the institutions through which they pressed their demands, particularly the national Congress, were devitalized and discredited”<sup>571</sup>

Moreover, when Perón was campaigning for the 1946 election that eventually made him president, the opposition —basically, Radicals and Socialists— ran the campaign by claiming that they represented the return to “the Constitution”, which was understood as against many of Perón’s reforms.<sup>572</sup> In many ways, Perón represented the promise of institutional reforms in favor of his main constituencies.

“By 1946 it had evidently become clear to the urban masses that the way to gain power was through the elevation of Peron. In the elections of that year the

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support from the lower middle class—as the excellent voting studies have indicated—but the line between this group and the working class was artificial”).

<sup>569</sup> See Peter H. Smith, above n. 566, at 31 (“It is not as though he had been a life-long crusader for social reform. Raised in the lower middle class, Perón was essentially a military man of great ambition”).

<sup>570</sup> *Id.*, at 48.

<sup>571</sup> *Id.*

<sup>572</sup> See Lee J. Alston & Andrés A. Gallo, above n. 565, at 187.

central issue was quite clearly drawn: whether Argentina should continue with her openly authoritarian political system or return to time-worn constitutional procedure”<sup>573</sup>

It was a momentous election, one that posed a choice between alternative constitutional systems, and one determined to no small extent by the fact of the continued electoral fraud and the closing down of clean political processes during the preceding decade:

“[...] citizens in Argentina found themselves not just electing a new president but also choosing between two different systems that would determine the institutional structure of the country for many decades to come. Though close, the citizens chose populism over a return to the path of checks and balances followed from 1914 until the interruption of the coup of 1930 and the fraud of the 1930s. The appeal of Juan Peron was in part a reaction to the electoral fraud in the 1930s”<sup>574</sup>

It is no wonder, then, that Peronism served as a vehicle for substantial constitutional change. Indeed, Bruce Ackerman and Carlos Rosenkrantz have rightly suggested that this era was a successful “constitutional moment” for Argentina, in the terms of a dualist theory of democracy.<sup>575</sup> Perón’s successful constitutional politics would have momentous consequences for property rights. The so-called “social function of property” would be the paramount conception in those years.

One must bear in mind three channels through which changes were accomplished: normal legislation of a “social character”, judicial appointments, and formal constitutional reform. I will not focus on the first channel, as it was neither a

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<sup>573</sup> See Peter H. Smith, above n. 566, at 47.

<sup>574</sup> Lee J. Alston & Andrés A. Gallo, above n. 565, at 188. See also *Id.* at 188-190 (using statistical data to present a model that shows how previous fraud was a very important component of Perón’s triumph in 1946).

<sup>575</sup> See Bruce Ackerman & Carlos Rosenkrantz, “Tres Concepciones de la Democracia Constitucional”, 29 *Cuadernos y Debates* 1, 16 (1991).

complete novelty of Peronism nor could have had, per se, the durable effects we can observe. The second channel, I can only mention here and it has been sufficiently explored in the literature.<sup>576</sup> It is very important to notice here that Perón, backed up by an unstoppable support in both Chambers of a Congress he dominated, successfully impeached four out of the five justices of the Supreme Court —the fifth justice, spared the impeachment procedures, was Tomás Casares, a catholic appointed by the military government of which Perón had been a part—, plus the Solicitor General, basically, because he did not see any advantages to preserving the Judiciary’s integrity and aspired, instead, to “peronize” the Court.<sup>577</sup> The impeachment procedures, certainly more than the new appointments themselves, would have a long-lasting, pernicious effect on Argentina’s practices regarding separation of powers and on the Court’s case law.<sup>578</sup> From then on, there has been a deep-rooted presidential aspiration to “have their own Court”.<sup>579</sup> The sparse *de iure* governments Argentina enjoyed during the second part of

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<sup>576</sup> See, e.g., Arturo Pellet Lastra *HISTORIA POLÍTICA DE LA CORTE (1930-1990)* (Buenos Aires, Ad-Hoc, 2001).

<sup>577</sup> See, e.g., Joseph A. Page, *PERÓN: UNA BIOGRAFÍA 195-196* (Buenos Aires, Javier Vergara Editor, 1984). The original in English: *PERÓN: A BIOGRAPHY* (New York, Random House, 1983). See also Arturo Pellet Lastra, above n. 576, at 30 (arguing that “Perón appointed four unconditional judges” and that the Court was “addicted to Perón”).

<sup>578</sup> See, e.g., Jonathan M. Miller, above n. 75, at 153 (arguing that “[t]he Supreme Court has been marked by relative weakness during all democratically elected governments since its 1947 impeachment, particularly in comparison with the many decisions in which it challenged the government in previous years”). See also Arturo Pellet Lastra, above n. 576, at 32, 37-39 (arguing that there are two distinctly different phases in the political history of the Argentine Supreme Court, one from its establishment in 1862 until the 1947 impeachment, in which there was an axiom of respecting the independence of the Judiciary, and another one, beginning in 1947, where Courts were frequently addicted to the incumbent president); Lee J. Alston & Andrés A. Gallo, above n. 565, at 194 (“The impeachment of the Court could be viewed as the culmination of the departure from the road towards a true system of checks and balances that was started by the coup of 1930 but burrowed into the beliefs of constituents with the decade of fraud during the 1930s”).

<sup>579</sup> See Diana Kapiszewski, *HIGH COURTS AND ECONOMIC GOVERNANCE IN ARGENTINA AND BRAZIL* 69 (New York, Cambridge University Press, 2012) (“In Argentina, more often than not, elected leaders sought to proactively shape the Supreme Court into a judicial ally by politicizing it. They repeatedly attempted to manipulate the CSJN’s [Supreme Court] size and composition [...] and executives often sought to appoint justices who, being ideologically compatible, were close allies or party affiliates”). See also Arturo Pellet Lastra, above n. 576, at 32, 37-39 (arguing that “[e]very civilian President since Perón

the twentieth century frequently had the intention of tampering with the Court's number of seats,<sup>580</sup> in order to build a consistently supportive majority. This undoubtedly affected the Court's performance and its ability to protect individual rights against Governmental decisions.

More centrally, the administration moved successfully to “peronize the Constitution”.<sup>581</sup> In 1949, after a highly controversial political process for calling a Constitutional Convention<sup>582</sup> and with the main opposition party abandoning the sessions,<sup>583</sup> a new, thoroughly revised, constitutional text was enacted, and property was

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has tried to choose a docile Supreme Court”); Alberto B. Bianchi, *UNA CORTE LIBERAL: LA CORTE DE ALFONSÍN* 26 (Buenos Aires, Editorial Ábaco, 2007) (arguing that the presidents' temptation for court packing has not ceased). It is remarkable that quite often Supreme Court integrations are named not after one justice (as it is the case in the U.S. with the Chief Justice), but after the president who managed to re-shape the Court's composition. This is especially the case with the Courts of the 1980s and 1990s, known as *La Corte de Alfonsín* and *La Corte Menemista*—or, even worse, *the automatic majority*—. See *Id.*, at 25 (arguing that the 1947 impeachment interrupted the possibility of calling the Court by the name of the most influential justice: “[u]ntil then, we could talk about the Gorostiaga's, Bermejo's or Repetto's Court. From then on, we have to tell the story in accordance to the changes occurred in the Executive Branch”).

<sup>580</sup> See, e.g., “La ampliación de la Corte trata Diputados”, *Clarín*, April, 5, 1990, at 6 (citing Peronist Deputy Jorge Yoma as saying that the “enlargement of the Court is an old aspiration of constitutional governments”). In 1990, Menem managed to enlarge the bench from five to nine justices, effectively appointing six justices to the Court (one justice from the old composition of the Court, Jorge Bacqué, resigned in protest for the enlargement, and another one—José Caballero—had resigned for personal reasons shortly before). In 2006, the Kirchner administration got Congress to shrink the Court, from nine members to seven—in a transitional phase—and down to five once two justices leave the bench. See Law #26,183 (available at: <http://www.infoleg.gov.ar/infolegInternet/anexos/120000-124999/123154/norma.htm>; last visited 01/24/2012). Arguably, the Kirchner couple, after having succeeded in removing the Menem-appointed majority through threats of impeachments and impeachment procedures in 2003 and having appointed four justices themselves, did not want to give the chance of re-shaping the Court to an eventual competitor that might have gained the presidency, especially when the two justices who were neither appointed nor politically close to Kirchner—Justices Fayt and Petracchi—were already the two most senior justices and, thus, the two most likely to leave the Court first.

<sup>581</sup> See Joseph A. Page, above n. 577, at 237-244.

<sup>582</sup> Peronists failed to secure the necessary majority of two-thirds of the total members of both Cameras for the legality of the bill authorizing the reform and the election of delegates to the Constitutional Convention, according to article 30 of the Constitution and the interpretive practice. Instead, they counted two-thirds of the members *present* at the moment of voting, and went along with the reform. The main opposition party, *Unión Cívica Radical* protested, but then, inconsistently took part in the election and took their seats in the Convention. See, e.g., Lucretia Illsley, “The Argentine Constitutional Revision of 1949”, 14 *J. Polit.* 224, 227 (1952).

<sup>583</sup> See, e.g., “El bloque radical se retiró de la Asamblea Nacional Constituyente”, *La Nación*, March, 9, 1949, at 1-4 (reporting the session and the Radicales' leaving the Convention); “Con la sola presencia de la

one of the institutions that received deep changes. Social justice was the driving idea of the movement, at the rhetorical level at least, and the “social function of property”, an idea first articulated by the French jurist Leon Duguit in 1911 in a series of lectures in Buenos Aires,<sup>584</sup> would serve as the means for realizing social justice in the economic sphere.

The inviolability of property which opened the text of Article 17 of the 1853 liberal Constitution was quickly replaced by the clear declaration that “private ownership has a social function and, therefore, shall be subject to the obligations imposed by law for the common good” (Article 38, 1949 Constitution). Moreover, it was for the State to control and intervene in the exploitation of the fields, and to procure that each farmer could become owner of the land he worked in (Article 38). Capital had to “serve the national economy” and have “social welfare as its main objective” (Article 39), and “the organization of wealth and its exploitation are meant to serve the people's welfare, within an economic order in accordance with the principles of social justice” (Article 40). The changes were substantial and quite visible.

Arturo Enrique Sampay, the mastermind behind the new constitutional text, denounced the *laissez-faire* economics that had inspired Alberdi:

“Non-intervention means leaving the different groups their hands free in their social and economic conflicts, and therefore, it means leaving the solutions to [be determined by] the power struggles between these groups. In such circumstances, non-intervention entails intervention in favor of stronger [party]”<sup>585</sup>

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mayoría deliberó la Convención Constituyente”, *La Prensa*, March, 10, at 5-6 (reporting sessions with the sole presence of the majority sector).

<sup>584</sup> See Sheila R. Foster & Daniel Bonilla, “The Social Function of Property: A Comparative Perspective”, 80 *Ford. L. Rev.* 101, 102 (2011).

<sup>585</sup> Arturo Enrique Sampay, *LA REFORMA CONSTITUCIONAL* 30 (La Plata, Ediciones de Biblioteca Laboremus, 1949).

To replace the political economy behind the liberal Constitution of 1853, Sampay proposed a “humanist programmatic economy” based upon the social function of property and social justice.<sup>586</sup> The text did not reject private property. Its underlying philosophy considered it a natural right, companion to free individual activity.<sup>587</sup> But both needed to be strictly limited by their social function, whose scope would be provided by the principles of social justice.<sup>588</sup> Such principles would also serve to set the “fair limits” of the profits generated by economic activity, because the Constitution “rejects unjust benefits”.<sup>589</sup> The new conception of property recognized a double function: individual, as the basis of liberty and the affirmation of personhood; and social, “insofar as such affirmation is not possible outside society [...] private property fulfills an individual goal by providing for the *needs* of the possessor, and a social goal by assigning the remaining [resources] to the community”.<sup>590</sup> The social orientation and the often authoritarian nature of the new constitutional text stands out in the following passage from Sampay, defending the constitutionalization of a solidarity principle that limited, among other things, the permissible uses of property rights:

“[T]he recognition of personal liberty cannot be understood as the protection of some individuals to the detriment [...] of others [...] [It is established that] the abuse of personal rights —note that we aim at the center of the legal order of bourgeois liberalism—, if it harms the common good or leads to any form of exploitation of man by man, is considered a crime that is punishable by law [...] We elevate the abuse of rights principle to a constitutional category [...] but we go

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<sup>586</sup> *Id.*, at 43-44.

<sup>587</sup> *Id.*, at 44.

<sup>588</sup> *Id.*

<sup>589</sup> *Id.*, at 47.

<sup>590</sup> *Id.*, at 45.

further still, because *we consider a crime the lack of social solidarity, the misuse of personal freedom*<sup>591</sup>

Despite these clearly illiberal and sometimes authoritarian overtones, the new conception of property was not particularly unpopular, even among elites. On the contrary, it was widely assumed among legal scholars and practitioners that some sort of social obligation annexed to property rights was not inappropriate.<sup>592</sup>

The reaction in the press was not unfavourable either, although this is a less useful indicator, as freedom of speech and of the press was not a particularly protected right in Argentina at the time. From 1947 on, Perón launched a campaign to control the press. His wife Evita bought the newspaper *Democracia*, and a pro-Perón holding called “Alea”, whose shareholders almost certainly included Evita, purchased *Crítica*, *La Razón*, *Noticias Gráficas* and *La Época*.<sup>593</sup> *La Prensa* was later confiscated, and *La Nación* and *Clarín* managed to survive by avoiding any substantial criticism of the administration.<sup>594</sup>

*Clarín*, for instance, opined that

“The Constitution of 1949 is superior to the Constitution of 1853 because the latter was simply liberal while the one that has been just sworn not only keeps the substantial principles of democracy but it also states clearly the most advanced concepts regarding the most salient economic and social problems of the times [...] *It is not conducive to cling to outdated concepts of absolute property and unbridled capitalism*”<sup>595</sup>

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<sup>591</sup> *Id.*, at 48-49. The italics are mine.

<sup>592</sup> See Susana T. Ramella, “Propiedad en función social en la Constitución de 1949: Una ‘mentalidad’ del Antiguo Régimen representada en el constitucionalismo social de la época”, 35 *Revista de Historia del Derecho* 297, 323-330 (2007) (surveying the opinions of law professors and practitioners before the constitutional reform of 1949).

<sup>593</sup> See Joseph A. Page, above n. 577, at 250.

<sup>594</sup> *Id.*, at 253.

<sup>595</sup> Roberto J. Noble, “Estamos con la nueva Constitución!”, *Clarín*, March, 18, 1949, at 6. The italics are mine.

*La Nación* allowed itself a small dose of sober and restrained critical attitude:

“[...] under the appearance of simple partial amendments [the project] introduced deep changes in our fundamental law [...] which altered its spirit in matters of vital importance [...] The presidential re-election, the independence of the Judiciary, the statute of economic rights, [...] economic interventionism [...] were issues in which the draft contained reckless innovations, sometimes because of their revolutionary scope, sometimes because of the confusion of concepts on which they were grounded”<sup>596</sup>

It is unsurprising that the substantial reform on the property rights regime was not emphatically rejected by any sector.<sup>597</sup> On the one hand, private property as such was not abolished, so a major rebellion by the owners, wealthy or not, was not to be expected. On the other hand, the social rights included in the new constitutional text were a major advance of the times, and the kind of advance that large parts of the population could appreciate. They were so much so that even after the Peronist Constitution was abrogated *de facto* in 1955, the new Constitutional Convention that convened in 1957 added a social rights clause to the original text of the 1853 Constitution (Article 14 bis). So the combination of the preservation of private property—it might have seemed to be in relative risk only for large capitalists who were not close to the regime—and the new social rights must have made good sense for the average person. For the wealthy, the reform might have been seen as a concession in their self-interest, the kind of argument that Frank Michelman aptly described as the “big bribe” theory of redistribution.<sup>598</sup> Apparently, Perón himself made such an argument. According

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<sup>596</sup> “Un plan inflexible”, *La Nación*, March, 7, at 4.

<sup>597</sup> See, e.g., “La cuestión constitucional”, *Clarín*, May, 3, 1956, at 3 (arguing that the true fears about the constitutional reform in 1949 had been a turn towards a corporatist state, whether rightist or leftist, and that innovations of economic and social order that the 1949 Constitution had included were not causes of anxiety as they “were resisted only in circles opposed to any sort of [social and economic] transformations”).

<sup>598</sup> See Frank I. Michelman, “Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy”, 53 *Ind. L.J.* 145, 154 (1977-1978) (describing redistribution as a price or bribe that the naturally well-endowed should find worth paying in exchange for peaceful acceptance by the naturally worse-endowed of the government’s police protective authority).



to *Clarín*, Perón would have said that “[...] structured innovation is an insurance policy against possible and serious problems of social nature” and, thus, the reform implied

“[...] a tentative to reconcile, without useless violence, the privilege of the few with the rights and needs of the many; a purpose that should be celebrated and supported both by the masses and [...] the holders of the accumulated wealth”<sup>599</sup>

Three additional factors must be born in mind to account for the reception of the reforms. First, Sampay’s political philosophy was very much in line with the social doctrine of the Catholic Church, still a very influential political actor at the time. The social function of private property had been part of the Church’s doctrine for quite some time. Therefore, it cannot be ruled out that large sectors of the population were influenced by the Catholic Church’s official position on the topic. Second, the concepts of the new Constitution were also attuned to the general direction of ideas in the rest of the world. While Perón stressed that Argentina followed a “third path” —not unbridled capitalism, not communism—, the truth of the matter is that the regulatory state was on the rise, and the “constitutional revolution of 1937”, the “constitutional moment” of the New Deal, was explicitly cited by Sampay as an example of an attempt to organize the economy in the benefit of the weak, exactly what he thought the 1949 Constitution was trying to do.<sup>600</sup> Third, the wealthy sectors, traditionally opposed to Perón, were never really liberal, not even in the economic realm; they were socially conservative and politically authoritarian.<sup>601</sup> In economic matters, they had already grasped the possibilities

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<sup>599</sup> See Roberto J. Noble, above n. 595, at 6.

<sup>600</sup> See Arturo E. Sampay, above n. 585, at 35.

<sup>601</sup> See Carlos S. Nino, above n. 104, at 158.

that interventionism opened for their own benefit.<sup>602</sup> Maybe it was just a matter of time. They could wait and see.

In fact, the true constitutional change had been coming along for quite a while, and outside the formal amendment tracks. Even traditionally formalist legal operators could recognize such a change. Thus, the Supreme Court could argue in 1955, shortly before the *coup d'état* that would overthrow Perón, that

“The evolution of the concept of property, in order to adjust it to the social sense of its function, has been taking place in the country on the base of an adequate interpretation of the common law, without the need to wait for a new constitutional text”<sup>603</sup>

Thus, landmark rulings prior to the constitutional reform, upholding intrusive regulations of economic rights, had gone through the media without being criticized. As early as 1944 and following in the footsteps of *Avico*, the justices had upheld a law that established a mandatory contribution of up to 1.5% of the total sales of livestock, to be paid by breeders and destined to fund the *Junta Nacional de Carnes*, a regulatory agency created by the same law to safeguard the national meat industry. The *Junta* was to invest the funds, among other goals, in the defense of the national breeding industry and the elimination of trusts and monopolies, favoring the supply of meat to the domestic market. Pursuant to a legislative authorization, the agency created the *Corporación Argentina de Productores de Carne*, making the contributing breeders forced members of the corporation. In *Inchauspe*<sup>604</sup> the Court gave constitutional blessing to the measures arguing, among other things, that

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<sup>602</sup> See above n. 397 and accompanying text.

<sup>603</sup> See CS, *Caillard de O'Neill, Magdalena E. M. v. Heguibeberé, Gerónimo*, 234 Fallos 384, 395 (1955). The reference to the “common law” in the quote is to the “derecho común”, the civil, criminal, labor, etc. laws that Congress enacts for the whole country, and not –obviously– to the anglo-saxon common law. It is usually referred as a “common” law because it is common to all the provinces.

<sup>604</sup> 199 Fallos 483 (1944).

“Freedom of contract cannot, of course, be legitimately invoked when [the attacked measure] does not mean parting up with material goods of some importance. In this case, the contribution is negligible, since it is, or may be, compensated with the rising price of the product, which adds up to the possibility of potential earnings achievable by the corporation. At all events, the compulsory association would be justified by the principle of social solidarity and the defense of the national interests”<sup>605</sup>

Notice that in *Inchauspe* the justices were not merely deferential to an arguably paternalistic measure: they built constitutional meaning by measuring up the popularity of the interventionist plan. A strongly “responsive” mode of adjudication, sensitive to the perceived needs of the dominant players of the time, was clearly displayed. Among the evidence of the reasonableness of the measures, the Court cited

“The vigorous defense of the law publicly made by all livestock associations in the country [and] the fact that no other lawsuits have been filed or any protests, other than those showing adherence to the law and repudiating the action attempted by very few livestock dissidents, have been made”.<sup>606</sup>

The decision was reported in a neutral tone in the press. *El Diario*, *El Federal*, *El Pueblo* and *La Razón* all adopted an almost identical style, which showed no criticism of the measures whatsoever.<sup>607</sup> The interventionist state had come to stay, and apparently it had not raised much opposition yet.

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<sup>605</sup> *Id.*, §10.

<sup>606</sup> *Id.*, §7.

<sup>607</sup> See, e.g., “La Corte declaró constitucional la ley de carnes”, *El Diario*, September, 3, 1944, at 3; “La contribución con que se grava la venta de ganado no es inconstitucional, expresa la Corte Suprema Nacional”, *El Federal*, September, 3, 1944, at 4; “Declaró la Corte que es constitucional la ley de carnes”, *El Pueblo*, September, 3, 1944, at 5; “Declara la Corte que es constitucional la ley de carnes”, *La Razón*, September, 3, 1944, at 10 (headlining that the *Junta* had avoided the formation of a monopoly and the realization of “arbitrary maneuvers”).

The kind of adjudication shown in *Inchauspe* would be deepened by the reformed Court after 1947. The social function of property justified a number of ever increasing restrictions on property rights.

Still, however addicted the Court to the regime and as much as the social function was the dominant discourse of the day, private property would not be swept off the constitutional map in the alleged search for social justice. According to the Court

“The constitutional text does not establish that property *is* a social function, in a way that could be understood as enrolled in Duguit’s position [internal citations omitted], a theory that leads to the negation of all individual rights, property among them. Property, as an individual right, is expressly recognized and its use and disposition in accordance to the laws that, without altering such right, regulate its exercise, is guaranteed [internal citations omitted]. The fact that property is *assigned* a social function has only the consequence of subjecting it to the obligations established by law for the common good”.<sup>608</sup>

So Peronist constitutional reform was, in a way, Argentina’s own New Deal, with its own particularities: a new constitutional conception became dominant, without much opposition from the supposedly conservative branch;<sup>609</sup> the Supreme Court was re-shaped in order to guarantee the judicial blessing of the new doctrines; and, finally, the movement would be more rigidly entrenched in a new Constitution. Property rights would take a second seat to rights more closely related, in the dominant view, to social justice. Judicial solicitude would change its focus, without ever completely abandoning property. There are quite a few similarities between the constitutional moment in Argentina and in the U.S. In a sense, it would have been striking that Argentina had retained a conception of property whose roots lied in a prior century, in the face of the changes the world had been witness to.

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<sup>608</sup> 234 *Fallos* 384, 394-395 (1955). The italics are mine.

<sup>609</sup> The Supreme Court would declare unconstitutional some measures of the Farrell’s military government and of the Perón administration, such as the creation of specialized labor courts, but it was not, by any means, an obstructionist Court.

For all these reasons, it is understandable that the conception of constitutional property embraced by the new fundamental law was not seriously questioned. The people had had a change of mood regarding property rights. Within certain limits, they were conceived as basically subject to regulation in pursuance of the common good, in accordance to the comprehensive view<sup>610</sup> now enshrined in the Constitution —social justice—. Seen through the lenses of a contemporary political philosopher, the Peronist era could be labeled, with some serious reservations, as the rise of high liberalism in all economic matters.<sup>611</sup>

It would take a while until the people noticed the persistent preference for the rich and the powerful that the “scientific policymaker” (the politicians who were being entrusted with achieving social justice, relatively unrestrained by property rights) would exhibit, creating a new kind of difficulty, and prompting yet another mood swing.

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<sup>610</sup> Bruce A. Ackerman, above n. 28, at 15.

<sup>611</sup> See John Tomasi, above n. 71, at 54 (“[...] high liberals are skeptical of the moral importance of private economic liberty [...] For them social justice is the ‘first virtue’, or primary ordering principle, of social institutions [...] high liberals advocate expansive state-based programs of economic redistribution (whether within generations or between them) in pursuit of social justice”). I emphasize that the label could only be used with serious reservations because, as I mentioned before, the new constitutional regime was not really liberal and had displayed significant authoritarian leanings. Even in issues regarding private property there were instances of open arbitrariness that would hardly be approved of by any “high liberal” that takes pride in being so called. For instance, during the Perón administration, the Government expropriated an expensive, unique sports car that had been stopped in Customs when its driver and owner was entering the country, as part of an international race, only to be sold at a fraction of its actual value to a friend of the Administration due to Perón’s express “recommendation”. The post-Peronist Supreme Court struck down the expropriation a few years later. See CSJN, *Nación v. Ferrario, Jorge*, 251 *Fallos* 246 (1961).

## The Times of Permanent Emergency and The Rise of the Regressive Redistribution Difficulty.

### a. Post-Peronism and the Advent of Permanent Emergency.

Peronism, for all its political force and its appeal to a significant sector of the people, would not escape the perils of being profoundly controversial. In 1955, after a period of economic decline and increasing domestic political battles, Perón would be overthrown by so-called *Revolución Libertadora*, a military *coup d'état* that, sadly and similarly to many other episodes in Argentina's history, enjoyed broad civilian support.<sup>612</sup> Perón had managed to polarize public opinion. At the time, one either loved or hated Perón. Therefore, reactions in the non-peronist press were, for the most part, not merely supportive of the *coup*, but largely euphoric. *El Mundo*, for example, reported that when General Lonardi was sworn in as President, the Republic sang “the hymn of liberty” and that “popular exultation” had overflowed the *Plaza de Mayo*.<sup>613</sup> It also applauded emphatically Lonardi's speech.<sup>614</sup> *La Nación* stated that Lonardi had been sworn in

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<sup>612</sup> See, e.g., “Apoya al nuevo gobierno el Partido Demócrata Progresista”, *Clarín*, September, 25, 1955, at 7 (reporting the statement of the Democratic Progressive party in support of the “provisional” military government); “Expresó el Socialismo su confianza en el gobierno del General Lonardi”, *Clarín*, September, 26, at 2 (reporting the statement of the Socialist Party in support of the military government); “El Círculo de la Prensa expuso su adhesión al gobierno provisional”, *Clarín*, September, 26, 1955, at 16 (reporting that an association of journalists had “adhered” to the provisional government); “En sendas declaraciones numerosas agrupaciones expresan su adhesión al gobierno revolucionario”, *Democracia*, September, 27, at 3 (reporting the expressions of support to the military government by a number of civil associations –e.g., Christian and commercial entities, and well as the Association of Professionals-); “Numerosas entidades han hecho llegar su adhesión al Nuevo gobierno provisional”, *Democracia*, September, 30, at 2 (same); “Expresan su solidaridad con los principios revolucionarios agrupaciones políticas”, *El Mundo*, September, 26, at 7 (reporting messages of support of various political parties); “Exhortan los dirigentes políticos a colaborar con el nuevo gobierno”, *El Mundo*, September, 25, at 6 (reporting expressions of support by prominent politicians of the opposition); “Todos los sectores de la ciudadanía se han adherido al Nuevo gobierno”, *La Razón*, September, 23, at 8 (arguing that all sectors of the population adhered to the provisional government).

<sup>613</sup> Front page, *El Mundo*, September, 24, 1955.

<sup>614</sup> See “Palabras que abren de par en par las puertas de la historia”, *El Mundo*, September, 24, at 6.

“amidst the indescribable enthusiasm of the crowd”<sup>615</sup> and that it was the time for the reconstruction of the Nation.<sup>616</sup> *La Razón* ran a very eloquent headline in its front page, reporting on Lonardi’s oath: “apotheosis of freedom”.<sup>617</sup> *Clarín* asserted that it was “collaboration time” and that the “great and magnificent principles of liberty and democracy” had been re-established after ten years.<sup>618</sup> Hence, in its view the revolution let the sun of liberty shine on the country, and citizens enjoyed expressing their “irrepressible happiness”.<sup>619</sup>

It is easy to guess that one of the first measures of such an epic military-political movement would be to repeal the legal structure mounted by Peronism, in particular, its constitutional text, and with it the new conception of property. The *coup* leaders abrogated the 1949 constitutional text and put back in force the old liberal Constitution of 1853, as long as it did not contradict the goals of the revolution, in early 1956. The official reason for this measure was that constitution-making is one of the most transcendental acts in the institutional life of a State, one that needs the most absolute observance of the principle of popular sovereignty in a context of freedom, and that the 1949 reform had been imposed by illegal means that did not respect such fundamental principles. The reform, in short, had not been the outcome of a free and inclusive debate

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<sup>615</sup> See “En medio del indescriptible entusiasmo de la muchedumbre juró ayer el Gral. Lonardi”, *La Nación*, September, 24, at 1.

<sup>616</sup> See “Palabras nuevas para un país renovado”, *La Nación*, September, 24, at 6.

<sup>617</sup> Front page, *La Razón*, September, 23, 1955.

<sup>618</sup> See “La hora de la colaboración”, *Clarín*, September, 25, at 1.

<sup>619</sup> See “El sol de la libertad”, *Clarín*, September, 25, 1955, at 8-9 (calling the day a “glorious Saturday” and reporting that the citizenship had taken the streets to express “their irrepressible happiness for re-conquest of the light, after the long, seemingly endless, night”).

by the people of the Nation as a whole.<sup>620</sup> Of course, the means used by the government to re-establish the allegedly violated constitutional order were even more illegal than the procedures used by Perón, but that's a detail that wasn't likely to bother any revolutionary that took pride in being called one.

Did the abrogation of the Peronist Constitution imply the rejection of the new conception of property? Some have argued as much, including then-Supreme Court justice Luis M. Boffi Boggero, who —faced with a constitutional challenge to a law enacted pursuant to the 1949 constitutional text— held that:

“It should be noted first that the law under review was enacted under the 1949 reform. Whatever the value that can be recognized to delegates' opinions on [constitutional] interpretation, it is true that they influenced the legal sanction [of the text], both as to the concept of property, which acquired a "social function" attributed to the arts. 38, 39 and 40 of this reform, against the individualistic concept attributed to the no longer in force standards of 1853 [...] The re-establishment of the Constitution of 1853 [...] must have an influence on the decision [of the instant case] by virtue of its different —better or worse— concept of property [...] the Law No. 14,226, as many others which fitted comfortably within the constitutional scheme in those days, no longer enjoy the shelter of the Constitution in force, for it interferes with the rights protected by the constitutional text. This does not mean that under the current Constitution it is not possible to enact progressive legislation, protective of those economically most vulnerable, because the country's history exhibits many decrees and laws that would show otherwise, and because many judgments of this Court would prove the same point categorically. It just means that laws or decrees, be them progressive or regressive, which are not in conformity with existing constitutional rules cannot be enacted or issued”<sup>621</sup>

Ricardo Zorraquín Becú, a catholic law professor, argued that the revolution's proclaimed goal of re-establishing the rule of law in the country necessarily implied recovering from the “declination” that the content of the laws suffered during the 1945-

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<sup>620</sup> See, e.g., “Proclamóse con fuerza obligatoria la vigencia de la Carta de 1853”, *Clarín*, May, 2, 1956, at (transcribing in full the text of the executive decree re-establishing the Constitution of 1853 without the reform of 1949 and the accompanying message of the *de facto* president Aramburu). See also “Dióse el decreto proclamando la vigencia de la Constitución del 53”, *La Época*, May, 2, 1956, at 2 (same); “Texto de la proclama que pone en vigor la Constitución del 53”, *La Nación*, May, 2, at 1 (same).

<sup>621</sup> CS, *Cine Callao*, 241 Fallos 121 (1960) (Boffi Boggero, J., dissenting, §10-11).



1955 decade, and to do so the revolution would need to heed such fundamental principles as “the fulfillment of the obligations of contracts” and “the respect for private property”.<sup>622</sup>

The truth of the matter is that the Peronist Constitution, despite being short-lived, left an unwritten mark on the conception of property rights in Argentina, and it could not have been otherwise, as the constitutional change had already occurred outside the text and was merely codified —perhaps somewhat unfaithfully, perhaps overstating the social overtones of the new conception of constitutional property—<sup>623</sup> by the formal reform process. Justice Boffi Boggero conceded as much in the quoted fragment, by acknowledging that both the legislative and judicial history of the country showed a record that allowed progressive legislation.

When the old constitutional text was put back in force in 1956, *Clarín* celebrated the occasion, but emphasized that

“[...] nobody should sensibly aspire to cling to dated concepts of absolute property and unbridled capitalism, entities that —it is worth reaffirming— have expired in almost all latitudes of the civilized world [...]”<sup>624</sup>

The military government had taken eight months to resolve the constitutional question of what to do with a constitution that embodied the very regime the military had set out to erase, because even in the committee that was advising the military government, some politicians had argued to keep the social and economic principles

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<sup>622</sup> Ricardo Zorraquin Becú, “Declinación y resurgimiento del derecho”, *Criterio*, April, 26, 1956, at 291.

<sup>623</sup> One should not forget that the main opposition party, the *Unión Cívica Radical*, had left the sessions and, therefore, the enacted text does not reflect any sort of compromise between different sectors of the population, but it was the unanimous imposition of the governing part. See above n. 583.

<sup>624</sup> See “La cuestión constitucional”, *Clarín*, May, 3, 1956, at 5.

incorporated in the 1949 text.<sup>625</sup> And the conservative magazine *Criterio* criticized the 1949 reform because “it was the last basic outline for the scenery of a dictatorship”, but not so much because the statements and amendments introduced in the text, which the magazine deemed “acceptable in many cases”.<sup>626</sup> The restoration of the old Constitution was met with a large measure of support,<sup>627</sup> but virtually all media accepted that the venerable text needed updating,<sup>628</sup> and social and economic justice were prominent among the candidates for the renewal of the Constitution.<sup>629</sup>

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<sup>625</sup> *Id.*

<sup>626</sup> See “Comentarios: La Constitución del 53”, *Criterio*, May, 10, 1956, at 334.

<sup>627</sup> See, e.g., “Elogia la Intransigencia Radical la vigencia de la Carta del 53”, *Critica*, May, 4, at 5 (transcribing an official statement from the sector *intransigente* of the Radical party, expressing support for the restoration of the 1853 Constitution); “Partidos y gremios libres aplauden a la revolución”, *Critica*, May, 4, at 2 (calling the restoration of the most “outstanding deeds of the Revolution” and reporting the support of various sectors of the population); “Argentina Returns to Constitution of 1853”, *The Buenos Aires Herald*, May 2, front page (subtitling the headline: “Last Shackles of Perón’s Despotic Rule Cast Aside”); “La vigencia de la Constitución del año 1853”, *La Nación*, May, 4, at 5 (reporting that the Teachers’ Confederation had decided to give away copies of the Constitution, as a sign of support for the restoration); “La vigencia de la Constitución del año 1853”, *La Nación*, May, 5, at 2 (reporting the support of the Rotary Club and of the Rural Confederations); “Restablecimiento de la Constitución”, *La Prensa*, May, 2, at 8 (calling the restoration a “redress to the People”, in the face of the “arbitrary imposition” of the 1949 Constitution); “La vigencia de la Constitución de 1853 tiene más adhesiones”, *La Prensa*, May, 6, at 3 (reporting expressions of support by numerous political and civil entities); “Unánime adhesión ciudadana a la vigencia de la Carta Magna del 53”, *La Razón*, May, 5, at 3 (same).

<sup>628</sup> Perhaps one exception may have been *The Buenos Aires Herald* which argued that the Constitution of 1853 was as good for the mid-1950s as it had been for the past, that under its “freedoms and protective clauses [...] Argentina advanced to the vanguard of the Latin American nations and its people acquired and economic and cultural status which distinguished them wherever they had contact [...] with foreign friends”, and that there was “no political or economic emergency with which it cannot cope if the authorities and people are sincerely minded”. See “The Sure Foundation”, *The Buenos Aires Herald*, May, 3, 1956.

<sup>629</sup> See, e.g., “El retorno a la Constitución del 53”, *La Nación*, May, 2, 1956, at 6 (arguing that the restoration was extremely important, and that its principles had not impeded any social improvements, but admitting that the passage of time might make some amendments advisable); “La vigencia de la Constitución del año 1853”, *La Nación*, May, 5, at 2 (reporting that the Democratic Christian Movement applauded the restoration, without denying the need for amendments that attuned the text now back in force to “the new social and economic demands, without altering its fundamental bases”); “La vigencia de la Constitución de 1853 motiva más adhesiones”, *La Prensa*, May, 8, at 6 (reporting that the Democratic Party had issued a statement applauding the restoration, which had been a part of its political program since 1951, regardless of the need for a reform “through legal means that reaffirms its progressive leanings”); “En la ruta luminosa de Mayo y Caseros”, *La Razón*, May, 2, at 3 (arguing that the restoration assured the rule of law and that a new constitutional convention could implement the necessary reforms regarding all problems that could not be foreseen by the forefathers of the Nation).

The constitutional politics of the 1940s, then, had an important influence on the way property was generally understood, an influence that, while initially plausible, has not been adequately integrated into the larger constitutional picture by the Court, whose later jurisprudence has often treated property as if the popular conception was purely Peronist. Today, as I will try to show, it is not.

Justice Boffi Boggero was exactly right in one point: even if the popular conception were entirely social-oriented, judicial rulings could not go beyond the “semantic resistance” of the text in order to accommodate popular aspirations; not, at least, without risking their authority and sociological legitimacy. Someone might argue that, if sociological legitimacy means that the relevant public deems the decision appropriate, it doesn’t really matter whether it can be squared with the text it is supposedly based upon.<sup>630</sup> The problem is that then constitutional texts risk becoming largely meaningless and courts that are not credibly constrained by those texts, however vague and capacious, are bound to suffer capture attempts by the political branches, as they become too unpredictable and, hence, dangerous.<sup>631</sup> The risk is, then, of both constitutions and courts becoming irrelevant. The U.S. Supreme Court seems to have dodged this risk fairly well, as diffuse public support for it seems high,<sup>632</sup> perhaps because it enjoys charismatic authority.<sup>633</sup> But this is clearly not the case of the Argentine Supreme Court. More on this later.

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<sup>630</sup> See, e.g., Michael L. Wells, “Sociological Legitimacy in Supreme Court Opinions”, above n. 107, at 1033 (2007) (arguing that “[s]ociological legitimacy turns on whether ‘the relevant public regards [a decision] as justified, appropriate, or otherwise deserving of support’ or at least acquiesces in it”).

<sup>631</sup> Jonathan M. Miller, above n. 75, at 154-155.

<sup>632</sup> See Barry Friedman, above n. 81, at 2616-2629 (using the evidence gathered by Caldeira & Gibson to argue that the U.S. Supreme Court enjoys a reservoir of public support that transcends the opinion on what the Court is doing at the time).

<sup>633</sup> Jonathan M. Miller, above n. 75, at 167 (arguing that the U.S. Supreme Court is a “charismatic yet cautious Court”). See also Paul W. Kahn *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON*

One of the very first announcements of the Lonardi *de facto* administration had been that the social conquests of the workers would be respected and consolidated, and the idea was also expressed publicly by Lonardi's successor, General Aramburu.<sup>634</sup> The *coup* was about getting rid of Perón, but many of the features of the Peronist state were there to stay. Interventionism in the economic realm, for one, would be retained. For the many who thought that achieving social justice should be one of the main goals of the government, interventionism was probably seen as an appropriate tool for the task. Writing from the left, Rodolfo Pandolfi suggested that democracy had to assimilate the Peronist experience;<sup>635</sup> going back to pre-peronism was not an option for the military, for many of the civilians who applauded them for overthrowing Perón, also approved of the social conquests. Peronism, in that sense, was an irreversible fact,<sup>636</sup> with or without the leader. The public support for social and workers' rights received constitutional entrenchment through the short-lived and largely failed Constitutional Convention of 1957, called by the revolutionary government. It only managed to add a new article, 14 bis, establishing a number of important social rights,<sup>637</sup> and to add a small part to an

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*THE CONCEPT OF SOVEREIGNTY* 13 (New York, Columbia University Press, 2011) (arguing that the U.S. Supreme Court “[...] relies on charisma —mystery and awe— as much as on argument”).

<sup>634</sup> See, e.g., “Respetará el Gobierno las conquistas sociales”, *Clarín*, September, 25, 1955, at 1 (reporting a public speech by President Lonardi where he stressed that social conquests would be respected); “El Gobierno respetará la Constitución de 1853”, *Clarín*, May, 2, 1956, at 8 (reporting a public speech by President Aramburu where he emphasized that “the worker’s conquests and rights will be respected and even enlarged”)

<sup>635</sup> Rodolfo M. Pandolfi, “Examen de conciencia”, 7-8 *Contorno* 137, 153 (1956).

<sup>636</sup> *Id.*

<sup>637</sup> The article reads: “Labor in its several forms shall be protected by law, which shall ensure to workers: dignified and equitable working conditions; limited working hours; paid rest and vacations; fair remuneration; minimum vital and adjustable wage; equal pay for equal work; participation in the profits of enterprises, with control of production and collaboration in the management; protection against arbitrary dismissal; stability of the civil servant; free and democratic labor union organizations recognized by the mere registration in a special record. Trade unions are hereby guaranteed: the right to enter into collective labor bargains; to resort to conciliation and arbitration; the right to strike. Union representatives shall have

article dealing with Congress' legislative powers. Still, it was proof of the mood of the times.

The so-called *Revolución Libertadora* and the practical abrogation, by a *de facto* decree, of the 1949 Constitution opened the times of permanent emergency in Argentina.<sup>638</sup> The emergency situation became permanent in two different, although related, senses: politically, the country entered a phase where civilian, democratically elected, governments were interrupted by military coups, in a seemingly never-ending cycle; legally, several emergency regimes remained in force during long years, kept alive by successive extensions issued by both civilian and military governments, or were replaced by other regimes.

The permanent political emergency makes the exploration of property rights regulations relatively uninteresting. Certainly there were several interventions in the scope of property rights, some of them of undoubted importance, such as the reform of the Civil Code in 1968 which altered the philosophical underpinnings of the country's private law, but in a context where institutional stability is far from assured, where civilian factions see resort to weapons as a way to solve political problems, and where the armed forces see themselves as charged with guarding the Nation from its own politics, it is understandable that property rights occupied a very minor place in the public's eyes.

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the guarantees necessary for carrying out their union tasks and those related to the stability of their employment. The State shall grant the benefits of social security, which shall be of an integral nature and may not be waived. In particular, the laws shall establish: compulsory social insurance, which shall be in charge of national or provincial entities with financial and economic autonomy, administered by the interested parties with State participation, with no overlapping of contributions; adjustable retirements and pensions; full family protection; protection of homestead; family allowances and access to dignified housing”.

<sup>638</sup> Some commentators, while embracing the idea of a permanent emergency regime, find its beginning in the late 1980s and early 1990s. See, e.g., Horacio Ricardo González, *ESTADO DE NO DERECHO: EMERGENCIA Y DERECHOS CONSTITUCIONALES* 58-59 (Buenos Aires, Del Puerto, 2007) (arguing that a qualitative change in the kind of emergency regulations occurred in the 1980s and 1990s, and that what initially was used to protect weak sectors of the population became a tool for trying to remedy the many problems of the State itself).

From 1955 on, Argentina suffered from institutional discontinuity, with no single civilian government able to finish its mandate. It also underwent a terrible phase of political violence, with armed groups of both extremes of the political spectrum turning politics into war, a phase that ended with the infamous military dictatorship of 1976-1983, where thousands of people were “disappeared”. The Constitution, while formally in force, was routinely subordinated to the great goals of the revolution of the time —we had *Revolución Libertadora* (1955-1958), *Revolución Argentina* (1966-1973), and *Proceso de Reorganización Nacional* (1976-1983)—. In such a context, which under the most charitable light can be considered as one of partial constitutionalism,<sup>639</sup> it is certainly naïve to expect that courts can protect constitutional rights against governmental decisions. To expect the general public to be paying close attention to regulations of property rights would border on blind fanaticism.

Legally speaking, emergency became ubiquitous, in a trend not too different from what can be observed in many western democracies during the twentieth century.<sup>640</sup> The housing crisis, for instance, had begun in the very first decades of the century, and had furnished the occasion for the rise of the economic emergency doctrine, in *Ercolano*.<sup>641</sup> The problem lingered on,<sup>642</sup> and prior to the constitutional reform, Perón’s government

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<sup>639</sup> See Robert Barros, “Courts Out of Context: Authoritarian Sources of Judicial Failure in Chile (1973–1990) and Argentina (1976–1983)” in Tom Ginsburg & Tamir Moustafa (Editors), *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 156 (New York, Cambridge University Press, 2008) (describing “partial constitutionalism” as “the idea that a judiciary, as structured by a given constitution, ought to uphold and defend another part of the constitution, its guarantees of rights, even after the core institutions of that constitution —elected legislative and executive institutions— have been suppressed and displaced by an autocratic centralization of power”).

<sup>640</sup> See William E. Scheuerman, “The Economic State of Emergency”, 21 *Cardozo L. Rev.* 1869, 1870-1874 (1999-2000) (explaining the proliferation, in the twentieth century, of economic emergency regulations in liberal democratic regimes).

<sup>641</sup> See 136 *Fallos* 161 (1922).

<sup>642</sup> See, e.g., “El problema de la vivienda”, *La Vanguardia*, September, 17, 1933, at 1 (arguing that the housing problem was still important for the working class); “El problema de la vivienda popular”, *Criterio*, November, 21, 1940, at 277-280 (arguing that the housing problem for the working class was extremely

extended the emergency regime then in force,<sup>643</sup> a problem that would haunt his *de facto* successors,<sup>644</sup> and that in the 1960s would still be there, showing no signs of being resolved.<sup>645</sup> Many other economic emergency interventions would take place. Compulsory hiring of entertainers,<sup>646</sup> prohibitions to harvest crops,<sup>647</sup> forcible payments of pensions and wages with state bonds,<sup>648</sup> reductions of pensions, consolidations of state debts into long term bonds,<sup>649</sup> forced savings,<sup>650</sup> not to mention devaluations and other

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worrisome); “Es excesivamente elevado el costo de los alquileres”, *Cabildo*, June, 9, 1943, at 8-9 (arguing that rent prices were excessively high and claiming for emergency measures to attack the problem); “Adquiere proyecciones de inusitada gravedad en el país el problema de la vivienda popular”, *La Fronda*, November, 30, 1944, at 7 (arguing that the housing issue was a formidable social problem).

<sup>643</sup> See, e.g., “Síntesis de los principales sucesos ocurridos en las últimas semanas”, *La Nación*, March, 4, 1949, at 4 (reporting that the Executive had issued a decree expanding the scope of the emergency rent regime, according to which landlords were forced to rent their property within thirty days of being vacated).

<sup>644</sup> See, e.g., “Estúdiase la prórroga de la ley de alquileres”, *Clarín*, September, 25, 1955, at 3 (reporting that the new government studied what to do with the extension of the emergency rent law); “La ley de alquileres”, *Democracia*, September, 28, 1955, at 3 (arguing that it was undoubted that the provisional government would take the emergency measures demanded by the situation of “countless tenants”, measures that “Congress would have taken, had it not been dissolved”); “El Gobierno prorrogó la ley de alquileres”, *Clarín*, September, 28, 1955, front page (headline stating that the government had extended the emergency rent law).

<sup>645</sup> 264 *Fallos* 344, 348 (1966), (Boffi Boggero, J., dissenting, §11 and 13) (summarizing the emergency regime for leases of both urban and rural property since 1943 and emphasizing that it had lasted for more than 22 years).

<sup>646</sup> See Emergency Law 14,226 (forcing owners of cinemas to include live numbers between the showing of movies and forcing hiring of entertainment artists to ameliorate the unemployment the varieties’ actors guild was undergoing).

<sup>647</sup> See “Yerba Mate: Prohibió el Gobierno levantar la cosecha”, *Clarín*, March, 19, 1966, at 8 (reporting that the Executive had issued a decree forbidding the harvest of yerba mate crop, for it was estimated that then current stock would cover the demand for two years).

<sup>648</sup> The so-called “9 de julio” bonds, in reference to the national independence day. The bonds were issued with an original term of 25 years and a 7% annual interest rate. The maturity term was later shortened to 10 years, and the bonds were paid in full in 1972. For a brief summary of these bonds’ cycle, see <http://www.billetesargentinos.com.ar/articulos/bonos9dejulio.htm> (last visited 04/15/2013).

<sup>649</sup> See Emergency Laws 23,982 (available at: <http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/381/norma.htm>; last visited 02/01/2012) and 25,344 (available at: <http://www.infoleg.gov.ar/infolegInternet/anexos/65000-69999/65053/norma.htm>; last visited

measures of economic and monetary policy that imposed severe restrictions to property rights in the name of the common good. The list is almost endless, and it is not possible to cover them all here. Moreover, many of those measures may not be adequate to get a glimpse of a popular conception of constitutional property, due to their limited scope.

I have chosen to focus, then, in the two last great economic crisis and the measures taken by democratic governments in their attempts to tame the crisis. I will analyze the hyperinflation crisis of 1988-1990, and the economic meltdown of 2001-2002. Both events were tremendously salient, with pervasive effects, and the measures taken to attack the crises had a broad reach. Therefore, they are very good candidates to survey popular opinions on property rights, for everybody was affected one way or another by the crises and the emergency regimes aimed at controlling them. I will not cover every emergency measure in each cycle, but only those that had a larger social impact.

This last cycle of economic crisis-emergency measures shows yet another change of conception of constitutional property. Large popular majorities ceased to be impressed by the unrestrained interventionist state and were claiming for a return to a situation of more respect for individual property. This can be seen clearly in the popular reactions to emergency measures taken in the late 1980's and early 2000's, both of which will be analyzed in-depth shortly. Moreover, such change of popular ideas regarding constitutional property was ratified by the 1994 constitutional amendments under Menem, which despite attempting a modernization of the rights part of the Constitution, left untouched the venerable property clauses, which date back to 1853. In this context,

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02/01/2012) (both establishing the consolidation of public debt and its restructuring through state bonds with maturities between 10 and 16 years).

<sup>650</sup> See, e.g., Emergency Law 23,549 (available at: <http://www.infoleg.gov.ar/infolegInternet/anexos/15000-19999/16090/norma.htm>; last visited 02/01/2012) (establishing a system of forced savings, where individuals and legal entities had to pay certain amounts and the State would pay them back in sixty months with a variable, but negative, interest rate).



deferential judicial decisions, upholding the emergency regimes, became increasingly countermajoritarian, in the sense that they were contrary to popular ideas on the topics informing the understanding of the inviolability of property.

At the same time, a new, different kind of difficulty began to surface: the regressive redistribution systematically produced as a consequence of the emergency measures eroded the perception of fairness in public burdens sharing and, by doing so, undermined the legitimacy of courts who were purportedly applying constitutional rules that mandated otherwise.<sup>651</sup> Two parallel difficulties plagued the activities of elected branches and courts during these episodes: an upside-down version of the classic countermajoritarian difficulty, where courts act in a countermajoritarian fashion by *deferring* to Congress and the Executive,<sup>652</sup> and the regressive redistribution difficulty. The latter could end up being yet another version of the former, insofar as a perception of unfairness in the distribution of the cost of the crises became widespread. But, of course, both difficulties need not coincide: a large majority could support regressive redistributions, e.g. from an insular and poor minority towards the richer majority, and normatively-speaking we would still face a difficulty, although not one based on the opposition to majoritarian preferences or judgments. In the case of Argentina, where the Constitution mandates that equality is the basis for the allocation of public burdens

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<sup>651</sup> Article 16 of the Constitution prescribes that “[...] Equality is the basis of taxation and public burdens”.

<sup>652</sup> Corinna Barrett Lain has recently defended a slightly different “upside-down” theory of judicial review, based upon the U.S. experience. In her version, courts sometimes act in a pro-majoritarian way by striking down laws. In my version, courts frequently act in a countermajoritarian way by deferring to political branches. See Corinna Barrett Lain, “Upside-Down Judicial Review”, 101 *Geo. L. J.* 113, 168 (2012) (arguing that “[w]hen widespread attitudes change but the law does not, pressure builds to effectuate that change—to give force of law to the transformation of attitudes, values, and policy preferences occurring in larger society. Sometimes the Supreme Court is the most conducive outlet through which this change can occur. Free of the legislative logjams that stymie the representative branches, and moved by majoritarian proclivities of its own, the Court responds to, and reflects, prevailing norms otherwise frustrated in the democratic process”).

(article 16), the difficulty is not merely philosophical or political, but constitutional as well. Let us examine the historical facts that support my story.

### **b. The Attempts to Tame Hyperinflation and Their Impact on Property Rights.**

During the 1980s, Argentina suffered recurrent inflationary crises that ended up in hyperinflation in 1989.<sup>653</sup> Alfonsín's administration took a few emergency measures that interfered with property rights in the constitutional sense. The first took place in 1985, when Alfonsín tried to tame inflation with his "Austral Plan". The plan comprised a diverse set of measures, including the momentous decision to replace the monetary sign in force (*peso argentino*) with a new one (*australes*), but an important part of it was trying to eliminate inflationary expectations, which were believed to play an important role in the skyrocketing spiral of prices.<sup>654</sup> Many, if not most, contractual obligations included clauses that attempted to save the agreement from the erosive effects of the expected inflation —basically, indexation clauses—. Such clauses were to be nullified, in accordance with the economic policy. Therefore, all pending obligations were subject to *desagio* —de-indexation—. They were to be paid in the new currency, in accordance with a conversion rate established by the same emergency decree that eliminated indexation in contracts. The administration's argument was that the unforeseen and abrupt elimination

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<sup>653</sup> See, e.g., Peter Bernholz, "Monetary Constitution, Political-Economic Regime, and Long-Term Inflation", 12 *Const. Polit. Econ.* 3, 4 (2001) (listing Argentina's inflationary crisis of 1989/1990 among the 20<sup>th</sup> century's hyperinflations).

<sup>654</sup> See Introductory presidential message to Emergency Decree 1096/86 (arguing that obligations "contain strong inflationary expectations, as evidenced by high nominal interest rates and the strong existing premiums over cash transactions") (available at <http://digesto.smandes.gov.ar/digesto.nsf/f937dc853f70ff5e0325676e0001a15c/9a01337025c144d4c12567e400172cf8?OpenDocument>; last visited 02/01/2012).

of inflation to be brought about by the “Austral plan” would make such clauses the instrument for unjust transferences of wealth from debtors to creditors.<sup>655</sup>

The economic plan was initially successful, but its effects did not last long.<sup>656</sup> In 1986, inflation was again a huge social problem that haunted the Alfonsín administration. Still, there was not much litigation over the constitutionality of *desagio*,<sup>657</sup> and when the Court finally upheld it, in April, 1989,<sup>658</sup> it was almost yesterday’s news. Cortés Conde speculates that people reacted favorably due to “the drama of the circumstances, the novelty of the instruments, especially *desagio* [...] and the promise that the Central Bank would not issue money”.<sup>659</sup> Moreover, the Court had left open the possibility of excluding obligations from *desagio* if it was proved that they did not contain inflationary expectations.<sup>660</sup> Hence, the people may have perceived less of an interference with their property rights, and at all events, a sort of interference that did not contradict the popular understanding of the inviolability of property. Contracts were modified by law in order to adjust them to the new non-inflationary situation. If the no-inflation assumption

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<sup>655</sup> *Id.*

<sup>656</sup> Roberto Cortés Conde above n. 396, at 276-283 (explaining the initial success and posterior failure of the economic plan); Pablo Gerchunoff & Lucas Llach, *EL CICLO DE LA ILUSIÓN Y EL DESENCANTO: UN SIGLO DE POLÍTICAS ECONÓMICAS ARGENTINAS* 399-405 (Buenos Aires, Ariel, 1998) (same). See also Mario Rapoport, *HISTORIA ECONÓMICA POLÍTICA Y SOCIAL DE LA ARGENTINA (1880-2003)* 742-750 (Buenos Aires, Ariel, 2006) (same).

<sup>657</sup> See Alberto B. Bianchi, above n. 579, at 106, esp. fn 75-76 (arguing that the *desagio* did not give rise to many questions of constitutionality, and that the large majority of lawsuits involving its application did not present constitutional challenges to the emergency decree).

<sup>658</sup> CSJN, *Porcelli, Luis v. Banco de la Nación Argentina*, 312 *Fallos* 555 (1989) (upholding the de-indexation mechanism established by the Emergency Decree 1096/85 insofar as it was not proved that the purchasing power of the amount converted in accordance to the decree was inferior to the purchasing power of the originally agreed interests, had inflation remained in levels similar to the one existing at the celebration of the contract).

<sup>659</sup> Roberto Cortés Conde above n. 396, at 278.

<sup>660</sup> See, e.g., CSJN, *Cantarelli*, 311 *Fallos* 1144 (1988).

obtained, there was going to be no actual encroachment of rights, but their effective realization in a new context. Theoretically, at least, no actual reduction of capital was to be involved, and therefore, inviolability would be preserved.

Alfonsín also implemented a system of forced savings to attack inflation, the idea being that the administration could avoid issuing money if it had access to the additional resources generated by the forced savings scheme. People and companies whose income was above a certain threshold were obliged to pay the State a percentage of the income tax, and the State would pay it back in 60 months time, with a low interest rate that ended up being clearly negative in the face of the persistent inflation. Thus, the supposed forced savers ended up with much less purchasing power than what they had given the State. The system had a few editions. The last one, in 1988, had a very low threshold: those who paid more than 500 *australes* of income tax had to pay an additional 40 percent over their income taxes.<sup>661</sup> When the bill was debated in Congress, Senator Aguirre Lanari, among others, objected that the forced saving would be unconstitutional, because there were no circumstances of emergency that justified the exceptional measure and because it was sure to be a confiscation of funds, as “a nominal capital, eroded by the increasing inflation, will be given back, and the interests, due to their meager amount, in no way can represent an adequate compensation that preserves the capital”.<sup>662</sup> He insisted on the old conception of constitutional property, according to which while temporary restrictions, and the ensuing deprivations of gains, are permissible under certain circumstances, losses of capital could not be constitutionally imposed:

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<sup>661</sup> See, e.g., “Las aristas del paquete impositivo. Alfonsín promulgará esta semana los nuevos impuestos”, *Ámbito Financiero*, January, 11, 1988, at 6 (arguing that “it was a very low tax base”).

<sup>662</sup> “La polémica en el Senado al debatir la reforma fiscal”, *Ámbito Financiero*, January, 11, at 6 (quoting Senator Juan Ramón Aguirre Lanari).

“A requisition of money cannot be done unless certain inexcusable conditions are met: i.e., to give back the exact amount, without inflicting any economic harm to the citizens”<sup>663</sup>

Other representatives defended the same view. Deputy Carlos Zaffore, for instance, argued that the forced savings could not be really considered a saving at all because “the capital is not indexed and [the regime’s conditions] are light-years away from the conditions of the financial market”.<sup>664</sup>

Senator Solari Yrigoyen, a member of the governing party, defended the measures as unavoidable to control inflation, but admitted that the forced savings were not “beneficial to the savers”.<sup>665</sup> There was popular tension as Congress debated the law, due to the “notorious lack of disposition” of the population to accept the fiscal package, which was to be especially hard on middle-income individuals.<sup>666</sup> Businesses were also affected and the *Coordinadora de Actividades Mercantiles Empresarias*, a business organization, complained that “the State appropriates the *regressive income distribution* carried out, plus an additional portion of the gains of companies and individuals”.<sup>667</sup> Similar criticisms were

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<sup>663</sup> *Id.*

<sup>664</sup> Carlos Zaffore, “La reforma impositiva y la desactivación de la bomba”, *Ámbito Financiero*, January, 14, at 11.

<sup>665</sup> “La polémica en el Senado al debatir la reforma fiscal”, *Ámbito Financiero*, January, 11, at 6 (quoting Senator Hipólito Solari Yrigoyen).

<sup>666</sup> Pablo Kandel, “Tensión por mayores impuestos”, *Clarín*, January, 9, at 10.

<sup>667</sup> “Documento de empresarios mercantiles. Es el descontrol fiscal”, January, 11, 1988, at 9 (citing a statement issued by the *Coordinadora de Actividades Mercantiles Empresarias*). But see “Para entender la guerra impositiva”, *Página 12*, January, 10, 1988, at 12-13 (denouncing a strong lobby of the business chambers to prevent tax raises from happening and citing off-the-record legislative advisors in the Peronist party saying that most of the approved measures did not have distributively regressive effects).

advanced by other social actors, mainly businesses and farmer's associations who had higher stakes than individuals in passage of the comprehensive tax legislation.<sup>668</sup>

Ultimately, the Peronists—who controlled the majority of the provinces and had an interest in getting funds for them—<sup>669</sup> and the Radicals—who had to support Alfonsín's administration's need for funding—reached an agreement and the debate was ended.<sup>670</sup> There were attempts to enforce strict party discipline on the vote, and the law was passed over the protests of many representatives who voted for it.<sup>671</sup> The majority had their way, the pressing necessities of the administration and the conveniences of the opposition prevailed, and the forced savings regime was enacted for one last time.

Still, and as much as they were disliked by the population, forced savings were probably perceived as an additional income tax and, hence, were not limited by the idea that reductions of capital are impermissible. People are used to all sort of taxes that do

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<sup>668</sup> See, e.g., “Dura crítica de la CIMT a las leyes impositivas”, *Crónica*, January, 13, 1988, at 15 (reporting the attack by Chamber of Steel Industry of Tucumán, which considered a problem of forced savings that the capital would be diminished by the time of the restitution); “Desagrado de Carbap por la mayor presión tributaria”, *La Nación*, January, 14, 1988, at 18 (reporting that the *Confederación de Asociaciones Rurales de Buenos Aires y La Pampa* considered the forced savings regime unconstitutional and that the *Confederaciones Rurales Argentinas* would analyze the subject in detail).

<sup>669</sup> Congress had at the same time enacted a new law regulating the distribution of federally-collected taxes and forced savings were a part of the fiscal federal deal. See “Un avance para cortar el déficit”, January, 9, 1988, at 1, 7 (interviewing Secretary of Finances Mario Brodersohn who explained that the new measures represented funds for 4,35% of the GDP, and that 1,03% -some 23.67% of the funds- would be destined to the provinces).

<sup>670</sup> See, e.g., Carlos Zaffore, above n. 664, at 11 (arguing that as a Deputy he had been prevented from presenting his views on the bill as a consequence of the agreement reached by Deputies Jaroslavsky —U.C.R.— and Manzano —Peronism—). See also “Una aprobación con muchos reparos”, *Clarín*, January, 9, at 5 (quoting Deputy Manuel Vidal, saying that “it is not healthy for the life of the democracy” that representatives are forced to act on such important matters under the pressure of urgency and depending on agreements—presumably, the Jaroslavsky-Manzano agreement- of which “we have been neither a part of, nor have been consulted on”); “Alsogaray: las leyes impositivas son un esfuerzo sin esperanza”, *La Nación*, January, 14, 1988, at 14 (quoting Álvaro Alsogaray, president of the political party *Unión de Centro Democrático*, accused Peronists and Radicales of agreeing in “this exaction”)

<sup>671</sup> See, e.g., “Una aprobación con muchos reparos”, *Clarín*, January, 9, at 5.

reduce the value of their holdings. This was, in the end, the argument used by the Supreme Court to uphold the forced saving laws many years later.<sup>672</sup>

“[...] there was a widespread perception in the community [that forced savings were] a tax figure, in the understanding that, as legislated, the regime not only implied a temporary curtailment of a portion of the individuals’ wealth, but also the high probability that such a restriction had a definitive nature, because of the insufficiency of the interest set by the legislature to compensate deterioration of the monetary unit’s purchasing power. This overall perception eventually coincided with the undeniable reality [...]”<sup>673</sup>

Justice Boggiano went as far as to argue that

“[...] the community did not trust the claims some of their representatives in the sense that the system of forced savings sanctioned integral restitution [...] several of the views held in Congress were only an illusion that failed to convince the large majority of its recipients”<sup>674</sup>

Forced savings were a tax, and a benevolent one at that, since the regime provided for the restitution of part of the taxes paid, and the only constitutional limit was that the tax could not be “confiscatory” —i.e., could not absorb a “substantial part” of the taxed capital or profit—. <sup>675</sup>

This measure was not very successful at controlling inflation either, and Alfonsín’s government entered a free-fall phase, with inflation turning into hyperinflation and social problems on the rise.

Shackled by the deep economic crisis and the ensuing social unrest, Alfonsín was forced to turn over power to elected president Menem six months in advance, in July

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<sup>672</sup> CSJN, *Horvath*, 318 *Fallos* 676 (1995) (upholding the first forced savings law, Law #23,256) and CSJN, *Indo*, 318 *Fallos* 785 (1995) (upholding the second forced savings law, Law # 23,549).

<sup>673</sup> 318 *Fallos* 676 (1995) (Belluscio, López, Bossert, JJ., plurality opinion, §12; Nazareno, Levene, JJ., concurring, §12; Boggiano, J. dissenting in part, §28).

<sup>674</sup> 318 *Fallos* 676 (1995) (Boggiano, J., dissenting in part, §28).

<sup>675</sup> 318 *Fallos* 676 (1995) (Belluscio, López, Bossert, JJ., plurality opinion, §25; Nazareno, Levene, JJ., concurring, §25; Moliné O’Connor, J., dissenting in part, §24, 31-32; Boggiano, J. dissenting in part, §23).

1989. At first, Menem had difficulties controlling the crisis. Several measures were attempted unsuccessfully.<sup>676</sup> In the high-inflation context of the time, people had basically two alternatives to preserve the value of their savings:<sup>677</sup> to buy foreign currency (basically, U.S. dollars), or to find an “investment” alternative that yielded a return rate higher than the inflation rate. Banks, in order to attract money to their vaults, offered increasingly high interest rates for very short-term deposits in *australes*, the national currency of the time. In the last weeks of 1989, interest rates on bank deposits reached a monthly 600%.<sup>678</sup> Banks, in turn, were subject to Central Bank regulations that required them to deposit about 80% of the money they received from depositors in the Central Bank as cash reserves and non-disposable deposits.<sup>679</sup> Such reserve accounts were paid even higher interest rates by the Central Bank,<sup>680</sup> thus creating the so-called “quasi-fiscal deficit”, which at a point was larger than proper fiscal deficit.<sup>681</sup> What was happening, in

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<sup>676</sup> See, e.g., Pablo Gerchunoff & Lucas Llach, above n. 656, 440-441 (arguing that in 1989 and 1990 there was scarcely any improvement in prices stabilization and that “a year and a half into his mandate [...] Menem had not achieved any lasting success” in controlling inflation). See also Mario Rapoport, above n. 656, at 786-789 (describing the failure of Menem’s first attempts at stabilizing the economy and controlling inflation).

<sup>677</sup> In such a context, the use of the word “saving”, while not technically imprecise, may be misleading: quite often people needed to preserve the value of their income from the tremendously rapid depreciation of the national currency, even if the money was intended to be used within a very short term (e.g. because it came from wages and it was destined to be used during the month. Thus, besides proper savings, destined for future consumption, there were short-term savings, to be used at a later moment in the same month.

<sup>678</sup> See, e.g., “Año nuevo, plan Erman González nuevo”, *Clarín*, Suplemento Económico, January, 7, 1990, at 12.

<sup>679</sup> See Alfredo Zaiat, “Los cierres y despidos se pasean por la city”, *Página 12*, January, 7, 1990, at 4-5 (citing Central Bank figures for October 1989 according to which 82,1% of the deposits made in commercial banks were, in turn, deposited in the Central Bank).

<sup>680</sup> Needless to say, banks, in the meantime, were profiting from this policy, given the spread between the interest rates they paid depositors and the interest rates they received from the Central Bank.

<sup>681</sup> Roberto Cortés Conde above n. 396, at 276 (explaining quasi-fiscal deficit as “the difference between interest payments that the Central Bank made on reserves and frozen deposits (*depósitos indisponibles*) and those that it received from rediscounts to the public sector or the financial system”).



fact, was that the Government was funding itself with the depositors' money<sup>682</sup> —at a very high interest rate. The situation was very problematic for the administration. Although it did not pay in cash a substantial portion of the interests it owed the banks, its nominal debt grew at a very fast pace. At the same time, the part of the interests that it did pay went to circulation, exacerbating the inflationary problem. Decisive action was necessary.

In December, 18, the Menem administration announced a new economic team, headed by the new Minister of Economy, Antonio Erman González. The new authorities, including the Erman González himself and the President of the Central Bank, promised publicly that bank deposits would be respected as far as amounts, terms, and conditions were concerned.<sup>683</sup>

Barely ten days after, in December, 28, 1989, however, a bank holiday was declared.<sup>684</sup> Shortly after, in January, 3, 1990, Menem issued emergency decree 36/90, declaring that all fixed-term deposits in excess of one million *australes* were to be repaid in national bonds nominated in dollars, subject to LIBOR interests over a 10-year maturity

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<sup>682</sup> See “Coloring the Currency”, *The Economist*, March, 24, 1990, at 71 (estimating that around four-fifths of the total 7-day bank deposits were borrowed by the Government); see also Guillermo Rozenwurcel & Leonardo Bleger, “El sistema bancario argentino en los noventa: de la profundización financiera a la crisis sistémica”, 37 *Desarrollo Económico* 163, 164 (1997) (arguing that deposits in the banking system at the time of the “Bonex plan” were basically short-term financing for the Government due to the high minimum cash positions mandated by the Central Bank).

<sup>683</sup> See, e.g., Daniel Artana & Enrique Szewach, “La gran estafa de no bajar el gasto”, *Cronista*, January, 4, 1990, at 4 (stating that both the Minister of Economy and the President of the Central Bank announced that bank deposits would be respected in their amounts, terms of restitution, and other contractual conditions); Luis García Martínez, “El camino de la desintegración social”, *La Nación*, January, 7, 1990, at 3 (arguing that the new authorities “promised [...] the respect of fixed-term deposits”); Francisco A. Mezzadri, “El futuro es hoy”, *La Nación*, January, 14, at 3 (quoting the authorities’ speech of December, 18, 1989, according to which “the maturities of time-deposits, [the amounts in] savings accounts, as well as other banking operations will be respected, and no reduction of capital, de-indexation, or restriction to the disposability of such funds will be imposed”).

<sup>684</sup> The banks would not re-open until the “Bonex plan” was firmly in place. See Pablo Kandel, “Los lamentos que más se escucharon”, *Clarín*, January, 5, 1990, at 4 (reporting on the situation in banks after “three days of forced banking holidays”).

term and with a 3-year grace period in which no payments of capital were to be made.<sup>685</sup> Moreover, a de-indexation mechanism was applied to bank deposits, but not to bank credits. Basically, it meant that deposits were to be frozen at their December, 28, amount, without any further interest during the bank holiday, while banks would be able to charge interests during the same period. It was called asymmetric *desagio*. It might impress as fairly irrelevant, as it comprised only seven days, but once one takes into account that time-deposit interest-rates were as high as 600% a month (and banks charged as much as 1,200% in their loans),<sup>686</sup> the picture changes radically. *Clarín* estimated that banks would save some 230 million dollars in unpaid interest to depositors.<sup>687</sup>

The measures were popularly known as “Bonex Plan”, due to the centrality of the national bonds called “Bonos Externos” (external bonds). It must be noticed that only extremely small deposits would be paid back in cash: the one million *australes* encompassed in the exception clause amounted to less than six hundred dollars.<sup>688</sup> The plan had two main goals. First, to cut off the quasi-fiscal deficit,<sup>689</sup> by substituting the

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<sup>685</sup> Other sorts of accounts and banking operations were included in the swap, but they are not relevant to the argument here. See articles 1 and 2, Decree 1427/89 (available at <http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/2212/norma.htm>; last visited 01/06/2012), and article 1, Emergency Decree 36/90 (summary available at: <http://www.infoleg.gov.ar/infolegInternet/verNorma.do?id=2559>; last visited 01/09/2012; full text available at [http://www.puntoprofesional.com/P/0650D/DECRETO\\_036-90.HTM](http://www.puntoprofesional.com/P/0650D/DECRETO_036-90.HTM); last visited 01/09/2012).

<sup>686</sup> See “Un esquema financiero que busca afianzarse”, *La Nación*, January, 5, at 16 (reporting that, due to asymmetric *desagio*, banks were able to charge 1,200% to their debtors during the bank holiday while denying any interest for bank deposits after December 28, 1989).

<sup>687</sup> See Alejandro Matvejcuk, “Aportan algunos detalles del desagio”, *Clarín*, January, 4, at 4 (estimating the total amount in 460,000 million *australes*, roughly equivalent to 230 million dollars at a 2,000 *australes* per dollar exchange rate, corresponding to the last week of December, 1989)

<sup>688</sup> The deposits in *australes* were converted to bonds in dollars at a parity of 1,800 *australes* per dollar (see article 4, Emergency Decree 36/90), which reflected fairly closely the market value of the dollar at the time the bank holiday was declared, in December, 28, 1989. Therefore, 1,000,000 *australes* were roughly equivalent to 555 dollars.

<sup>689</sup> When announcing the measures to the population, Minister of Economy Erman González said that the State would reduce its deficit from 600 million dollars a month to roughly the same amount per year. See

LIBOR interest rate that the State would pay on the bonds for the extremely high interest rate it was paying on reserve accounts in the Central Bank. Second, to dry up the market, by making *australes* extremely scarce and, thus, preventing the fly to the dollar and making the national currency more valuable, in the hope of controlling inflation.<sup>690</sup>

Popular reactions to the measures hint at a reinstatement of the more traditional conception of constitutional property that had gained acceptance after the 1920s decisions on the constitutionality of the rent laws. They also point in another direction: the question of the distributive fairness of the measures begins to gain force here. The emergency regime was perceived as an attempt to tackle a very real and pressing necessity and, in that sense, as legitimate. It was expected that the administration did something. But the particular measures taken with deposits were largely deemed as unconstitutional, because they were perceived as inflicting losses on depositors and because they were thought to distribute unfairly the cost of the crisis. Let us see.

*Clarín* reported that newspapers received

“[...] multiple calls from *savers outraged* by what they described as a *confiscation of savings*, in some cases savings of a lifetime, and inquired about the chances [of success] if they went to courts by writ of *amparo*”<sup>691</sup>

An article by a columnist in the same newspaper stressed that “under the pretext of ending with the *patria financiera*, the State appropriated 1,800 million dollars from the savers”.<sup>692</sup> Another columnist argued that the “the alleged attack on the *patria financiera*

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“Pagarán los plazos fijos con Bonos Externos 1989”, *El Cronista*, January, 4, 1990, at 4 (citing Erman González); see also “Después de un fin de año angustioso”, *La Nación*, January, 3, 1990, at 11 (same).

<sup>690</sup> See, e.g., “El Banco Central mantiene la aguda escasez de australes”, *Clarín*, January, 8, 1990, at 3 (explaining the intention of the monetary authority to keep *australes* scarce to control hyperinflation).

<sup>691</sup> “Ahorristas preocupados”, *Clarín*, Suplemento Económico, January, 6, at 4.

<sup>692</sup> Alejandro Matveiczuk, “Ajetreo para la banca y la empresa”, *Clarín*, January, 7, at 4.

has turned into a ‘boomerang’ for all citizens who did any kind of operations in the financial system”.<sup>693</sup>

*La Nación* reported that the plan displayed a “strong dose of authoritarianism on the part of the Central Bank”, deciding on the “benefits and losses of the citizens”.<sup>694</sup> It also emphasized that “most financial analysts acknowledge that the freezing of interest accrual in December 28 implies a *confiscation* for savers in *australes*”,<sup>695</sup> and expressed its own view saying that

“[w]hile the Minister’s argument is that the banking system [inflation] expectations were excessive, which led to an increase in interest rates that made them unaffordable, *it does not seem fair that savers are to bear the burden of such overvaluation*”<sup>696</sup>

In the same newspaper, one commentator emphasized that the State had “expropriated a substantial part of the savings of millions of people (and not of a few speculators)” and that “such an attack on the legitimate rights of many people is not the right path to reestablish confidence in the legal order”.<sup>697</sup> Another one decried that “an ad hoc technocracy did not hesitate to ignore [...] property rights”.<sup>698</sup>

Another commentator had a different perception of the same phenomenon, and argued that the immediate loss that depositors suffered was nothing more than the

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<sup>693</sup> Daniel Muchnik, “El sistema, con fragilidad”, *Clarín*, Januar, 6, at 3.

<sup>694</sup> “Un esquema financiero que busca afianzarse”, *La Nación*, January, 5, at 16.

<sup>695</sup> *Id.* The italics are mine.

<sup>696</sup> *Id.* The italics are mine.

<sup>697</sup> Luis García Martínez, “El camino de la desintegración social”, *La Nación*, Suplemento Economía, January, 7, at 3.

<sup>698</sup> Francisco A. Mezzadri, “El futuro es hoy”, *La Nación*, Suplemento Económico, January, 14, at 3.

absorption of the “violent interest rates” of the last week of 1989, and that once the people noticed that, a new scenario of stability might come into view.<sup>699</sup> It was a distinctly minority position, and apparently, most people agreed with *La Nación* that such a distribution of burdens was not fair. *Diario Popular*, for instance, reported that savers expressed their outrage at the Menem administration measures and that they thought them to be “a government’s scam”.<sup>700</sup>

The Radical leader in the *Chamber of Deputies*, César Jaroslavsky, argued that the Administration was “sucking up people’s money”.<sup>701</sup> Socialist Deputy Silvia Mas complained bitterly that the plan was “brutally recessive” and “a massive confiscation of the middle class”.<sup>702</sup> Guillermo Francos, of the Federal Party, criticized severely the “confiscatory measures” over bank deposits in *australes*.<sup>703</sup> The local Committee of the *Unión Cívica Radical*, the main opposition party, argued that the plan harmed “small and medium savers” and that it was a violent and unjust measure.<sup>704</sup> The people felt as if, literally, they were being stolen by what could be described as the “pickpocket State”.<sup>705</sup>

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<sup>699</sup> Raúl Clauso, “Un plan audaz para observar atentamente”, *Cronista*, January, 3, at 10. See also Horacio Verbitsky, “Cuentos asombrosos”, *Página/12*, January, 14, at 8-9 (arguing that the relative passivity of savers in the face of the clear confiscation might be explained by their perception that it was a risk accepted when they received astronomically-high interest rates on their deposits).

<sup>700</sup> See “Con tensión y sin australes, el dólar bajó a 1.310”, *Diario Popular*, January, 5, at 2 (quoting various depositors who were protesting in the Banks).

<sup>701</sup> See “Nuevas reacciones por las medidas económicas”, *Clarín*, January, 8, at 5 (quoting César Jaroslavsky).

<sup>702</sup> See “Dispares opiniones sobre el plan”, *Clarín*, January, 6, at 5 (quoting Silvia Mas).

<sup>703</sup> See “Opiniones encontradas sobre el plan”, *Clarín*, January, 7, at 21 (quoting Guillermo Francos).

<sup>704</sup> See “Siguen las reacciones a las nuevas medidas económicas”, *Clarín*, January, 8, at 5 (quoting the Committee).

<sup>705</sup> See “De la histeria a la confusión”, *La Nación*, Suplemento Económico, January, 7, at 2.

Even banks were worried about the likelihood of facing lawsuits by savers who understood that the compulsory swap violated their property rights.<sup>706</sup> Average depositors must have perceived the plan as imposing on them a reduction of capital, as the long-term bonds were bound to sell way below par during considerable periods of time. And, remember, according to the conception of constitutional property that, I am arguing, had gained hold again, reductions of capital were impermissible. That this must have been an extended belief is further proved by the fact that presidential advisor Álvaro Alsogaray made an explicit appeal to the distinction between reductions of capital and deferments of maturities when he defended the plan publicly:

“What has [the State] said to the savers who had their money in banks that, in turn, took it to the Central Bank? Gentlemen, we are bankrupt, we cannot pay, we have no resources to do it. Hence, *we ask you to accept a deferment* [...] we guarantee it with Bonex. Your *capital is now safe*, but you will have to wait for a while”<sup>707</sup>

To make matters worse, large companies and the banks lobbied ferociously to get special benefits in the height of the crisis, which may have deepened the perception of distributive unfairness in the minds of many people. Large businesses attempted to liquefy their debts to the financial system by pushing for the possibility of paying the banks with bonex at their face value. They enjoyed the help of then-Minister of Foreign Affairs (and soon-to-be Minister of Finance) Domingo Cavallo. The plan ultimately failed, due to the strong opposition of the financial sector.<sup>708</sup> The banks, in turn, managed to free themselves from paying interest on bank deposits during the bank

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<sup>706</sup> See “Bancos: temor por acciones legales”, *Cronista*, January, 3, at 4.

<sup>707</sup> “Alsogaray: estamos abandonando el estatismo y el intervencionismo”, *La Nación*, January, 3, at 1, 12 (interviewing Alsogaray). The italics are mine.

<sup>708</sup> Alejandro Matveiczuk, “Ajeteo para la banca y la empresa”, *Clarín Suplemento Económico*, January, 7, at 4. See also “No podrán cancelarse deudas con bonex”, *Clarín*, January, 10, at 6 (explaining the lobbies and the outcome of the power struggle); “No habrá pago de deudas con Bónex”, *Cronista*, January, 9, at 5 (same).

holiday —no interest accrued during those days— while at the same time retained their legal ability to collect interest on their loans. Since the State decided not to pay interests on cash reserves and *depósitos indisponibles* either, the banks and the State made a good profit of about 350 million dollars that was split in roughly similar portions.<sup>709</sup>

Popular humor also reflected the idea that the government was acting in impermissible ways. Taking advantage of the proximity of a popular Christian tradition for children, called the night of the Three Wise Men, in which children leave their shoes by the door at night and they receive gifts the next morning, an extremely well-known comic character, *Clemente*, explained

“-There are people who bought dollars at 2000 and some [*australes*] last week, and just in case, deposited the rest of their money in time-deposits, and they got Bonex instead. Tonight they don’t want to even leave their shoes because they are afraid that the Three Wise Men will come and take them”.<sup>710</sup>

*La Nación* printed a comic by Almeida where two men are having a heated argument in the street, each with a time-deposit certificate in their hand, and while they argue two long arms, coming from each side of the cartoon, are stealing from the men’s pockets.<sup>711</sup> The idea is that while people were seeing what to do with their monies, they were stolen.

In a decidedly more grotesque fashion, *Página/12* ran a comic that may have well depicted how the most vulnerable of bank depositors felt about the Bonex plan.<sup>712</sup>

“Retiree: -Do you have suppositories?”

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<sup>709</sup> See “Aportan algunos detalles del desagio”, *Clarín*, January, 4, 1990, at 4 (providing slightly lower figures in national currency). See also Alejandro Matveiczuk, “Ajetreo para la banca y la empresa”, *Clarín Suplemento Económico*, January, 7, at 4 (providing figures in U.S. dollars).

<sup>710</sup> Caloi, “Clemente”, *Clarín*, January, 5, 1990, at 44.

<sup>711</sup> Almeida, untitled comic, *La Nación*, January, 5, at 16.

<sup>712</sup> See Daniel Paz & Rudy, untitled comic in *Página/12*, January, 5, at 1.

“Pharmacist: -No, sorry, sir, all we have are bonex.”

“Retiree:-Bonex? And how do you use them?”

“Pharmacist:-In the same way suppositories are used.”

Other comics in the same newspaper appealed to similar ideas. In one of them, a man has just made a deposit and he is telling a friend that he is not sure that it had been a wise decision. When the friend asks why, the man —holding the fixed-term deposit certificate with both hands— replies: “Look what the small letter says: Foolish is he who deposits”. At the same time, other two men are in the background, commenting on the situation of the depositor and the talk with his friend, which these two men have just witnessed. One of them, referring to the fixed-term deposit the depositor was holding in his hands, comments: “And in the nights of full moon it [the deposit] becomes a bonex”. The bank teller is depicted as a naughty fellow, laughing as having just conned the depositor.<sup>713</sup> In another political satire story, two kids are having a conversation on the Three Wise Men’s tradition:

“Kid 1:-I’m telling you, there are no Three Wise Men, it’s the parents...”

“Kid 2:-However, Carlitos’ and Zulemita’s dad [note: they were President Menem’s children] is a president and a Magician-King [as the Three Wise Men are considered in the tradition]”

“Kid 1:-Who told you that?”

“Kid 2:-My dad. He says the Government reached into his pocket and took all of his money without his noticing it”

“Kid 1:-Did Government return the money later?”

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<sup>713</sup> *Id.*



“Kid 2:-Yes, but the trick does not end there. *The most magical thing is that my dad had the same amount of money as before, but it was worth only half* [of its previous value]”

“Kid 1:-Awesome!”

“Kid 2:-And he’s not the only one. My dad told that there was once a minister-magician who turned the *peso* into poop.”

“Kid 1:-And now there’s another one who turned the *australes* into Bonex.”

“Kid 2:-Another one? My dad told me that it’s the same guy. That’s another magical skill ministers have: they look different, but they are all the same.”

“Kid 1:-I insist: the parents are the Three Wise Men.”

“Kid 2:-No, sir, the Three Wise Men [in the Spanish tradition, they are Magician-Kings, with kings being important in this part of the story] are the Government [...]”<sup>714</sup>

Many people felt that their savings were exchanged for bonds that weren’t worth the paper they were printed on,<sup>715</sup> at the same time that bigger players, wealthier individuals and companies were spared the burdens of trying to control inflation and were even benefitted by the measures.

A comic by Carlos Basurto, printed in *La Nación*, depicted both presidential advisor Álvaro Alsogaray—who was thought to be one of the masterminds behind the Bonex plan and had been involved in another bond-based emergency plan in the early 1960s—and Minister of Foreign Relations Domingo Cavallo—who was about to become Minister of Finance and had antecedents in instances of nationalization of private debt as a former President of the Central Bank—as peeling fresh fruits with their hands, with a couple of blenders in sight. A sign above their heads read “Especialidad en

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<sup>714</sup> Rudy, “Privilegiados”, *Página/12*, January, 6, frontpage of section *Sátira/12*. The italics are mine.

<sup>715</sup> Although time would eventually prove them wrong on this score.

licuados” —translated, “We specialize in smoothies”, but the word play in Spanish also means “We specialize in liquefaction”, pointing towards debt liquefaction—. <sup>716</sup> The public perceived that big players were, once again, attempting to make a profit out of the crisis situation.

Even though the effects of the compulsory conversion of deposits into long-term bonds reached even the most modest sectors of the population, <sup>717</sup> the emergency discourse sang a different song: the plan had been an attack on speculation, <sup>718</sup> the end of the *patria financiera*, <sup>719</sup> and a novelty in that “for the first time in forty years the contribution to overcome the crisis will be made by the well-to-do”. <sup>720</sup> As it was to be

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<sup>716</sup> See Carlos Basurto, “Deuda interna”, *La Nación*, January, 8, at 8.

<sup>717</sup> Notice that even those who did not have any sort of savings were hit by the measures. People in the informal economy (street vendors, people performing services for a tip, etc.) depend centrally on the availability of national currency and, thus, they suffered an indirect, yet strong, blow when those who usually bought goods or services from them did not have *australes* to spend. On the immediate shortage of currency caused by the “Bonex plan”, see, e.g., “El Banco Central mantiene la aguda escasez de australes”, *Clarín*, January, 8, 1990, at 3 (explaining the intention of the monetary authority to keep *australes* scarce to control hyperinflation).

<sup>718</sup> See, among others, “Respaldo empresarial a las medidas”, *Clarín*, January, 2, 1990, at 5 (quoting Alberto Iribarne, then president of the National Congress of the Small and Medium Size Firms saying that the plan made the speculative sectors bear the costs of the measures, and quoting Deputy Eduardo Varela Cid, in the same line of thought); “El nuevo plan hará pagar el ajuste a los especuladores”, *La Prensa*, January, 3, 1990, at 5 (quoting Alberto Iribarne, same statements as *Clarín*).

<sup>719</sup> The expression *patria financiera* was used to refer to a sector of the population that, allegedly, lived on the rents produced by speculative financial devices, instead of working or engaging in productive investments. One of the most used speculative operations was to “jump” between short-term deposits in national currency and purchases of U.S. dollars: “With seven day or shorter interest periods, customers would cash in their investments, buy more dollars with their profit, and force the value of the dollar higher, requiring the banks to offer even higher interest rates to attract depositors. Prices were, all the while, rising, as the value of the local currency deteriorated”, William C. Banks & Alejandro D. Carrió, “Presidential Systems Under Stress: Emergency Powers in Argentina and the United States”, 15 *Mich. J. Int’l L.* 1, 40 (1993). For statements that the measures aimed at ending the opportunities for the *patria financiera*, see “Ahora hay que pasar el verano”, *Página/12*, January, 3, 1990, at 2-3 (quoting presidential advisor Álvaro Alsogaray). See also “Cautela de políticos y empresarios frente a los anuncios de Erman González”, *La Prensa*, January, 2, 1990, at 4 (quoting right-wing deputy Federico Zamora saying that “it seems that once and for all a decision has been made to exterminate the rats that inhabit the caves of the *patria financiera*”).

<sup>720</sup> Statements of Roberto Azaretto, then a member of the *Alianza de Centro*, a coalition that supported the neoliberal orientation of President Menem’s reforms. See “Nuevas repercusiones acerca de las medidas económicas”, *La Nación*, January, 3, 1990, at 10 (quoting Azaretto); see also “Respaldo empresarial a las medidas”, *Clarín*, January, 2, at 5 (same). Interestingly enough, Azaretto’s statements were an open admission of the distributively-regressive character of previous emergency plans.

expected, the rhetoric of the “common good” and the “general interest” had a significant place in the discourse. The President of the *Sociedad Rural Argentina*, an important center of lobby on behalf of large farmers, took up the flag of the “general interest”, stating that while “very respectable individual interests may feel harmed, it is inevitable to put the general interest first”.<sup>721</sup> A similar line of argument was advanced by the intellectual leaders of the *Partido Justicialista*, who argued that the Administration had acted “to the detriment of individuals, but in defense of the public good”.<sup>722</sup> What is most interesting is the emphasis on the supposedly egalitarian, and even progressive, character of the measures, which was trumpeted by figures standing in different points of the political spectrum. Minister of Labor Jorge Triaca claimed that “this time, everybody contributes in the fight against hyperinflation [...] It was time that the adjustments variables moved from salaries to speculation”.<sup>723</sup> The then governing party, *Partido Justicialista*, gave full public support to the measures through a message by one the leaders of the party in Congress, Deputy José Luis Manzano, who took the opportunity to stress that the measures would be “resisted by the privileged few”<sup>724</sup> and that

“[t]hose who have nothing to eat, those who face grave difficulties, they have already made contributions to social peace [...] Those who had large deposits,

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<sup>721</sup> See “Opiniones de empresarios”, *La Nación*, January, 2, at 12 (quoting Guillermo Alchourrón).

<sup>722</sup> See “El Parlamento busca rol en el Plan Bónex”, *Cronista*, January, 8, at 4 (citing unnamed “Peronist theorists”).

<sup>723</sup> “Esta vez todos aportan contra la hiperinflación”, *La Prensa*, January, 7, 1990, at 5 (quoting Jorge Triaca).

<sup>724</sup> “La conducción del PJ respaldó las medidas”, *La Nación*, January, 4, 1990, at 4 (quoting José Luis Manzano).

the big savers, and the banks will have to show the same behavior as the rest of the community”<sup>725</sup>

But was it really so? Was it really the case that large depositors, banks, and—in short—the well-off were the ones to bear the weight of the emergency plan? It seems fairly obvious that the relatively weak and poor, as well as the less-informed, would be the ones to bear the heaviest burden. For some time, the bonds were sold in the secondary market at a heavy discount, equivalent to the present value of the credit.<sup>726</sup> Initially, they traded at 40% of their nominal value, reaching an all-time low of 29% during March 1990,<sup>727</sup> and slowly regaining their value over time.<sup>728</sup> By definition, those with fewer resources were more likely to sell their bonds to provide for needs and expenses they could not afford otherwise. Relatively poor or needy depositors were unlikely to be able to wait ten years (or even three years, until amortization of capital began). The likely purchasers of those bonds had to be, again almost by definition,

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<sup>725</sup> “El PJ dio un aval completo a la gestión económica del gobierno”, *La Prensa*, January, 4, 1990, at 4 (quoting José Luis Manzano).

<sup>726</sup> See Richard A. Brealey & Stewart C. Myers *PRINCIPLES OF CORPORATE FINANCE* 16-21, 669-699 (New York, The McGraw-Hill Companies, 2000) (explaining the concepts of present value, net present value, the opportunity cost of capital, and the general mechanics of debt valuation).

<sup>727</sup> See “De todo en 30 días”, *Clarín*, Suplemento Económico, March, 31, 1990, at 10 (describing the ups-and-downs in the prices of Bonex during March and mentioning the price at which they were traded initially).

<sup>728</sup> By mid-1991, the bonds had reached a respectable price, nearing 70% of their nominal value. However, the capital loss to the depositors was still quite large, as the accumulated inflation for the January, 1990-June, 1991 period reached 2,514% and the Convertibility Plan (April, 1991) had established a fixed parity of 10,000 *australes* per dollar. Therefore, someone with an original deposit of 5 million *australes* received bonds for some 2,777 dollars, which if sold at the time (at 70% of their face value) would have commanded something close to 1,944 dollars (or 19,444,444 *australes*, according to the Convertibility Plan). Considering the accumulated inflation, the purchasing power the original deposit had in January, 1990, was equivalent to 125,700,000 *australes* (5,000,000 *australes* adjusted by an inflation rate of 2,514%). A depositor who had to sell at the time recovered something close to the 15.46% of the purchasing power of her original deposit. The loss was, thus, close to an 85% even a year and a half into the plan. The Bonex prices and the accumulated inflation are taken from Luis García Martínez, in Germán J. Bidart Campos, Néstor P. Sagués, Luis García Martínez & Horacio A. García Belsunce, “El plan Bonex y los derechos adquiridos (causa ‘Peralta, Luis A. y otro c/Estado Nacional)’”, XXVI *Anales de la Academia Nacional de Derecho y Ciencias Sociales de Buenos Aires* 113, 125 (1991) (making a similar example).

people with enough spare resources to invest, wait, and make a profit. Therefore, the relatively worse-off bore the capital losses, while the well-to-do enjoyed the corresponding gains.<sup>729</sup>

In order to see how the measures burdened especially the lower middle class and, in general, more vulnerable savers, consider the profile of the average depositor caught by the “Bonex plan”. The average deposit in the banking system must have been somewhere around 1,965 dollars.<sup>730</sup> Hardly enough to make its owner qualify, *per se*, as a

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<sup>729</sup> See, e.g., Héctor Juan Rubini, “Encajes fraccionarios remunerados por el Banco Central. La experiencia argentina (1977-1989)”, *Instituto de Investigaciones Económicas, Facultad de Ciencias Económicas, Universidad del Salvador Documento de Investigación #2* 1, 35 (Dec., 2010) (available at <http://www.usalvador.com.ar/fce/informes/doc2.pdf>; last visited 01/12/2012) (arguing that the certificates for BONEX that the savers received in the beginning were frequently purchased by the banks at 20% of their face value, therefore savers sustained losses of up to 80% of their capital).

<sup>730</sup> Unfortunately, Central Bank figures for different segments of deposits, according to their amounts, are available only from 1995 on. So I have had to dig into other sources to attempt a reconstruction of the average depositor caught by the emergency measures. According to these sources, at the moment of the emergency decree 36/90, there were about 4,600,000,000,000 *australes* in deposits reached by the compulsory swap. Of them, 1,300,000,000,000 would be repaid in cash, which means that they consisted of deposits of 1,000,000 or less *australes*. A simple mathematical operation shows that there were some 1,300,000 deposits (1,300,000,000,000 total *australes* to be paid back in cash divided by 1,000,000 *australes* — the top limit for restitution of deposits in cash—). If the total amount of australes was 4,600,000,000,000 and the maximum number of deposits was 1,300,000, then the average deposit was 3,538,461 *australes* (4,600,000,000,000 divided by 1,300,000), which amounted to 1,965 dollars (3,538,461 divided by 1,800 — the conversion rate set by article 4 of the Emergency Decree 36/90—, see above n. 688). For simplicity’s sake, I have considered that every *austral* to be repaid in cash corresponded to a deposit of 1,000,000 australes or *more*. It is clear that there may have been many deposits of *less* than 1,000,000 *australes*, which should have been completely repaid in cash, thus making the number of total deposits reached by the measures larger. However, this would only make my argument stronger, as the average deposit would be smaller than the 1,965 dollars I have considered in the text. Also, I have not considered in the calculations the amount to be repaid in cash in excess of 1,000,000 *australes* per deposit, corresponding to amounts destined to payments of employees’ salaries or social security’s contributions corresponding to December 1989 and other exceptions such as judicially-mandated deposits (article 1, Emergency Decree 36/90). I have not found any estimates as to what proportion these exempted deposits represented over the total amount to be repaid in cash. Still, I think the calculation made above holds even when considering this lack of information, if one assumes these exemptions of over 1,000,000 *australes* are canceled out by considering both the deposits of *less* than 1,000,000 *australes* and the joint deposits mentioned by presidential advisor Álvaro Alsogaray (where each individual’s contribution may have been of less than 1,000,000 *australes*) as deposits of 1,000,000 *australes* or more (see below n. 732). For the figures used in these calculations, see “Los números del plan Cavallo. Duras pugnas financieras”, *Clarín*, January, 9, 1990, at 7 (stating that a proposal by then-Foreign Relations Minister and soon-to-be Minister of Economy Domingo Cavallo, being considered by the Central Bank at the time, relied on there being a total amount of 4,600,000,000,000 *australes* to be converted in bonds and 1,300,000,000,000 to be repaid in cash). For other, probably less precise, estimates that do not alter substantially the calculations, see “Abren la temporada del Bónex 89”, *Página 12*, January, 4, 1990, at 2 (early speculation that the total amount to be repaid in cash would be about 1,000,000,000,000 australes, which in turn would have been close to one-third of the total deposits reached by the emergency measure) (this figures would imply an even lower average deposit, of some 3,000,000 australes, equalling 1,666 dollars); see also “Respaldan el programa económico”, *Clarín*, January, 31, 1990, at 16 (citing versions that Minister Erman González would have told the Senate that in December 28, 1990, the total amount in fixed-term deposits reached some 4,000,000,000,000 *australes*).

member of the wealthy classes.<sup>731</sup> Not only that, but also many people —usually co-workers— made joint deposits, meaning that some deposits represented the even smaller savings of a larger number of people.<sup>732</sup> People who had received sums of money as redresses for, say, physical injuries suffered in accidents, or severance payments became subject to a long-term credit restructuring.<sup>733</sup> Those with better information and resources were either rescued by their own banks through illegal means in the middle of the chaos of the emergency,<sup>734</sup> or were not exposed to the risk because, e.g., they had purchased dollars and kept them in foreign accounts or private vaults.<sup>735</sup>

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<sup>731</sup> Minister of Economy Erman González went to the Senate on January, 30, 1990, to search for legislative support of the emergency decree. When Senator Conrado Storani, concerned about the injustice the decree caused to smaller depositors, asked González whether he knew what proportion of the total deposits belonged to small and medium savers and what proportion belonged to large savers, González replied that such information could not be obtained, as many large investors had resorted to making a large number of small amount fixed-term deposits. See “Respaldan el programa económico”, *Clarín*, January, 31, 1990, at 16 (citing versions that reported González’s interaction with the senators). González’s explanation is implausible. It is hard to believe that the Central Bank could not gather, from each bank, the number of deposits that each individual had in each banking institution. Moreover, it is unlikely that someone with, say, 1,800,000,000 *australes* —about 1,000,000 dollars— made, for instance, 100 different deposits equivalent to 10,000 dollars each.

<sup>732</sup> In a discourse defending the measures, presidential advisor Álvaro Alsogaray acknowledged that “there are many people in companies that joined their small deposits and deposited them together [in one single deposit]. That exceeds one million [australes] and now they only get one million. Maybe it can be corrected”. See “Alsogaray: estamos abandonando el estatismo y el intervencionismo”, *La Nación*, January, 3, 1990, at 1, 12 (quoting Álvaro Alsogaray).

<sup>733</sup> Those who had been fired on or after December, 1, 1989 were later exempted from the compulsory conversion, as were those who needed surgical interventions (up to a maximum of 10,000,000 *australes*). See Emergency Decree 591/1990. Of course, many people who had been fired before that date also had deposited their severance pay money, and were affected by the sudden freezing of their support money.

<sup>734</sup> See “Respaldan el programa económico”, *Clarín*, January, 31, 1990, at 16 (citing Minister of Economy Erman González acknowledging the problem of the allegedly hard-to-prove case of some banks that, during the banking holiday, had moved the fixed-term deposits of some “special clients” to checking accounts —which were exempted from the compulsory conversion— thus benefitting such clients).

<sup>735</sup> According to then presidential advisor Álvaro Alsogaray, collectively Argentine private citizens had about 40,000,000,000 dollars abroad and only 5,000,000,000 in the country. See “Alsogaray: estamos abandonando el estatismo y el intervencionismo”, *La Nación*, January, 3, 1990, at 1, 12 (quoting Álvaro Alsogaray). See also William C. Banks & Alejandro D. Carrió, above n. 719, at 40 (arguing that “only Argentines who maintained their savings in local currency were harshly affected by the decree; the wealthy kept their savings in dollars”).

Even though some pensioners and retirees were later exempted from the compulsory conversion of their bank deposits,<sup>736</sup> they were subject to equally rough treatment when their judicially-recognized credits for readjustment of their pensions<sup>737</sup> were consolidated and substituted for yet other bonds (this time called “BOCONES”, short for “consolidation bonds”), also with a 10-year maturity term and no amortizations during the first six years.<sup>738</sup> The elderly were undoubtedly hurt, as they are a population with a greater need for liquidity. Elders have higher health payments and are in a phase of life where they spend more than they earn, so they were likely candidates to sell the bonds in the short-term. The regressive redistribution mechanism was even clearer in this case, as the Consolidation Law 23,982, allowed *any* holder of the bond to pay their debts to the social security system with bonds at their face value.<sup>739</sup> Big companies were, then, likely purchasers of the bonds in the secondary market, thus profiting from the elderly’s losses.<sup>740</sup>

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<sup>736</sup> Depositors who were 75 or older were exempted from the “Bonex plan” after a well-known tango composer, Enrique Cadícamo, sent a personal letter to president Menem, complaining about the injustice of applying the compulsory conversion to the elderly. Cadícamo was 91 years old at the time. Menem exempted Cadícamo from the plan, and later issued Emergency Decree 591/1990 (April, 4, 1990), generalizing the exemption. See, e.g., “No les devolvieron ayer a los ancianos los plazos fijos”, *Clarín*, April, 17, 1990, at 10 (explaining the contents of Emergency Decree 591/1990); “La bronca de Menem y González no alcanzó para cobrar la plata”, *Página/12*, April, 19, 1990, at 4 (same).

<sup>737</sup> Article 14 bis of the Argentine Constitution mandates that the laws shall establish adjustable retirements and pensions (English version available at: <http://www.senado.gov.ar/web/interes/constitucion/english.php>; last visited 01/06/2012), and retirees and pensioners routinely have to litigate to obtain adjustments that compensate the erosive effects of inflation.

<sup>738</sup> See articles 1, 2, 3, 10, and 14, Law 23,982 (available at: <http://www.infoleg.gov.ar/infolegInternet/anexos/0-4999/381/norma.htm>; last visited 01/06/2012).

<sup>739</sup> See article 14, ¶2, Law 23,982.

<sup>740</sup> Arguably, this option to use the bonds at face value may have made them more attractive and, hence, may have increased their price in the secondary market by creating more demand for BOCONES. While this is true, it remains the case that, at least during a few years, the bonds had to be sold below par in order to be attractive for potential buyers. Therefore, a capital loss must have been endured by pensioners and retirees who sold during that period of time, with a corresponding profit made by investors. Moreover, the fact that BOCONES did not yield any return during 6 years must have created additional pressure to sell in

The emergency discourse, then, tried to disguise the true distributive consequences of the emergency plan, which were almost certainly regressive.<sup>741</sup> The Supreme Court followed suit when it upheld the Bonex plan in the much-maligned *Peralta* case.<sup>742</sup> Among the arguments supporting the ruling, the justices held that:

“[t]he sector that would be, in principle [...], harmed does not appear to have been chosen unreasonably [...] for the ownership of such deposits [...] is a signal, in the majority of the cases, of a corresponding economic capacity, which excludes the possibility of an unfair selection [...]”<sup>743</sup>

If the measures were largely deemed as a violation of constitutional property and as a harsh blow on relatively poor depositors and other involuntary bondholders, as I have argued before, how could one make an argument that the emergency discourse played any significant role in hiding the true nature of the measures? Surely, it must have been nothing but an ineffective attempt by the Administration and its supporters. The truth of the matter is a bit more complicated. Although the people largely thought the measures were an encroachment on property rights and an unfair distribution of the costs of controlling the crisis, they were also convinced that something had to be done.<sup>744</sup>

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the case of needy original holders and, thus, it must have led to a decrease in the bond's value due to the increased supply.

<sup>741</sup> One cannot rule out offhand that, all things considered, those at the very bottom of the social ladder benefitted from the measures, even if those at the top also did at the expense of the lower-middle class. I will deal with such scenario in the second part of the dissertation. See below chapter VII.b.

<sup>742</sup> 313 *Fallos* 1513 (1990). For a quick summary of the case and some criticisms of it, see William C. Banks & Alejandro D. Carrió, above n. 719, at 41-43. For extensive criticism of the arguments of the decision, see Alberto B. Bianchi, “La Corte Suprema ha establecido su tesis oficial sobre la emergencia económica”, 1991-C *La Ley* 141; see also Germán J. Bidart Campos, “El fallo de la Corte sobre el “plan bonex” (El amparo: airoso; la propiedad: desprotegida; la constitución: entre paréntesis)”, 141 *El Derecho* 519 (1991); Gustavo Ariel Kaufman, “Constitucionalidad del avasallamiento consumado: el caso ‘Peralta’”, 146 *El Derecho* 666 (1992); Germán J. Bidart Campos, Néstor P. Sagués, Luis García Martínez & Horacio A. García Belsunce, above n. 728.

<sup>743</sup> 313 *Fallos* 1513 (1990), §58.

<sup>744</sup> See, e.g., “Martes clave de un verano fatídico”, *Diario Popular*, January, 7, at 4 (arguing that social discontent with the measures was not the same as unpopularity of the emergency plan, as savers would



Measures were to be taken. The alternative was, the Administration warned, “truly dramatic”.<sup>745</sup> The emergency plea served, first, to reinforce the feeling of inevitability of painful measures and, second, to try to divide the opposition against the plan. By emphasizing the need to take some rough measures, lest the worst happen, the government’s supporters helped the lay folks be convinced that *their* sacrifice was inevitable. By arguing that the “privileged few” were bearing the costs, the Menem administration and its allies attempted to enlist the support of the lowest classes—which were affected by the plan only indirectly—<sup>746</sup> against the claims of socially-adjacent groups (lower middle and middle class) that were hit hard by the plan. Moreover, the discourse deflected the attention from the disquieting fact that the wealthy and influential were largely spared the sacrifices and were given precious opportunities to become even richer.

How was the *Peralta* decision received by the public? In truth, the decision was unsurprising. The public seems to have been largely resigned to a Court that would basically uphold any measures taken by the Administration. There were hardly any grounds to expect otherwise. President Menem had packed the Supreme Court with political allies to sustain his ambitions for neoliberal reform.<sup>747</sup> In April 1990, Congress

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have “reluctantly agree[d] that ‘something had to be done’ to control the unstoppable race between the dollar and the interest rates”).

<sup>745</sup> See “Opiniones encontradas sobre el plan”, *Clarín*, January, 7, at 21 (quoting presidential advisor Álvaro Alsogaray).

<sup>746</sup> Street vendors, other small merchants, those who performed services for small fees (such as people who offered to watch your car parked in the street for a small tip, those who offered to wash your car for small amounts of money), and even beggars, were affected indirectly for their customers and people they got their money from were suffering from a severe shortage of currency and, thus, extremely reluctant to engage in their usual transactions and to give money to beggars.

<sup>747</sup> For a detailed account of the “packing” of the Court by then President Menem, see Arturo Pellet Lastra, above n. 576, at 450-474.

enlarged the Court's membership from 5 to 9, with the convalidation of the emergency measures as one of the main goals in sight.<sup>748</sup> Given the one justice had resigned in protest for the Executive's blatant attempt to capture the Court, Menem got to appoint five justices, thereby constituting an effective majority. But even in the strictly legal terrain, the hopes for meaningful constitutional review of emergency measures were thin. Even if *Peralta* was in fact quite a stretch of the precedents, the record of the Supreme Court after the 1930s did not provide grounds for hope that the Court would strike down the emergency regulation.<sup>749</sup> One unnamed legislator reflected on the likelihood of a judicial invalidation of the plan in the following terms:

“Why would the Judiciary worry over the procedure [used to enact the plan]? Hasn't there been, throughout the years, dollar bank deposits [which were] paid in *pesos*, salaries and wages paid with government securities, *desagio*, freezing of foreign currency deposits, forced savings, freezing of the rights of pensioners, rent laws, mandatory refinancing schemes?”<sup>750</sup>

While everybody knew that the Court had to resort to “legal juggling” to reject the claims of those who felt “cheated and swindled” by the compulsory swap,<sup>751</sup> the media did not reflect public outrage over the *Peralta* decision, nor were there any

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<sup>748</sup> See, e.g., “Amplían de cinco a nueve los miembros de la Corte”, *Clarín*, April, 6, 1990, at 3 (reporting that President Menem had the bill that he needed to “sustain the constitutionality of the laws that are most important for his administration” and that it was “expected that the new composition of the Court” granted constitutional validity to the decree that force the conversion of bank deposits into bonds).

<sup>749</sup> For an excellent and provokative analysis of the Supreme Court economic emergency caselaw, although one I partially disagree with, see Carlos F. Rosenkrantz, “Constitutional Emergencies in Argentina: The Romans (not the Judges) Have the Solution”, 89 *Tex. L. Rev.* 1557 (2011); see also Horacio Spector, “Don't Cry for Me Argentina: Economic Crisis and the Restructuring of Financial Property”, 14 *Fordham J. Corp. & Fin. L.* 771 (2009). For my own take on these issues, see José Sebastián Elias, “Massa' y la saga de la pacificación: lo bueno, lo malo y lo feo”, 2008-II *Jurisprudencia Argentina* 1326.

<sup>750</sup> See Eduardo Luis Bonelli, “De la histeria a la confusión”, *La Nación*, Suplemento Económico, January, 7, at 2 (citing an unnamed legislator).

<sup>751</sup> See “Plan Bónex: un año sin ley”, *Página/12*, December, 28, at 4.

significant protests. The major newspapers limited themselves to publishing excerpts of the decision.<sup>752</sup>

This does not mean that the Court's attitude did not have a cost in terms of its sociological legitimacy. Quite the contrary. The unrelenting judicial support of emergency measures that encroached upon the property rights of increasingly larger sectors of the population played a significant role in the steady decline of the Court's public image and legitimacy.<sup>753</sup> After the *Peralta* decision, the Court suffered a peak in its negative public image. Arturo Pellet Lastra argues that "the negative image of the Supreme Court went from 62,5% up to 69,6%", a rise "undoubtedly driven by the decision handed down in the *Peralta* case".<sup>754</sup> Other surveys support the same conclusion: between July, 1990 — immediately after the enlargement of the Court's membership— and April, 1991 —in the aftermath of the *Peralta* decision—, the image of the Court deteriorated, with an increase of its negative public image from 70,3% to 73,4%.<sup>755</sup>

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<sup>752</sup> See, e.g., "La conversión de depósitos a Bonex convalidó la Corte", *Clarín*, December, 30, 1990, at 23; "No devuelven depósitos convertidos en Bónex", *Crónica*, December, 29, at 3; "La Corte Suprema de Justicia convalidó el llamado Plan Bónex", *La Nación*, December, 29, at 12; "La Corte convalidó el pago de plazos fijos con Bónex", *La Prensa*, December, 29, at 3.

<sup>753</sup> See Jonathan M. Miller, above n. 75, at 131-151 (explaining the changes in the Supreme Court caselaw regarding the protection of property and arguing that "unlike the United States, where a 'responsive' approach toward law has not seriously undermined judicial authority, in Argentina the consequences for judicial authority have been catastrophic").

<sup>754</sup> See Arturo Pellet Lastra, above n. 576, at 26. Pellet Lastra bases his statement on the fact that from December, 1991, to March, 1992, the Court's negative image rose some 7.4 percentual points. This change in the public perception of the Supreme Court cannot possibly be attributed to the *Peralta* decision, which was handed down on December, 27, 1990, and therefore, was already in the books in December, 1991. Still, while Pellet Lastra's grounds for such an assertion are questionable, the assertion itself is much less so, as proven by the studies cited below n. 755 and n. 757.

<sup>755</sup> *Id.*, at 27 (citing a study by Rosendo Fraga that compared the evolution of the negative public image of the Court). It is important to highlight that half of the most publicly salient cases of the period between July, 1990 and April, 1991, were economic emergency decisions. Four decisions stand out in the period: the *Peralta* decision —already analyzed in the text—, the *Videla Cuello* decision (313 *Fallos* 1638) —a decision handed down on the same day as *Peralta* that basically upheld the economic emergency law 23,696 insofar as it suspended for two years of the judicial procedures to collect debts from the State—, the *Montalvo* decision (313 *Fallos* 1333) —a decision that overruled *Bazterrica*, a 1986 decision that had held unconstitutional the Narcotics Act insofar as it punished the possession of illegal drugs for personal use—, and the *Riveros* decision (313 *Fallos* 1392) —upholding presidential pardon of perpetrators of grave

Of course, there were other factors at play, besides the countermajoritarian character of its economic emergency decisions. The fact that the Court's personnel had been manipulated to suit President Menem's plans, along with a perceived alignment with the Administration in the politically sensitive cases,<sup>756</sup> also played a role in the decline of the Court's sociological legitimacy.<sup>757</sup> But economic emergency decisions were very salient, and they were basically contrary to the popular conception of constitutional property.

As previously noted, this popular return to a more traditional conception of constitutional property, one that embraced the protection of capital as the core of the inviolability promised by the text and abandoned the strong social overtones brought to the jurisprudential landscape by the Peronist movement in the 1940's, was ratified by the constitutional politics of the early 1990's. When Menem undertook his project of modifying the 1853 Constitution in order to be able to run for re-election, he agreed with Alfonsín —still the leader of the main opposition party— on a package of comprehensive amendments to the traditional text, popularly known as the “Olivos Pact”. This political agreement provided for the modernization of the “Bill of Rights” of the Constitution, by the inclusion of new rights (consumers' rights, environmental rights,

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violations to human rights—. The *Montalvo* decision, controversial as it was among liberal law professors and lawyers, seems less likely to have been strictly countermajoritarian, as it merely upheld a law passed by Congress basically contradicting the *Bazterrica* decision, and was not out of sync with the mood of the times regarding consumption of illegal drugs. *Riveros*, in turn, was a decision that upheld a largely unpopular, although arguably constitutionally-valid, decision.

<sup>756</sup> See Jorge Bercholz, *LA INDEPENDENCIA DE LA CORTE SUPREMA A TRAVÉS DEL CONTROL DE CONSTITUCIONALIDAD* 144-145 (Buenos Aires, EDIAR, 2004) (acknowledging that the public opinion had the intuition of there being an “automatic majority” in favor of the Administration, despite the fact that most decisions in the period after the Court's enlargement were unanimous, and leaving open the possibility of qualitative criticism of the Court).

<sup>757</sup> See Christopher Larkins, “The Judiciary and Delegative Democracy in Argentina”, 30 *Comp. Polit.* 423, 429-430 (1998) (describing the performance of the Court after the successful packing plan by President Menem and citing polls that show the very negative public image of the Supreme Court).

etc.). However, the plan —incarnated in Law 24,309 that called for the Convention— explicitly provided for the preservation of the traditional liberal rights, including the property clauses in Articles 14 and 17 of the Constitution. The first 35 articles of the Constitution were to be left untouched by the Convention, under penalty of nullification of any *ultra vires* reform (Articles 6 and 7, Law 24,309). While it would be easy to argue that leaving property rights out of the topics open for amendment was consistent with the then-expanding “Washington Consensus”, which fostered neoliberal reforms around the world and was followed closely by the Menem administration, the decision not to tamper with property —and other traditional— rights reflected a deeper consensus in Argentina’s society. Popular fear of a substantial alteration of the 1853 “Bill of Rights” could have been a significant obstacle to reformist plans, and it was sidestepped by shielding those rights. Therefore, insofar as it embodies a conscious decision to keep in place the old property clauses of the 1853 text —even if suitably adapted through interpretive glosses—, the 1994 process of constitutional reform ratified the rejection of the conception of property embraced by the Peronist movement in the 1940’s (codified in the 1949 Constitution). Old understandings had regained a central place in the popular conception of constitutional property and they would be firmly in place when the next episode of economic emergency struck the country.

It happened in the early 2000s. The Administration was faced with an economic and monetary system that did not seem sustainable any longer, and the time came to make decisions about who should bear the costs of coming out of a fixed-rate exchange system. But this is a story that takes us back to Menem’s first attempts at economic stabilization and the Bonex Plan. Let us go there for a while.

### **c. Coming In and Out of a Fixed-Rate Monetary System: The Triumphs and Miseries of the Convertibility Plan.**

Unfortunately, and despite the Administration's aspirations, the "Bonex plan" was not successful in controlling the hyperinflation that had thrown Alfonsín out of office and was threatening Menem as well.<sup>758</sup> It was the "Convertibility Plan" that finally tamed the beast. Convertibility —enacted by Law 23,928 in April, 1991— was a currency board system<sup>759</sup> that consisted, basically, in a one-for-one peg between the *peso*<sup>760</sup> and the U.S. dollar and the full backing of the monetary base with international reserves.<sup>761</sup> Moreover, the national currency was to be freely convertible with the U.S. dollar.<sup>762</sup> The plan was an immediate success: the monthly rate of inflation fell from 11% in March, 1991, to only 1.3% in August and then to just 0.6% by December of that same year,<sup>763</sup> reaching international levels in 1994.<sup>764</sup> This led to stability,<sup>765</sup> an investment-led boom

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<sup>758</sup> See, e.g., Alan Cibils & Rubén Lo Vuolo, above n. 62, at 757 (2007) (stating that there was another hyperinflationary episode toward the end of 1990); Luis García Martínez, in Germán J. Bidart Campos et al., above n. 728, at 125 (arguing that the Bonex plan failed in controlling inflation and stabilizing the exchange rate); and Jorge C. Ávila, "Internacionalización monetaria y bancaria", Documento de Trabajo, Universidad del CEMA 1, 13 (2004) (available at: <http://cdi.mecon.gov.ar/doc/cema/doctrab/285.pdf>; last visited 01/12/2012) (arguing that monetary stabilization would not be reached until the Convertibility Plan and that in towards the end of 1990 there was another inflationary surge, reaching a 50% monthly rate). But see Roberto Cortés Conde, above n. 396, at 291 (arguing that the conversion of deposits would be the beginning "of what later became a convertibility system"). One could argue that the abrupt reduction of the *australes* in circulation, due to the confiscation carried out by the "Bonex plan", afforded the Menem administration the opportunity to establish convertibility. See Pamela K. Starr, "Government Coalitions and the Viability of Currency Boards: Argentina under the Cavallo Plan", 39 *J. Interam. Stud. World Aff.* 83, 90 (1997).

<sup>759</sup> For the differences between a "pure" currency board system and Argentina's "Convertibility Plan" system, see Pamela K. Starr, above n. 758, at 87-89.

<sup>760</sup> The name *austral* would be substituted by *peso* shortly after, in January, 1992, and the parity would 10,000 australes per *peso*, the same parity established between the *australes* and the U.S. dollar by article 1 of the "Convertibility Law" 23,928 (available at <http://www.infoleg.gov.ar/infolegInternet/anexos/04999/328/norma.htm>; last visited 01/11/2012).

<sup>761</sup> Domingo F. Cavallo & Joaquin A. Cottani, "Argentina's Convertibility Plan and the IMF", 87 *Am. Econ. Rev.* 17 (1997). See also article 4, Law 23,928.

<sup>762</sup> See articles 1, 2, and 3, Law 23,928.

<sup>763</sup> Pamela K. Starr, above n. 758, at 83-84.

<sup>764</sup> Domingo F. Cavallo & Joaquin A. Cottani, above n. 761, at 17.

and strong economic growth,<sup>766</sup> arguably without producing regressive income redistribution.<sup>767</sup> No wonder that “from a political point of view, convertibility was a smashing success”.<sup>768</sup>

By the mid-1990s, convertibility had become an acquired taste for Argentines, and a political trap for politicians. Menem won a second term in office, riding on the success of his monetary stabilization program. In 1999, the Alliance<sup>769</sup> presidential candidate Fernando De la Rúa had campaigned on the maintenance of the convertibility regime, while Peronist candidate Eduardo Duhalde had talked about a “model” that was exhausted and had to be replaced.<sup>770</sup> Despite being a member of the governing party, as well as governor of Argentina’s most populated province, and despite the lack of charisma of De la Rúa, Duhalde’s talk of abandoning convertibility scared many

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<sup>765</sup> See Pablo Gerchunoff & Lucas Llach, above n. 656, at 442 (the Convertibility Plan was an “unusual success regarding its specific goal of abating inflation”).

<sup>766</sup> See, e.g., Jerome Booth, “Argentina: The Case for a Permanent End to Fiscal Transfers”, 15 *Camb. Rev. Int. Aff.* 483, 484 (2002).

<sup>767</sup> Domingo F. Cavallo & Joaquin A. Cottani, above n. 761, at 17. See also Pablo Gerchunoff & Lucas Llach, above n. 656, at 443 (the virtual elimination of the “inflationary tax” had a progressive distributive effect).

<sup>768</sup> *Id.*

<sup>769</sup> The Alliance encompassed, basically, the Radical Party structure and the FREPASO —a new party that in the 1995 elections had come in second to Menem, with 30% of the total votes—. Its main *raison d’être* was to cut short Menem’s search for an unconstitutional third term, and to prevent the Peronist Party from retaining the presidency.

<sup>770</sup> This very rough depiction of the 1999 electoral rhetoric shows how much the “convertibility” conditioned Argentine politics during the 1990s. The Radical candidate committed himself publicly to maintaining Menem’s trademark economic policy —the very same policy the party had criticized during a few years and the backbone of Menem’s political capital—, which at the same time, the Radical Party had to criticize to get the Peronists out of power. Meanwhile, the Peronist candidate Eduardo Duhalde, who was Menem’s former vice-president and, by that time, his already declared political enemy, was criticizing official economic policy.

Argentines, and De la Rúa became president with about 48.50% of the total votes, against Duhalde's 38.09%.<sup>771</sup>

The politically successful “Convertibility plan” came, however, with problems of its own. From the standpoint of economic policymaking, it was extremely rigid:

“[...] a government constrained by a currency board can increase spending for unemployment insurance, anti-poverty programs, increased credit availability, or to shore up a weak financial system only if —and this is a big ‘if’— it can finance this deficit spending in private capital markets, or if spending is reduced in other areas”<sup>772</sup>

A significant real appreciation of the *peso*, due partly at least to a differential between domestic and international inflation rates,<sup>773</sup> progressively complicated the country's competitiveness in international markets and, along with other limitations inherent to the “Convertibility plan”,<sup>774</sup> led to a profound recession.<sup>775</sup> Sticking to the “Convertibility plan” meant severely limiting the Government's options to tackle the crisis.

Moreover, from the perspective of the financial system, the convertibility policy led to a large dollarization that created high risks. Savers generally chose the seeming

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<sup>771</sup> Electoral data available at <http://pdba.georgetown.edu/Elecdata/Arg/Pres99.html> (last visited 01/11/2012).

<sup>772</sup> Pamela K. Starr, above n. 758, at 89.

<sup>773</sup> *Id.*, at 96.

<sup>774</sup> See Jerome Booth, above n. 766, at 485 (arguing that “the discipline of the currency board, which procyclically shrinks the money supply as reserves dwindle, constrained domestic demand at exactly the time stimulus was needed. Consequent low growth led to low tax revenues, hence more difficulty in meeting fiscal targets and the need for greater fiscal austerity, which, in turn, again hampered growth. With a large external debt, low growth also worsened the debt ratios and their projections, damaging international confidence”).

<sup>775</sup> See, e.g., Daniel F. Sotelsek, “Crisis bancaria en un esquema de currency board: la experiencia argentina”, 39 *Desarrollo Económico* 213, 215 (1999) (arguing that in system of fixed exchange rate with free mobility of capitals recessive effects are to be expected in the long-term, if the national currency is overvalued —which is a fairly common situation— or if public deficit undermines credibility).



safety of dollar deposits over the higher-interest yielded by deposits in national currency,<sup>776</sup> and banks aggressively offered —and sold— loans denominated in dollars,<sup>777</sup> mostly to people whose income was not in hard currency, but in *pesos*. While interest rates were generally higher in Argentina than in international markets, banks operating in the country enjoyed an exceptionally high spread during those years.<sup>778</sup> Still, the high exposure of the system was obvious.<sup>779</sup> On the one hand, without any lender of last resort of real magnitude (the Central Bank cannot print dollars) the risk that banks could not repay deposits in the event of a run were significant. On the other hand, in case of a

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<sup>776</sup> In 1991 the banking system had deposits for 8,000,000,000 *pesos* and 6,500,000,000 dollars; in 1994, dollar deposits outdid pesos deposits by a small margin (23,000,000,000 to 22,400,000,000) (see Daniel F. Sotelsek, above n. 775, at 219 (showing a table)). The trend continued the following years, to the point that in January, 31, 2002, the banking system had some 26,088,000,000 *pesos* deposits and some 39,888,000,000 dollar deposits (see Brief for Defendant Central Bank of the Argentine Republic in case S.173.XXXVIII, *Provincia de San Luis v. Estado Nacional et al.*, on file with author, ruling on the merits in 326 *Fallos* 417 (2003)).

<sup>777</sup> Mortgages denominated in dollars went up from 31,7% of the total mortgages in June, 1993, to 63% in June, 1996. The proportion of dollar-denominated secured loans on personal property remained steadily high between 1993 and 1996, around 90%. The total proportion of dollar loans in the system, vis-a-vis loans in national currency, raised from 48% in 1993 to 60% in 1996. See Francisco Buera & Juan Pablo Nicolini, “Los spreads de tasas de interes en la Argentina”, 38 *Desarrollo Económico* 231, 234 (1998) (showing a table). By December, 2001, about 80% of the loans in the system were nominated in dollars (60,144,000,000 dollars vs. 15,478,000,000 pesos). See Central Bank of the Argentine Republic, “Información diaria sobre principales activos de las entidades financieras (préstamos y otros)”, Year 2001, available at: <http://www.bcra.gov.ar/estadis/es020200.asp> (selecting “2001” in the field “Período”) (last visited 02/01/2012)

<sup>778</sup> See Francisco Buera & Juan Pablo Nicolini, above n. 777, at 232 (arguing that by the end of 1996 the passive interest rate —the rate paid by banks to depositors— had fallen to international levels, the spread was clearly high by international standards); see also Guillermo Rozenwurcel & Leonardo Bleger, above n. 682, at 175 (noting the “persistence of extremely high spreads”).

<sup>779</sup> See Gerardo Della Paolera & Alan Taylor, “Gaicho Banking Redux”, 3 *Economía* 1, 17-18 (2003) (arguing that “the potential inconsistency between a dollar exchange standard and a banking system that “creates” money” was a central flaw of the convertibility system and the ground for the violation of the most basic property rights); Guillermo Rozenwurcel & Leonardo Bleger, above n. 682, at 190-191 (arguing that the risks posed by such an extensive dollarization of the financial system were very high due to: first, the possibility of a sudden divergence between the evolution of the income of a significant proportion of debtors and of the exchange rate, either because of a nominal devaluation or of deflation, with the ensuing impact of the solvency of the banks; and, second, the lack of an adequate safety net to deal with bank runs); see also Jorge C. Ávila, above n. 758, at 17-18 (arguing that while the financial system was very strong in 2001 and political mismanagement played a central role in unleashing the crisis, Convertibility and fractional bank reserves created an important problem).

devaluation of even moderate proportions most small and medium debtors, who did not have access to dollarized assets or income, would strain to repay their debts.

In 2001, the progressive decrease of confidence in the country's ability to keep financing the convertibility system led to capital flight. Bank deposits dropped steadily beginning in February,<sup>780</sup> falling from some 88,000,000,000 dollars to barely 69,000,000,000 in November.<sup>781</sup> In an attempt to stop the outflow, Congress passed Law 25,466, the so-called "Intangibility of Deposits Act". The Act declared that money deposits in nationally regulated banks were "intangible." Then, it defined "intangibility" as the express prohibition on altering deposits in any form. Specifically, the law forbade the State from changing the currency of the deposits, from altering interest rates or maturities, and from exchanging deposits for national bonds. The rights arising from such deposit operations were explicitly deemed as 'vested-rights' under the protection of the property clause of the Constitution.<sup>782</sup>

But the flow of money did not stop. So in December, 2001, the Executive Branch issued emergency decree 1570/2001, basically forbidding all but small cash withdrawals from banks (up to 250 *pesos* or dollars per week). Money could be used within the banking system, though.<sup>783</sup> The measure was tremendously unpopular. The middle-class felt that its money was just steps away from being confiscated, despite the emphatic assurances given by Congress, and the lower class suffered from the sudden shortage of

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<sup>780</sup> See Presidential Introduction to Emergency Decree 1570/2001, available at <http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/70355/norma.htm> (last visited 11/01/2012) (acknowledging the steady drop in the level of deposits since February 2001).

<sup>781</sup> See Jorge C. Ávila, above n. 758, at 18.

<sup>782</sup> See articles 1, 2, and 3, Law 25,466 (available at <http://www.infoleg.gov.ar/infolegInternet/anexos/65000-69999/69026/norma.htm>; last visited 01/12/2012).

<sup>783</sup> See articles 2, 4, and 5, Emergency Decree 1570/2001.

money. Argentina had, at the time, a fairly large informal economy<sup>784</sup> that provided some opportunities to the worse-off.<sup>785</sup> The deepest and most perturbing crisis in Argentina's history was about to unleash in full,<sup>786</sup> and large scale regressive redistributions were about to take place, once again, under the benign rhetoric of economic emergency.

President De la Rúa resigned in the face of massive social unrest, and Argentina had the so-called “week of the five presidents”. Eduardo Duhalde was eventually appointed president by Legislative Assembly (both Houses of Congress in joint session) on January, 1, 2002. Meanwhile, Congress enacted Emergency Law 25,561 on January, 6, 2002, delegating to the Executive branch, among other powers, the power to set the value of the national currency against foreign currencies —basically, the power to take the country out of the convertibility system that had reigned almost untouched for ten

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<sup>784</sup> According to Rodolfo Díaz, in Argentina, more than half of the GDP was not “in the books”, and that this “second economy”, which contained more than half of the work, of the production, and of the trade in the country, was an extraordinary source of political and economic energy. See Rodolfo Díaz, “Como aprovechar la segunda economía”, *Clarín*, Sección Opinión, 10/24/2001 (on file with author, formerly available at <http://www.clarin.com/diario/2001/10/24/o-02702.htm>; last visited 05/15/2007).

<sup>785</sup> See George L. Priest, “The Ambiguous Moral Foundations of Underground Economy”, 103 *Yale L. J.* 2259, 2280 (1994) (arguing that informal economies may prove very successful in promoting the “Rawlsian value of protecting those least advantaged in society”). See also Rodolfo Díaz *THE REFORMS IN ARGENTINA DURING THE 1990s*, English version of his book *LAS REFORMAS DE LOS 90 EN ARGENTINA: PROSPERIDAD O ILUSION* (Buenos Aires, Abaco, 2002), on file with the author, Chapter 7, (remembering his own intervention in the Congressional debate over the Labor Reform Law, in the 1990s: “This situation of the black labor is not the result of employers' perversity or workers' carelessness, but simply of fifteen years of crises in the Argentine economy. In order to survive as such, productive units in our country had to find countless survival strategies: one of them was the generation of this situation”).

<sup>786</sup> The crisis of 2001-2002 was an extremely complex phenomenon and the analysis of its multiple causes far exceeds the scope of this dissertation. For different hypothesis on the causes of the crisis, see, among others, Laura Tedesco, above, n. 59 (analyzing the role of the “politics of informality” in the crisis); Carlos Escudé, above n. 62 (linking the crisis to with “an unprecedented and financially unsustainable level of indebtedness”); Jorge C. Ávila, above n. 758, at 18 (emphasizing political mismanagement as a cause of the crisis); Gerardo Della Paolera & Alan M. Taylor, above n. 779, at 18-21 (analyzing multiple economic causes for the crisis); Alan Cibils & Rubén Lo Vuolo, above n. 62, at 768-773 (analyzing the role of the IMF and of Argentina's indebtedness in the crisis); Jerome Booth, above n. 766, at 485-488 (analyzing the role of the “fiscal problem”); Robert Boyer, “La crisis argentina: un análisis desde la teoría de la regulación”, 192 *Realidad Económica* (2002) (arguing that internal contradictions of the currency board, and not an allegedly relaxed attitude towards public spending, caused the crisis) (available at: <http://www.iade.org.ar/modules/noticias/article.php?storyid=706>; last visited 04/09/2012); see also, generally, Pamela K. Starr, above n. 758 (analyzing the role of political coalitions in the exit of the Convertibility Plan and foreseeing some possible difficulties).

years—. <sup>787</sup> Congress, however, was mindful that any devaluation would create problems for some debtors to repay their debts and for the banks to repay dollar deposits. Hence, it provided for the partial “pesification” of the dollar-denominated debts: small bank debtors could pay back in *pesos* at a one-to-one parity. <sup>788</sup> Obligations arising from contracts between private individuals, not related to the financial system, were put under a system of negotiation, where the parties had a period of six months to reach an agreement that split the differences generated by the new exchange rate in accordance with a spirit of “shared sacrifice”. <sup>789</sup> Finally, and regarding bank deposits, Congress instructed the Executive to take measures to protect depositors’ capital, including deposits in foreign currency, and to restructure maturities in a way that would facilitate the solvency of the financial system. <sup>790</sup> However, shortly after, president Eduardo Duhalde issued a sweeping emergency decree that completely “pesified” the economy: bank deposits were repaid at a rate of 1,40 *pesos* per dollar, while all other dollar-

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<sup>787</sup> See article 2, Emergency Law 25,561 (available at <http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/71477/norma.htm>; last visited 01/12/2012).

<sup>788</sup> The law provided that all dollar-denominated loans where a bank was the creditor would be restructured by the Executive branch and would be payable in *pesos* in lieu of dollars, at a one-to-one parity, if the following conditions were met: 1) the original amount did not exceed 100,000 dollars; 2) the loan was either a mortgage-secured loan destined to the purchase, building, or refurbishing of a house, a personal credit, a secured loan destined to the purchase of motor vehicles, or a credit given to a person meeting the micro, small and medium businesses regime. See article 6, ¶2, Emergency Law 25,561. This provision was later abrogated by Law 25,820, in December 2003, consolidating the general “pesification” of the economy carried out by Emergency Decree 214/2002. The text of the Law 25,561 with the modifications introduced by Law 25,820 is available at <http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/71477/texact.htm> (last visited 01/12/2012).

<sup>789</sup> See article 11, Law 25,561 (later modified by Law 25,820, in December, 2003, to establish a general “pesification” at the one-to-one parity plus C.E.R. (an adjustment index that followed inflation and aimed at ameliorating erosion of “pesified” obligations due to inflation) or C.V.S. (an adjustment index that followed raises in salaries).

<sup>790</sup> See article 6, ¶5, Law 25,561 (later modified by Law 25,820, in December, 2003, which added a sentence to the effect that the mandated protection of the savers’ capital could be carried out by the offer of public bonds).

denominated obligations were repaid at a one-to-one parity.<sup>791</sup> At the same time, the government defaulted on its sovereign debt and several national and provincial bonds — generally, all bonds that were not subject to foreign law— were “pesified” at a 1,40 pesos per dollar rate.<sup>792</sup>

The problem for depositors was that the official conversion rate established by the emergency decree was far from the free market value of the dollar, which reached four-to-one during the height of the crisis. At some points, there was a difference of more than 100%, and an ensuing capital loss of over 50% for depositors. At the same time, many goods and services followed the evolution of the dollar price and, hence, the “pesified” deposits lost value even if measured only in relation to goods and services in the domestic market.<sup>793</sup> Dollar debtors, in turn, were relieved by “pesification”.

How were the measures received by the people? Was the combination of “pesification” and deferment of maturities of bank deposits considered a violation of property rights? Was the alteration of non-financial, dollar-denominated contracts considered constitutionally impermissible from the popular standpoint? What can the 2001-2002 economic crises tell us about the popular conception of constitutional property? Let us see.

Depositors were enraged and violent riots took place, and tens of thousands filed suits in federal courts, claiming the unconstitutionality, first of the “corralito”, and later

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<sup>791</sup> In both cases, an adjustment index was added. Optional long-term dollar-denominated national bonds were also offered to bank depositors. See articles 1, 2, 3, 4, 8, and 9, Emergency Decree 214/2002 (available at <http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/72017/norma.htm>; last visited 01/13/2012).

<sup>792</sup> See article 1, Emergency Decree 471/2002 (available at <http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/72885/norma.htm>; last visited 01/14/2012).

<sup>793</sup> See, e.g., 329 *Fallos* 5913 (2006) (Argibay, J., concurring in the judgment, §8) (arguing that some goods, notably real estate property, had maintained their prices in U.S. dollars).

of the restructuring and forced conversion.<sup>794</sup> The first round of restrictive measures, the so-called “corralito”, spurred a very peculiar form of protest: “pan-and-pot” banging, popularly known in Spanish as “cacerolazo”. Other forms of protests, such as picketing and the so-called “escraches” against politicians, also spread. The protests eventually led to President De la Rúa’s resignation, and to a succession of provisory presidents, that ended up with Duhalde’s appointment as president. But the change of presidents did not modify the people’s views on the restrictions to property rights.

In early March, 2002, *Clarín* reported that “marches, picketing, and *escraches* against banks are impossible to count”.<sup>795</sup> A CEOP poll cited by the same newspaper concluded that there was a “high degree of [popular] identification” with the “cacerolazo” protest movement, with 64,1 percent of the respondents reporting having a “positive image” of the protest.<sup>796</sup> Importantly, a significant portion of the people thought the protestors to be motivated exclusively by the desire to “get their dollars back, not because of the 14 million poor people [that there were] in the country”, but this conclusion did not prevent the movement from enjoying wide support.<sup>797</sup> Almost 45 percent of the people chose the rejection of the economic policy of the government as

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<sup>794</sup> In December, 2002, there were more than 30,000 lawsuits only in the competent federal chamber of appeals in Buenos Aires. See Acordada 46/2002, Cámara Nacional en lo Contencioso Administrativo Federal, cited by Corte Suprema de Justicia de la Nación, Acordada 1/2003 (available at [http://www.csn.gov.ar/docus/documentos/cons\\_tipo.jsp](http://www.csn.gov.ar/docus/documentos/cons_tipo.jsp); last visited 01/13/2012). The phenomenon was replicated throughout the country, and *The Economist* had an estimate, as of March, 2003, of some 180,000 lawsuits. See 366 *The Economist* 38-39 (March, 8, 2003). Pablo Gallegos Fedriani, a judge in the Federal Court of Appeals, recalls receiving some 200,000 lawsuits in the first trimester of 2002. See "El corralito fue una locura pero como Poder evitamos una situación absolutamente caótica", *Diario Judicial*, December, 12, 2011 (<http://www.diariojudicial.com/reportajes/El-corralito-fue-una-locura-pero-como-Poder-evitamos-una-situacion-absolutamente-caotica-20111212-0002.html>; last visited 01/14/2012).

<sup>795</sup> See “El cacerolazo, con más aceptación que participación”, *Clarín*, March, 10, 2002 (available at <http://www.clarin.com/diario/2002/03/10/p-00402.htm>; last visited 04/16/2012).

<sup>796</sup> *Id.* (citing a C.E.O.P. —*Centro de Estudios de Opinión Pública*— poll).

<sup>797</sup> *Id.*, (citing the C.E.O.P. poll according to which 60,6 percent of the people thought the protestors’ main motivation to be the protection of their dollar deposits, not the complaint about extended poverty).

the main cause of social protest, and some 17 percent singled out one particular cause: the rejection of “corralito”.<sup>798</sup> And while Duhalde enjoyed some 43 percent of “positive image” among the public in late February, only 20 percent approved of his economic policies, which were basically devaluation and “pesification”.<sup>799</sup>

*La Nación* also printed surveys and polls that showed a high degree of popular identification with the protest movement by the savers known as “cacerolazo”<sup>800</sup> and a similarly high rejection of the restrictions on property rights.<sup>801</sup> Some 66 percent of the people rejected the “pesification” of bank deposits.<sup>802</sup>

*Página/12* concluded that “most Argentines disapprove of the devaluation and forced restructuring of savings accounts and time deposits”, even if they supported some

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<sup>798</sup> *Id.*

<sup>799</sup> See “El cacerolazo crece en una encuesta”, *Clarín*, February, 24, 2002 (available at: <http://www.clarin.com/diario/2002/02/24/p-01902.htm>; last visited 04/16/2012) (citing a poll by Analogías).

<sup>800</sup> See “El 90 por ciento de la gente se identifica con los cacerolazos”, *La Nación*, January, 13, 2002 (available at: [http://www.lanacion.com.ar/nota.asp?nota\\_id=366311&high=encuesta%20pol%EDticos](http://www.lanacion.com.ar/nota.asp?nota_id=366311&high=encuesta%20pol%EDticos); last visited 04/24/2012) (citing a poll according to which 65,8% of the respondents felt “identified with the cacerolazo”).

<sup>801</sup> See “El 83% de los argentinos no aprueba el corralito financiero”, *La Nación*, January, 17, 2002 (available at: [http://www.lanacion.com.ar/nota.asp?nota\\_id=367292&high=encuesta%20justicia](http://www.lanacion.com.ar/nota.asp?nota_id=367292&high=encuesta%20justicia); last visited 04/24/2012) (citing a Gallup according to which 83% of the respondents rejected the so-called “corralito”; 73% rejected devaluation, and 57% rejected the restructuring of maturities for bank deposits set by the Minister of Economy, which at the time extended up to three years and nine months).

<sup>802</sup> See “La mayoría rechaza dolarizar y prefiere la pesificación”, *La Nación*, February, 24, 2002 (available at: [http://www.lanacion.com.ar/nota.asp?nota\\_id=376411&high=encuesta%20corralito](http://www.lanacion.com.ar/nota.asp?nota_id=376411&high=encuesta%20corralito); last visited 04/24/2012) (citing a Gallup poll, requested by *La Nación*, according to which two out of every three Argentines disapproved of the “new economic measures”, which meant “without a doubt, the reinforcement of corralito”). It is important to note that the main new economic measure taken between the poll cited by the paper in its January 17 edition (above n. 801) and this new poll was the complete “pesification” of the economy, including bank deposits, in accordance with Emergency Decree 214/2002 of February, 3, 2002. The “pesification” had been anticipated by President Duhalde on January, 20. See, e.g., “En los hogares argentinos, la pesificación no fue bienvenida”, *La Nación*, January, 21, 2002 (available at: [http://www.lanacion.com.ar/nota.asp?nota\\_id=368226&high=protesta%20pesificaci%F3n%20dep%F3sitos](http://www.lanacion.com.ar/nota.asp?nota_id=368226&high=protesta%20pesificaci%F3n%20dep%F3sitos); last visited 04/24/2012).

initiatives taken by the Duhalde administration.<sup>803</sup> An study by Ibope concluded that there was a significant level of popular identification with the depositors' cause:

“As the people’s savings were seized, let them protest against the banks as they prefer, even if that implies that there’s some violence’. That could be a summary of the opinion of four out of every ten Argentines. There is another, significantly smaller, segment [of opinion] that also seems to identify itself with the protest, although from a more legalistic standpoint: protests, yes; *escraches*, no [...] ‘People think that banks effectively kept the savers’ money’ and, therefore, say ‘let them protest as much as they please’, ‘it is only fair’ [...] *a large part of the respondents, no less than 71 percent, say they feel identified with the cacerolazos*”<sup>804</sup>

And violence indeed there was. But it was limited, and seemed to serve a cathartic function. Banks were generally covered with metal sheets to protect them from the rage of savers. Some protestors painted the bank’s facades; others hammered on cash transporter trucks and banks’ windows; yet others threw stones or eggs against the banks.<sup>805</sup>

Earlier on, on February, 1<sup>st</sup>, when the total pesification of the economy had not been decreed yet, *Página/12* believed that the proposal to “pesify” all bank deposits at a one-to-one parity —a proposal that a group of banks plus the productive sector was to

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<sup>803</sup> See “Una de cal y una de arena”, *Página/12*, January, 13, 2002 (available at: <http://www.pagina12.com.ar/diario/elpais/1-792-2002-01-13.html>; last visited 04/24/2012) (citing a poll by Analogías).

<sup>804</sup> “Los ahorristas, con consenso”, *Página/12*, March, 13, 2002 (available at: <http://www.pagina12.com.ar/diario/elpais/1-2835-2002-03-13.html>; last visited 04/19/2012). The italics are mine.

<sup>805</sup> See, e.g., “La furia de los ahorristas en la City es cada vez más violenta”, *La Nación*, February, 19, 2002 (available at: [http://www.lanacion.com.ar/nota.asp?nota\\_id=375174&high=escrache](http://www.lanacion.com.ar/nota.asp?nota_id=375174&high=escrache); last visited 04/24/2012) (reporting on the increase of violence in the savers’ protests, but transcribing testimonies of non-violent savers who also protested); see also “Un día a los martillazos en el corazón de la City”, *Clarín*, February, 16, 2002 (available at: <http://www.clarin.com/diario/2002/02/16/e-01402.htm>; last visited 04/24/2012) (reporting on the protests).



present to president Duhalde that same day, in order to ease the “pesification” of all debts— seemed “delirious, in the face of the *cacerolazos*”.<sup>806</sup>

An international-award winning writer, Marcos Aguinis, captured a well-extended popular sentiment when he asserted in his best-selling political pamphlet *¡Pobre Patria Mía!* that the “corralito” had been “the most brutish offense to private property ever committed” in Argentina.<sup>807</sup>

Popular arts also paid attention to the phenomenon. A new movie sub-genre appeared, the “cine corralito”, which encompasses “the films of the crisis”, those pertaining exclusively to the “[social] class battered by the banks, post 2001”.<sup>808</sup> Other forms of art expression also relied on the “cacerolazos” and “corralito”, and a novel literary sub-genre focused on those topics.<sup>809</sup> *Social Genocide* —original title, *Memorias del Saqueo*, literally “memories of the looting”— is a documentary that purports to show the broad crisis, with a focus on the vanishing of savings deposited in banks and the generalized poverty.<sup>810</sup> *Verano Amargo*, a recently-released movie starring a number of

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<sup>806</sup> “Renació la Santa Alianza de los ‘90”, *Página/12*, February, 1, 2002 (available at: <http://www.pagina12.com.ar/diario/economia/2-1428-2002-02-01.html>; last visited 04/24/2012). The italics are mine.

<sup>807</sup> Marcos Aguinis, *¡POBRE PATRIA MÍA!* 104 (Buenos Aires, Sudamericana, 2009). In only five months, the book got to its tenth edition, with more than 100,000 copies sold, an important number for the Argentine book market. In 2009, the book sold 130,000 copies, and it ended up the third most-read title in the country, after Stephanie Meyer’s *Twilight* series and Isabel Allende’s *La isla bajo el mar*. For the stats, see “Análisis filosófico del fenómeno Crepúsculo”, *La Gaceta Literaria*, October, 10, 2010 (available at: <http://www.lagaceta.com.ar/nota/402469/LA-GACETA-Literaria/Analisis-filosofico-del-fenomeno-Crepusculo.html>; last visited 04/16/2012).

<sup>808</sup> See “Entre éxitos y fracasos”, *Clarín*, April, 13, 2004 (available at: <http://www.clarin.com/diario/2004/04/13/c-00301.htm>; last visited 04/16/2012).

<sup>809</sup> See “Las manifestaciones culturales inspiradas en los cacerolazos”, *Clarín*, June, 18, 2002 (available at <http://www.clarin.com/diario/2002/06/18/s-02415.htm>; last visited 04/16/2012) (analyzing different forms of art inspired by the 2001-2002 protests).

<sup>810</sup> See “Plot Summary for Social Genocide (2004)”, available at <http://www.imdb.com/title/tt0400647/plotsummary> (last visited /01/03/2013) (providing a synopsis of the film).

well-known Argentine actors, is based upon the real case of a retired man who got to the point of threatening to use a grenade, in a desperate attempt to get his money back.<sup>811</sup>

In January, 2002, Norberto Roglich, a 62-year old diabetic retiree, went into the local bank manager's office holding a grenade in his hand and got his 22,000 dollars back. When apprehended by the police, Roglich stated: "Did I rob the bank? No...I only took what's mine".<sup>812</sup>

Other individuals resorted to less extreme, but equally explicit, actions. In a protest in front of a foreign capital bank, a saver was tied to a cross and raised to a height of three meters, with a sign that read "crucified and pesified".<sup>813</sup> The symbolism is clear: the savers were being sacrificed to expiate the sins of the big economic players, who lobbied for "pesification" and benefitted tremendously from it.

Despite the intense July cold, a 40-year old man marched naked through Buenos Aires City, claiming for the restitution of his deposits and as a part of a multitudinary three-times-a-week marches campaign to reject the "pesification" of bank deposits. The naked protestor wore only a small sign that covered his genitals and read: "Justice. They left us buttnaked".<sup>814</sup> The idea being that due to the emergency measures, savers were stripped of their property. Another frustrated saver chained himself to the building of a

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<sup>811</sup> See, e.g., "En rodaje", *Clarín*, June, 1, 2007 (available at <http://www.clarin.com/diario/2007/06/01/espectaculos/c-01305.htm>; last visited 04/16/2012) (giving a brief description of the movie's script); "Acorralados (2011)", <http://www.imdb.com/title/tt0426566/> (last visited 04/16/2012) (providing a description of the film).

<sup>812</sup> See "Amenazó con una Granada y logró que le devolvieran la plata", *La Nación*, January, 24, 2002 (available at: <http://www.lanacion.com.ar/369005-amenazo-con-una-granada-y-logro-que-le-devolvieran-la-plata>; last visited 04/16/2012).

<sup>813</sup> See "Mar del Plata: un ahorrista se crucificó simbólicamente", *La Nación*, March, 14, 2002 (available at: [http://www.lanacion.com.ar/nota.asp?nota\\_id=380838&high=protesta%20pesificaci%F3n%20dep%F3sit%20os](http://www.lanacion.com.ar/nota.asp?nota_id=380838&high=protesta%20pesificaci%F3n%20dep%F3sit%20os); last visited 04/24/2012).

<sup>814</sup> "Un hombre desnudo participó de la protesta de ahorristas", *La Nación*, July, 10, 2002 (available at: [http://www.lanacion.com.ar/nota.asp?nota\\_id=412663&high=protesta%20pesificaci%F3n%20dep%F3sit%20os](http://www.lanacion.com.ar/nota.asp?nota_id=412663&high=protesta%20pesificaci%F3n%20dep%F3sit%20os); last visited 04/24/2012).

bank's branch.<sup>815</sup> In another march, the protestors carried on a coffin and a funeral wreath, representing the money they thought lost in the hands of the banks.<sup>816</sup> Four mountaineers climbed to the top of *El Paso* mountain, in Mendoza, at 5,600 meters above the sea, and staked a flag claiming for the resignation of the Supreme Court justices.<sup>817</sup> A group of savers entered into a hunger strike in front of the Court's building.<sup>818</sup> Other people, who trusted the "Intangibility of Deposits Act", felt they had been "raped" by the emergency regime, which was "a robbery".<sup>819</sup> The cases and examples one could cite are endless.

Perhaps none of this should be surprising. Perhaps it is nothing but a reaffirmation that, as Blackstone famously said, "[t]here is nothing which so generally

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<sup>815</sup> See "Ahorrista encadenado", *La Nación*, May, 8, 2002 (available at [http://www.lanacion.com.ar/nota.asp?nota\\_id=394896&high=ahorrista%20encadenado](http://www.lanacion.com.ar/nota.asp?nota_id=394896&high=ahorrista%20encadenado); last visited 04/24/2012). It is important to note, however, that the saver in this case was a customer of Scotiabank Quilmes, the only foreign-owned bank that fell during the crisis, and that due to the intervention by the Central Bank was not paying any monies, whatever their origin, to its depositors. The outraged chained saver was not able to get the money from his salary, which was a special (and more urgent) circumstance than that of the average depositor.

<sup>816</sup> See "Escrache a los bancos en la City", *Clarín*, February, 7, 2002 (available at: <http://www.clarin.com/diario/2002/02/07/e-00701.htm>; last visited 04/24/2012) (reporting on the protest marches in various provinces of the country).

<sup>817</sup> See "Siguen las protestas, desde Tribunales al Aconcagua", *Clarín*, February, 8, 2002 (available at: <http://www.clarin.com/diario/2002/02/08/p-02103.htm>; last visited 04/24/2012) (telling the story of the mountaineers).

<sup>818</sup> See "Ahorristas ayunan en Tribunales", *Clarín*, December, 10, 2002 (available at: <http://www.clarin.com/diario/2002/12/10/e-00602.htm>; last visited 04/24/2012) (reporting on the savers' hunger strike to exert pressure on the Court to rule against "pesification").

<sup>819</sup> See "Desventuras de una ahorrista que confió en la ley y quedó atrapada en el corralito", *Clarín*, May, 14, 2002 (available at <http://edant.clarin.com/diario/2002/05/14/e-00401.htm>; last visited 01/03/2013) (quoting Miriam Luna, a 42-year old woman, who reported that she had trusted Congress and left her money in the bank and now she felt "raped; there is no better word to sum up what I feel").

strikes the imagination, and engages the affections of mankind, as the right of property”.<sup>820</sup>

In any case, the prevailing feeling was that the people were being deprived of what was legitimately theirs, and depositors were mobilized.<sup>821</sup> A number of associations of defrauded savers were created across the country,<sup>822</sup> and in July, 2002, marches still gathered substantial numbers of participants. Resignation did not settle in. Some 20,000 people gathered for a protest meeting in Buenos Aires, on July, 9, Independence Day in Argentina.<sup>823</sup>

A judicial fight of unprecedented proportions was launched. I cannot go into its development in any detail here, and the events lend themselves to a number of equally interesting inquiries, each of which might be the topic of a doctoral dissertation.

Every time the Supreme Court handed down an important decision on the topic, whatever the legal merits of their reasoning, some or all of the justices were accused of acting out of (mostly spurious) political, not legal, motives.<sup>824</sup> In most instances, perhaps

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<sup>820</sup> William Blackstone, 2 *COMMENTARIES ON THE LAWS OF ENGLAND* 2 (available at: [http://avalon.law.yale.edu/18th\\_century/blackstone\\_bk2ch1.asp](http://avalon.law.yale.edu/18th_century/blackstone_bk2ch1.asp); last visited 04/24/2012).

<sup>821</sup> See, e.g., “Los ahorristas se juntan para compartir su desesperación”, *La Nación*, February, 25, 2002 (available at: [http://www.lanacion.com.ar/nota.asp?nota\\_id=376604&high=corralito%20protesta](http://www.lanacion.com.ar/nota.asp?nota_id=376604&high=corralito%20protesta); last visited 04/24/2012) (transcribing the reasons given by many protestors as to why they protested actively).

<sup>822</sup> Among others, the “Movimiento de Ahorristas Bancarios Argentinos Estafados” (Defrauded Argentine Savers Movement) (see [www.ahorristasestafados.com.ar/](http://www.ahorristasestafados.com.ar/); last visited 04/01/2013), “Asociación de Ahorristas Damnificados por la Pesificación y el Default” (Association of Savers Harmed by the “Pesification” and Default) (see Anabella Quiroga, “Hay ahorristas que quieren pedir el lucro cesante”, *Clarín*, December, 28, 2006 (available at <http://www.clarin.com/diario/2006/12/28/elpais/p-00503.htm>; last visited 01/17/2013) (quoting the secretary of the association)), “Movimiento Independiente de Ahorristas Argentinos” (Independent Movement of Argentine Savers), “Ahorristas Platenses” (Savers from La Plata City) (see <http://www.ahorristasplatenses.8m.net/Encuentro2.htm>; last visited 04/01/2013).

<sup>823</sup> “Nueva protesta contra el corralito y los bonos”, *La Nación*, July, 9, (available at: [http://www.lanacion.com.ar/nota.asp?nota\\_id=412292&high=protesta%20pesificaci%F3n%20dep%F3sit%20os](http://www.lanacion.com.ar/nota.asp?nota_id=412292&high=protesta%20pesificaci%F3n%20dep%F3sit%20os); last visited 04/24/2012).

<sup>824</sup> The majority in *Smith* and *San Luis*, with the exception of Justice Fayt, was formed by justices who were thought to be too close to former president Menem, who was at the time running for a third term in the office and who was a political enemy of then-president Duhalde (Menem’s former vice president). Thus,

with the possible exception of the *Massa* court in 2006, there were good grounds for such speculations. This must be born in mind when assessing reactions to the rulings. Still, a quick survey of popular reactions to the different rulings may help to further clarify what conception of constitutional property was most extended.

In *Smith*, a 6-to-0 decision, the Court struck down the initial restrictions on money withdrawals, in light of the “Intangibility of Deposits Act”.<sup>825</sup> The decision was not enough to reinstate credibility for the Court, as it was perceived as part of a political maneuver amidst the Court’s face-off with Duhalde. Still, along with the then-forthcoming *San Luis* ruling, the *Smith* decision likely served a useful social role, as lower courts started granting injunctions in favor of savers, who could thus recover part of their

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the Court was accused of attempting to de-stabilize Duhalde to favor Menem’s electoral chances in the upcoming 2003 presidential election. In a rather politically-unsavvy move, Duhalde accused the Court publicly of blackmailing him with the *Smith* ruling. He then promoted the impeachment of all nine justices, which eventually failed. The plurality in *Bustos* was formed by one Duhalde appointee and two Kirchner (initially, Duhalde’s candidate) appointees, plus a former member of the “Menem majority” (Justice Boggiano) who was accused of switching to favor Kirchner’s preferred positions in order to save himself from the impeachment procedures that Congress was carrying out against Menem-appointed justices. Thus, it was also suspected of acting on the desires of the Minister of Economy. See, e.g., Laura Zommer, “La decisión que sonó a declaración de Guerra”, *La Nación*, February, 2 (available at <http://www.lanacion.com.ar/371182-la-decision-que-sono-a-declaracion-de-guerra>; last visited 01/03/2013) (reporting on the Administration’s reactions to the *Smith* ruling and its interpretation as a decision unduly motivated by non-legal reasons); “La crisis. Sondeo del Gobierno. La encuesta”, *Clarín*, February, 5, 2002, (available at <http://www.clarin.com/diario/2002/02/05/p-02003.htm>; last visited 01/03/2013) (reporting that a poll requested by the Administration showed that some 56.3% of the people thought the *Smith* decision aimed at boycotting the Duhalde administration, and only about 6% thought it aimed at defending the savers); “La Corte Suprema continúa en crisis”, *La Nación*, October, 30, 2004 (available at [http://www.lanacion.com.ar/nota.asp?nota\\_id=667199&high=bustos%20fallo](http://www.lanacion.com.ar/nota.asp?nota_id=667199&high=bustos%20fallo); last visited 01/03/2013) (arguing that the *Bustos* decision had been handed down “under the undeniable pressure” of the Administration); Joaquín Morales Solá, “Una gran victoria para Lavagna”, *La Nación*, October, 27, 2004 (available at [http://www.lanacion.com.ar/archivo/nota.asp?nota\\_id=648631&origen=relacionadas](http://www.lanacion.com.ar/archivo/nota.asp?nota_id=648631&origen=relacionadas); last visited 09/15/2007) (pointing out that the validation of “pesification” had been the great worry of then-Minister of Economy Lavagna, in regard to the restructuring of the defaulted public debt, and that Lavagna lobbied furiously to obtain such a decision from the Court, talking to the Justices and making promises to Justice Boggiano in regard to the impeachment procedure he was undergoing at the time); Silvana Boschi, “Pesificación: otro capítulo en la Corte”, *Clarín*, November, 3, 2004 (available at <http://edant.clarin.com/diario/2004/11/03/elpais/p-00701.htm>; last visited 01/08/2013) (stating that “According to judicial sources [...] the Court worked against the clock to get ready drafts of the [*Bustos*] decision so urgently expected in the Government and the Ministry of Economy, to accompany the presentation of the official offer to the United States for a way out of the debt default”); Pablo Abiad & Mariano Thieberger *JUSTICIA ERA KIRCHNER* 11, 43-57, 128-130 (Buenos Aires, Editorial Marea, 2005) (telling the story of the administration’s role in the renewal of the Court’s personnel and the importance of the “pesification” issue in the process, as well as the lobby for a decision upholding it).

<sup>825</sup> 325 *Fallos* 28 (2002).

savings, and channeled social tension through institutional, pacific means.<sup>826</sup> Future Supreme Court justice, Ricardo Lorenzetti praised the federal judiciary in the following terms:

“[m]any have criticized the judges, and have done so even in law journals. On the contrary, we think that it is necessary to attempt a ‘praise of the judges’. In the terrible months we have lived in 2002, we faced the greatest crisis in our history, and we did it in Democracy. This is not usual in Argentine history, and we owe it [this change], to a large extent, to the citizens and the judges. The citizens did not resort to the [military] barracks, but to the streets, first, and the courts, later. The judges were not indifferent; they attended to the claims, worked tirelessly throughout the country, and were an extremely important check to the abuses of the other branches. *I don’t think there is an example in the world of a Judiciary that has been able to channel so much accumulated social demand, that has declared so many unconstitutionalitys, and that has generated such a solid groundswell of public opinion in defense of individual rights*”<sup>827</sup>

*La Nación* criticized Congress’ attempt to stop judicial injunctions that allowed depositors to recover part of their funds arguing that, as the depositors’ right to their monies was indisputable, the legislation had left judges with few options but to grant the injunctions.<sup>828</sup> It also emphasized that

“[...] the combination of the devaluation of the currency with the prohibition of the withdrawals of funds and their forced restructuring, in addition to the ‘pesification’ of foreign currency deposits, amounted to a plain and simple violation of the property rights guaranteed by the Constitution. These are the grounds of the *amparos* that are being filed and also of the injunctions that judges are granting [...] any steps towards a reasonable and gradual return of the deposits that remain trapped in the financial system will be an invaluable contribution to recovering the political and institutional normalcy of the country and the social peace, as well as to overcoming the crisis that tears the country apart”<sup>829</sup>

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<sup>826</sup> See, e.g., Pablo Gallegos Fedriani, above n. 794 (recalling the situation that lower courts faced in the early years of the crisis and passing judgment on courts having played a valuable social role).

<sup>827</sup> Ricardo L. Lorenzetti, “Contratos en la emergencia económica: Pesificación - Obligaciones en mora - Un modelo de interpretación”, 2002-F L.L. 1086. Emphasis added.

<sup>828</sup> “La ‘ley tapón’ y sus debilidades”, *La Nación*, May, 3, 2002 (available at [http://www.lanacion.com.ar/nota.asp?nota\\_id=393537&high=tap%F3n](http://www.lanacion.com.ar/nota.asp?nota_id=393537&high=tap%F3n); last visited 03/12/2013).

<sup>829</sup> *Id.*

In *San Luis*,<sup>830</sup> the first decision on the merits of the compulsory conversion of dollar deposits, a 5-to-3 majority of the Supreme Court ruled “pesification” unconstitutional, on both formal and substantial grounds, and argued that depositors had relied on the “Intangibility of Deposits Act” and that a fifty percent loss of capital, as produced by the emergency regime conversion formula at the time of the decision, ran afoul of the property clause of the Constitution. The justices emphasized that the breach of the promises of the “Intangibility of Deposits Act” was “an ambush” for the depositors and that the State had not acted in good faith.<sup>831</sup> They also pointed out that the emergency regime had “plainly obliterated the constitutional guarantee of property”.<sup>832</sup> By diminishing the value of the savers’ deposits in approximately fifty percent, it had become “irredeemably confiscatory”.<sup>833</sup>

The decision was received exultantly by the savers,<sup>834</sup> and was not subject to severe criticism, except by those who thought that, regardless of the soundness of its reasoning, the decision had been motivated by spurious reasons or those who thought its economic effects to be deleterious. But even people in this latter group could not object to the ruling in legal terms.

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<sup>830</sup> 326 *Fallos* 417 (2003).

<sup>831</sup> *Id.* (Fayt, J., concurring, §20; similarly, Moliné O’Connor, López, JJ., concurring, §49; Vázquez, J., concurring, §23; Nazareno, J., §34-36).

<sup>832</sup> *Id.* (Moliné O’Connor, López, JJ., concurring, §47; Nazareno, J., concurring, §41; similarly, Vázquez, J., concurring, §19).

<sup>833</sup> *Id.* (Fayt, J., concurring, §39; similarly, Vázquez, J., concurring, §19)

<sup>834</sup> See, e.g., “Los ahorristas celebraron frente al Palacio de Justicia”, *La Nación*, March, 5, 2003 (available at [http://www.lanacion.com.ar/nota.asp?nota\\_id=478553&high=fallo%20provincia%20san%20luis](http://www.lanacion.com.ar/nota.asp?nota_id=478553&high=fallo%20provincia%20san%20luis); last visited 01/03/2013) (reporting that savers celebrated in front of the Court’s building with signs and pan-and-pot banging, chanting “now there is justice”); “Corte: piden a bancos que negocien con ahorristas”, *Clarín*, March, 8, 2003 (available at <http://www.clarin.com/diario/2003/03/08/e-00301.htm>; last visited 04/25/2013) (reporting that the *San Luis* ruling, striking down “pesification” of bank deposits, had had a “favorable effect upon the public”).

*Clarín*, a newspaper often accused of having benefited tremendously with “pesification” of its debt,<sup>835</sup> polled its readers on the *San Luis* decision. The question was “What do you think of the Supreme Court decision the re-dollarized the term deposit of San Luis?”. The answers vary, and some respondents explicitly accused the Court of acting politically,<sup>836</sup> but most of them coincided in praising the legal merits and, often, the intrinsic justice of the decision. Let us see.

One reader stated that “all the Court did was to maintain the force of the right of property in the event of an emergency of the state. If we analyze the effects of the decision, in principle they seem optimal”.<sup>837</sup> Another one opined that the ruling was “extremely correct, because it re-establishes the right of property guaranteed in Article 17 of the Constitution”.<sup>838</sup> Another reader, a biologist who criticized the justices heavily for allegedly deciding in order to further Menem’s electoral interests, claimed that “the ruling is legally correct. And just, as it would have been to nullify the *corralito* in the proper time”.<sup>839</sup>

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<sup>835</sup> See, e.g., “Al Grupo Clarín nunca le gustó perder”, *América Noticias*, May, 6, 2007 (available at [http://www.americanoticias.com/?action=displayNote&id\\_noticia=107](http://www.americanoticias.com/?action=displayNote&id_noticia=107); last visited 01/09/2013) (arguing that Clarín benefitted from “pesification”); “Clarín, el gran negociante argentino” (available at <http://comunicacionpopular.com.ar/clarin-el-gran-negociante-argentino-2/>; last visited 01/09/2013) (accusing Clarín of having gotten tremendous benefits from “pesification” and other measures of the Duhalde administration, such as the reform to the Bankruptcy Law); “Las medidas de devaluación y pesificación perjudicaron al Grupo Clarín” (available at <http://www.grupoclarin.com/content/10-las-medidas-de-devaluacion-y-pesificacion-perjudicaron-al-grupo-clarin>; last visited 01/09/2013) (official version of *Clarín*, attacking the “official rhetoric”, according to which, Clarín would have benefitted from “pesification”);

<sup>836</sup> See “¿Qué opina del fallo de la Corte Suprema que redolarizó el plazo fijo de la provincia de San Luis?”, *Clarín*, March, 16, 2003 (available at <http://www.clarin.com/diario/2003/03/16/o-531042.htm>; last visited 01/03/2013) (stating that there was a generalized suspicion among its readers that a political move underlied the ruling and that although the Court defended the savers’ property rights, they wouldn’t get their dollars back).

<sup>837</sup> *Id.* (quoting one reader by the name of Alejandro Matías Actis, lawyer).

<sup>838</sup> *Id.* (quoting one reader by the name of Fidel Améndola; judging by the reader’s ID number, 25.690.050, he might have been around 25-years old at the time of the statement).

<sup>839</sup> *Id.* (quoting one reader by the name of Guillermo Enrique Haut).



Of course, it could be argued that such a small sample cannot be taken as representative of public opinion. True. But the approval of the ruling's legal stance, and of the need to respect the savers' capital, must have been very widely held, indeed, if one is to judge the issue by the then-presidential candidates' positions on the topic, barely three weeks before election day. *La Nación* reported that

“[a]lthough presidential candidates adopted different postures when evaluating the Supreme Court ruling in favor of the ‘re-dollarization’ of the province of San Luis term deposit, they all agreed on the need to repay the deposits in the original currency”<sup>840</sup>

Presidential candidate Adolfo Rodríguez Saá, from one branch of the Peronist party, declared that the banks “must take responsibility and return the dollars they received”.<sup>841</sup> Néstor Kirchner, also from the Peronist party and Duhalde's candidate, declared very eloquently that savers should “rest assured that with him [as president] they will never get stuck with the bill”<sup>842</sup> and that his position had always been “to respect the original currency [of the deposits]”.<sup>843</sup> Leopoldo Moreau, from the Radical party, criticized the decision for he considered it of impossible implementation and motivated by the political necessities of Carlos Menem, but he acknowledged “the rights of the savers that have been cheated”.<sup>844</sup> Elisa Carrió, from the opposition party ARI, held that

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<sup>840</sup> See “Dispar postura de los candidatos”, *La Nación*, March, 6, 2003 (available at [http://www.lanacion.com.ar/nota.asp?nota\\_id=478759&high=fallo%20provincia%20san%20luis](http://www.lanacion.com.ar/nota.asp?nota_id=478759&high=fallo%20provincia%20san%20luis); last visited 01/07/2013)

<sup>841</sup> *Id.*

<sup>842</sup> *Id.* The expression in Spanish is “que los ahorristas se queden tranquilos, que conmigo jamás van a ser el pato de la boda”.

<sup>843</sup> *Id.*

<sup>844</sup> *Id.*

“[w]e must respect the Constitution and the law for the small and medium savers who believed in the country and did not [participate] in capital flight, and contemplate the situation of millions of debtors and savers who, along with all the people, are the ultimate victims of this phase [of the country]”<sup>845</sup>

The same trend is observed when the electoral platforms for the 2003 presidential election are analyzed. No single platform offered the electorate a solution to the economic crisis that consisted in anything like the “restitution of dollar bank deposits in pesos, at a conversion rate that did not reflect the free market value of the dollar”. A quick review of the platforms of the five slates that gathered the most votes<sup>846</sup> show that the proposals put forward to the electorate were: to take measures to return the bank deposits in the currency originally agreed (Menem<sup>847</sup> and López Murphy),<sup>848</sup> to resolve “the *confiscation* of the deposits and the asymmetric pesification [...] *Acknowledging the legal limitations, a revision of the indiscriminate measures* that favored the *liquefaction of the liabilities of solvent debtors* will be carried out and *all remaining restrictions* to the use of funds by depositors *will be lifted*” (Carrió);<sup>849</sup> “to create a framework that allowed banks and savers

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<sup>845</sup> *Id.*

<sup>846</sup> Taken together, they amount to the 91.22% of the votes in the 2003 presidential election (data available at <http://www.towsa.com/andy/index.html>; last visited 01/08/2013).

<sup>847</sup> In Menem’s proposal, the State would compensate the banks for the differences paid to the savers. A trust funded with the banks’ assets would be set up, to back up the restitution of dollar deposits (electoral platform available at <http://www.pjn.gov.ar/cne/download/Partidos%20Nacionales/Alianza%20frente%20por%20la%20lealtad/Alianza%20frente%20por%20la%20lealtad.pdf>; last visited 09/24/2007).

<sup>848</sup> López Murphy proposed a compensation system between the State and the banks, allowing each bank a quicker restitution of its clients’ deposits depending on the quality of its assets and the recovery of the public’s trust in the financial system. The final goal was restitution in the original currency (platform available at <http://www.pjn.gov.ar/cne/download/alianza%20movimiento%20federal%20para%20recrear%20el%20recimiento.pdf>; last visited 09/24/2007).

<sup>849</sup> Even if the platform does not explicitly state that deposits would be returned in the original currency, it does speak of “confiscation”, of “acknowledging the legal limitations” (among which the *Smith and San Luis* Supreme Court precedents were especially relevant), of “lifting all remaining restrictions”, and of “revising the indiscriminate measures that favored liquefaction of the liabilities of solvent debtors” (which,

to negotiate the mode of restitution of the deposits” (Kirchner);<sup>850</sup> and, finally, to establish “a financial system that regenerates the savers’ confidence” (Rodríguez Saá).<sup>851</sup>

Notice that even the candidate who had Duhalde’s support in those elections, Néstor Kirchner, went only as far as proposing a negotiated process where banks and savers should agree on how the deposits should be returned. And the proposals that most clearly spoke of restitution in the original currency got, together, nearly 55% of the votes. It is evident that the candidates’ support for restitution in dollars or, at least and for some, their extreme reluctance to show any signs of supporting “pesification”, must have been based on the resonance of respecting the savers’ capital in the general public. The popular conception of constitutional property did not tolerate “pesification”, however convenient from the economic standpoint it might have been.

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presumably, refers to the “generalized pesification” of the emergency decree 214/02, as opposed to the “limited pesification” of Law 25.561). On top of that, Carrió criticized the *Bustos* decision very harshly. (see, e.g., “Carrió, Cruciani, y un nuevo capítulo de Política y Justicia”, *Diario Judicial*, October, 29, 2004, available at <http://www.diariojudicial.com/nota.asp?IDNoticia=23411>; last visited 01/09/2013). All this allows the inference that the platform aimed at resolving the problem by fulfilling bank contracts in terms as close to the original as possible (platform available at <http://www.pjn.gov.ar/cne/download/Alianza%20Afirmacion%20para%20una%20Republica%20Igualitaria.pdf>; last visited 09/24/2007). Emphasis added.

<sup>850</sup> This platform is silent regarding the currency of restitution. However, it suggested that the issue should be resolved through negotiated agreements between banks and depositors, with the State’s role limited to creating a framework that fostered such negotiations. With the Supreme Court’s rulings *Smith* and *San Luis* in the books, and the large masses of savers who had gone to the courts in search of justice, it does not seem reasonable to infer that a negotiated settlement would include the compulsory “pesification” at an arbitrary parity, as a form of restitution (platform available at <http://www.pjn.gov.ar/cne/download/Partidos%20Nacionales/Alianza%20Frente%20para%20la%20victoria/alianza%20frente%20para%20la%20victoria.pdf>; last visited 09/24/2007). Moreover, Kirchner had declared publicly that his position “had always been restitution in the original currency”. See “Dispar postura de los candidatos”, *La Nación*, March, 6, 2003 (available at [http://www.lanacion.com.ar/nota.asp?nota\\_id=478759&high=fallo%20provincia%20san%20luis](http://www.lanacion.com.ar/nota.asp?nota_id=478759&high=fallo%20provincia%20san%20luis); last visited 01/07/2013)

<sup>851</sup> This platform is surely the most vague and succinct of all the registered platforms. There are no references to how the deposits would be returned, nor to any concrete mechanism for that purpose, at all (platform available at <http://www.pjn.gov.ar/cne/download/Partidos%20Nacionales/alianza%20frente%20movimiento%20popular.pdf>; last visited 09/24/2007).

Contradicting public opinion, and despite his previous strong public assurances to the contrary, president Kirchner sought a decision that upheld “pesification” as it helped his political plans.<sup>852</sup> Through a combination of resignations and impeachments, Kirchner was eventually able to appoint a new majority to the Court; validating “pesification” was one of his main objectives.<sup>853</sup> In *Bustos*,<sup>854</sup> a plurality of the Court reversed its immediate prior decisions and upheld “pesification” as applied to a 1.3 million dollar deposit. However, in *dicta* in a concurring opinion Justice Zaffaroni stated his opinion that “pesification” of small deposits would be “dysfunctional to social progress”,<sup>855</sup> and that other cases (elderly savers, depositors who were sick, and even

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<sup>852</sup> There were many reasons why Kirchner had become a silent supporter of “pesification” by 2004. I can only mention a few here. One of the main political and economic reasons for Kirchner’s change of mind was that he was trying to restructure the national debt that had been defaulted in 2001 and it was going to be harder to convince the external creditors that they should accept a substantial haircut when national depositors were acknowledged the right to collect 100 percent of their dollar credits. It’s true that depositors were not the State’s creditors (they were creditors of the banks), but the State was already formally into the equation, as it had committed itself to compensate the banks for the difference between the 1-to-1 “pesification” of their credits and the 1.40-to-1 “pesification” of their debts (the deposits) (see Article 6, Law 25,561). Moreover, the banks argued that since they couldn’t afford to repay their deposits in dollars if forced to collect their loans in pesos, if the deposits were to be repaid in dollars, the State would have to subsidize the cost of the operation. If the State issued money to compensate the savers (or the banks), the inflation problem would just exacerbate. Moreover, this would alter the delicate fiscal equilibrium needed to afford fulfilling the proposal to foreign holders of defaulted bonds. In the external front, Argentina was facing several lawsuits in the ICSID, in which “pesification” was at stake, and a ruling by the national Supreme Court striking down “pesification” would hardly help the Administration’s cause before the ICSID. Last, but not least, the unconstitutionality of “pesification” was stuck to the old, Menem-appointed, Court, whose majority members Kirchner had managed to remove by impeachment procedures.

<sup>853</sup> See Pablo Abiad & Mariano Thieberger, above n. 824, at 11, 43-57, 128-130 (telling the story of the administration’s role in the renewal of the Court’s personnel and the importance of the “pesification” issue in the process, as well as the lobby for a decision upholding it). A similar argument, regarding an alleged packing of the U.S. Supreme Court to overrule the first legal tender decision, *Hepburn v. Griswold* (75 U.S. 603 (1870)), has been made frequently. See Gerard N. Magliocca, “A New Approach to Congressional Power: Revisiting the *Legal Tender Cases*”, 95 *Geo. L. J.* 119, 145-149 (2004) (presenting the criticism but arguing that *Knox* was an act of interpretation rather than a crude attempt to achieve a specific result and, thus, that the view that it was a political act is incorrect).

<sup>854</sup> 327 *Fallos* 4495 (2004). The decision was handed down by a “transition” Court, made up of two new appointees, two justices appointed by Alfonsín in the early 1980s, and one justice appointed by “transition” president Duhalde in 2002. Two seats were still vacant, and one justice had recused himself.

<sup>855</sup> *Id.* (Zaffaroni, J., concurring, §8).

people who had already been paid in dollars due to injunctions)<sup>856</sup> also deserved to be excluded from the “general rule of pesification”, thus preventing a majority from upholding the emergency regime.

An unprecedented rebellion took place among lower courts, which refused to follow the decision,<sup>857</sup> and took advantage of the loopholes created by Justice Zaffaroni’s concurring opinion to continue ruling the “pesification” regime unconstitutional.

A large number of federal appellate judges issued the *Declaración de Comodoro Rivadavia*, a statement in which, citing the words of then-Supreme Court nominee

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<sup>856</sup> *Id.* (Zaffaroni, J., concurring, §13-14)

<sup>857</sup> See, among countless other decisions, Cámara Federal de Apelaciones de La Plata, en pleno, 06/26/2006, *Abalde, Jorge y otros c. Banco Río*, 2006 L.L.B.A. 797 (*Bustos* was deemed inapplicable in all cases involving special individual situations, as per the same emergency regime, and one of the judges, Compaired, held that “given that the Court’s thesis [in *Bustos*] can hardly be reconciled either with reality or with the applicable rules’ values and contents, there arises the *duty* for all other courts in the Republic *not to follow* such position”; emphasis added); Cámara Federal de Apelaciones de La Plata, sala II, 03/01/2007, *G., I.G. c. PEN*, opinion of judges Schifrin and Fleicher, 2007-B L.L. 248 (which although referred centrally to the *Massa* decision, imply the absolute rejection of the *Bustos* decision); Cámara de Apelaciones en lo Civil y Comercial de Corrientes, sala II, 06/01/2006, *Olivi, Mirta c. Bank Boston*, 2007 L.L. Litoral 130 (rules “pesification” unconstitutional and cites to Justice Fayt’s *dissent* in *Bustos*); Cámara de Apelaciones en lo Civil y Comercial de Corrientes, sala IV, 04/28/2006, *Castello, Julio E. c. Banco Río de la Plata*, 2006 L.L. Litoral 1057 (considers *Bustos* as not binding and cites to *Smith* and *San Luis*); Cámara Nacional de Apelaciones en lo Civil y Comercial Federal, sala III, 05/23/2006, *Bogomolny, Estela c. Poder Ejecutivo Nacional*, L.L.O. (the court denied the *recurso extraordinario federal*—an extraordinary appeal similar to the writ of certiorari in the U.S. federal system, but whose formal admissibility is adjudicated by the same court whose decision is appealed— filed against its decision ruling “pesification” unconstitutional against *Bustos* and citing to its own previous decision in *Mauri*, where the court had given “suficiente reasons to ground the decision not to follow *Bustos*”); Cámara Nacional de Apelaciones en lo Civil, Sala D, 06/30/2005, *Carballido, Laura c. BNL*, 2005-F L.L. 44 (the court held that *Bustos* was largely based upon “arguments of a political, controversial tint, which do not provide enough normative grounds to set aside a decision [*San Luis*] that aims at protecting the right of property of the creditor, whose constitutional protection [had been] reinforced by Law 25,466”); Cámara Nacional de Apelaciones en lo Civil, sala B, 06/30/2005, *Carrillo, María del Carmen c. BBVA*, L.L. O. (declared “pesification” unconstitutional and, regarding *Bustos*, held that it was not possible to “sidestep the various criticisms levelled against said ruling, which justify our not following it. The emergency regime [...] deprived the savers of the disposition of their credits, encroaching upon vested rights and the right to property”); Cámara Nacional de Apelaciones en lo Contencioso-administrativo Federal, sala II, 21/06/2005, *Salas, Mirtha R. c. Poder Ejecutivo Nacional*, L.L.O. (ruled “pesification” unconstitutional, and judge Herrera, concurring, pointed out that “the Supreme Court decision in the B. 139 XXXIX *Bustos, Alberto Roque y otros c. Estado Nacional y otros s/ Amparo* case, of October, 26, 2004, that rejected an amparo action analogous to the one in this case, cannot alter the reasoning of this court in the *Pape, Mariela Susana c. PEN - dtos. 1570/01 - M° E Resol. 9/02 s/ amparo ley 16.986* case, of August, 28, 2002 [...] Therefore, I maintain the same solution I adhered to in countless precedents of this court”); Cámara Federal de Apelaciones de Mendoza, Sala A, 03/12/2004, *Lavado, Roberto*, 2005 L.L.G.C. 274 (struck down “pesification” as unconstitutional and justified at length the court’s refusal to follow *Bustos*).

Ricardo Lorenzetti,<sup>858</sup> they defended their own rulings striking down “pesification” from the rough criticisms of Justices Belluscio and Maqueda in the *Bustos* decision.<sup>859</sup>

Many judges criticized the Court’s decision heavily,<sup>860</sup> and one federal district court judge, Martín Silva Garretón, went as far as to say, in writing, that the *Bustos* decision contained “staggering contradictions”, “hasty statements” and a “blatant disregard of law”.<sup>861</sup> Silva Garretón also criticized the justices’ individual concurring opinions, one by one, and had no problem in claiming that Justice Highton’s concurrence exhibited an evident ignorance of the principles governing legislative delegation.<sup>862</sup>

Another lower court judge, Julio Cruciani, criticized his superiors and said publicly that the ruling “brings about a lack of credibility and hope in the new Supreme Court”.<sup>863</sup> Echoing the now-widespread “regressive redistribution difficulty”, judge

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<sup>858</sup> See above n. 827 and accompanying text.

<sup>859</sup> See, e.g., “Camaristas federales replicaron a la Corte”, *La Nación*, October, 27, 2004 (available at <http://www.lanacion.com.ar/657811-camaristas-federales-replicaron-a-la-corte>; last visited 01/17/2013) (quoting *Declaración de Comodoro Rivadavia*); “Pesificación: replica de jueces a la Corte”, *El Día*, October, 27, 2004 (available at <http://www.eldia.com.ar/ediciones/20041127/economia1.asp>; last visited 01/17/2013) (same).

<sup>860</sup> See, e.g., Juan Carlos Vaca, “Más fallos en Córdoba contra la pesificación”, *La Nación*, November, 23, 2004 (available at [http://www.lanacion.com.ar/nota.asp?nota\\_id=656559&high=bustos%20fallo](http://www.lanacion.com.ar/nota.asp?nota_id=656559&high=bustos%20fallo); last visited 01/07/2013) (reporting that four decisions in the federal courts in the province of Córdoba held that the *Bustos* decision was unconstitutional and not binding).

<sup>861</sup> See Pablo Abiad, “Un juez critica a la Corte y declara inconstitucional la pesificación”, *Clarín*, November, 10, 2004 (available at <http://www.clarin.com/diario/2004/11/10/elpais/p-00801.htm>; last visited 01/07/2013) (transcribing parts of Silva Garretón’s ruling in the *Killian* case).

<sup>862</sup> See Gabriel Sued, “Un juez invalidó la pesificación en un caso mayor a U\$S70.000”, *La Nación*, November, 10, 2004 (available at [http://www.lanacion.com.ar/nota.asp?nota\\_id=652721&high=bustos%20fallo](http://www.lanacion.com.ar/nota.asp?nota_id=652721&high=bustos%20fallo); last visited 01/08/2013) (transcribing parts of Silva Garretón’s ruling in the *Killian* case).

<sup>863</sup> See, e.g., “Carrió, Cruciani y un nuevo capítulo de Política y Justicia”, *Diario Judicial*, October, 28, 2004 (available at [http://www.diariojudicial.com/contenidos/2004/10/29/noticia\\_0009.html](http://www.diariojudicial.com/contenidos/2004/10/29/noticia_0009.html); last visited 01/08/2013) (quoting judge Julio Cruciani).

Cruciani pointed out that “*as always*, the injured party is Doña Rosa and Don José, and the beneficiaries are the banks”.<sup>864</sup>

The judges were reacting to the more than dubious legal bases of the Court’s decision, but they were also reflecting the public outrage at the ruling. They knew most of the citizens were with them, not with the *Bustos* plurality. There were violent protests when the ruling was made public,<sup>865</sup> and the savers kept protesting in front of the Supreme Court building weeks after the ruling.<sup>866</sup> Some justices who voted to uphold “pesification” in *Bustos* suffered violent demonstrations and pickets in front of their homes.<sup>867</sup> One of them, Juan Carlos Maqueda, even suffered physical aggression and had to spend one night in a hospital.<sup>868</sup> His wife was also a victim of the savers’ rage.<sup>869</sup>

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<sup>864</sup> *Id.* Emphasis added. “Doña Rosa” and “Don José” are equivalents of “Jane Doe” or “John Smith”, which convey the idea of the “regular guy on the street”, the layfolk.

<sup>865</sup> See, e.g., “La Corte convalidó la ley de pesificación”, *La Nación*, October, 26, 2004 (available at [http://www.lanacion.com.ar/nota.asp?nota\\_id=648407&high=bustos%20fallo](http://www.lanacion.com.ar/nota.asp?nota_id=648407&high=bustos%20fallo); last visited 01/03/2013) (reporting that, right after the decision was made known, a group of outraged savers gathered in front of the Solicitor General office—who had submitted a brief in support of “pesification”—, painted it and lighted bonfires, and that another such group did the same inside the Court’s building and were repressed by the police); Carolina Keve, “Enfrentamientos frente a Tribunales”, *Página/12*, October, 27, 2004 (available at <http://www.pagina12.com.ar/diario/elpais/subnotas/42853-14663-2004-10-27.html>; last visited 01/07/2013) (reporting that when the *Bustos* decision was known, the courthouse was submerged in chaos, as savers attempted to break into the justices’ conference room, throwing trash cans and lighting fire, and they confronted the police; similar incidents occurred in front of the Solicitor General office); “A poca distancia de los jueces, los ahorristas hicieron sentir su queja”, *La Nación*, October, 27, 2004 (available at [http://www.lanacion.com.ar/nota.asp?nota\\_id=648609&high=protesta%20fallo](http://www.lanacion.com.ar/nota.asp?nota_id=648609&high=protesta%20fallo); last visited 01/07/2013) (same).

<sup>866</sup> See “La Corte, empantanada con las causas sobre pesificación”, *Clarín*, November, 17, 2004 (available at <http://www.clarin.com/diario/2004/11/17/elpais/p-01205.htm>; last visited 01/07/2013) (reported that the previous day there had been yet another protest by savers affected by “pesification”, who “loudly demanded the restitution of their deposits in dollars and criticized the ruling that upheld their “pesification””).

<sup>867</sup> See Victoria Ginzberg, “La agresión resulta inadmisible”, *Página/12*, November, 10, 2004 (available at <http://www.pagina12.com.ar/diario/economia/2-43427-2004-11-10.html>; last visited 01/07/2013) (reporting that Justices Boggiano and Maqueda had suffered savers’ demonstrations in their homes).

<sup>868</sup> *Id.* (reporting that Maqueda was approached by a woman who asked him “how is it going?” and when the justice said “I’m fine”, she replied “I’m not”, and between 40 and 50 people threw him against a shop windows and hit him in the head with the signs they were carrying).

Maqueda, who had been appointed by Duhalde and had been a member of the Senate that passed Emergency Law 25,561, had been the target of the savers' indignation since his appointment. When he took office, more than two hundred demonstrators broke the windows of the entrance doors to the Court's building and threw tomatoes, eggs and firecrackers towards the inside.<sup>870</sup> He had also suffered a demonstration in his natal province of Córdoba.<sup>871</sup>

Elisa Carrió, an important opposition leader, reacted vehemently to the ruling. She accused then-Minister of Economy Roberto Lavagna of "having celebrated the scam", of "having spoken with the Court" which was "an insult to millions of Argentines", and she said that she supported "the renegotiation of the debt, but not the immorality of an Administration that celebrates immorality".<sup>872</sup> Regarding the ruling itself, she claimed that its arguments were of "an unacceptable rusticity", and requested the impeachment of Justices Belluscio, Maqueda, and Boggiano.<sup>873</sup>

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<sup>869</sup> *Id.*

<sup>870</sup> See "El juez Maqueda tuvo que ser internado tras un escrache", *Clarín*, November, 6, 2004 (available at <http://edant.clarin.com/diario/2004/11/06/um/m-863953.htm>; last visited 01/07/2013).

<sup>871</sup> *Id.*

<sup>872</sup> See "Carrió acusó a Lavagna de haber festejado la estafa de la pesificación", *La Nación*, October, 30, 2004 (available at <http://www.lanacion.com.ar/649726-carrio-acuso-a-lavagna-de-haber-festejado-la-estafa-de-la-pesificacion>; last visited 01/08/2013).

<sup>873</sup> See, e.g., Silvana Saldisuri, "Carrió pedirá el juicio político a Belluscio por su fallo a favor de la pesificación", *Cronista*, October, 28, 2004 (available at <http://www.cronista.com/impresageneral/Carrio-pedira-el-juicio-politico-de-Belluscio-por-su-fallo-a-favor-de-la-pesificacion-20041029-0088.html>; last visited 01/08/2013); "Carrió acusó a Lavagna de haber festejado la estafa de la pesificación", *La Nación*, October, 30, 2004 (available at <http://www.lanacion.com.ar/649726-carrio-acuso-a-lavagna-de-haber-festejado-la-estafa-de-la-pesificacion>; last visited 01/08/2013). Unsurprisingly, a Congress dominated by the Kirchners rejected Carrió's request.



Ricardo López Murphy, leader of the opposition party Recrear, opined that the *Bustos* ruling was a “legal scandal” and that “clearly” there was “a serious problem with this ruling because it confirmed the possibility of confiscating savings”.<sup>874</sup>

Another piece of important evidence in this inquiry is the fact that Congress had refused to ratify Duhalde’s emergency decree that “pesified” bank deposits not once but twice,<sup>875</sup> probably mindful of extreme impopularity of the measures. It was only after the Court had validated the emergency regime —taking the corresponding heat— in *Bustos* that Congress finally ratified the measures.<sup>876</sup>

The *Bustos* decision was met with extended popular, as well as judicial, disapproval, and the Court wasn’t able to gather consensus among the justices to rule “pesification” constitutional in all cases.

Two new justices took the bench, and more than two years later, in *Massa*,<sup>877</sup> a definitive solution was reached: “pesification” was ruled constitutional,<sup>878</sup> but only insofar

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<sup>874</sup> See “Pesificación: duro debate tras el fallo de la Corte”, *El Día*, October, 31, 2004 (available at <http://www.eldia.com.ar/ediciones/20041031/elpais3.asp>; last visited 01/08/2013).

<sup>875</sup> The Executive branch sent budget bills (which were true omnibus bills) containing provisions that ratified the emergency decree 214/02 (the one that had established the “pesification” of bank deposits), among various other emergency decrees, two years in a row. Congress, however, explicitly excluded emergency decree 214/02 from ratification in the corresponding enacted laws (see Laws 25,725 and 25,827). See also Emilio A. Ibarlucía, *LA EMERGENCIA FINANCIERA Y CONTROL JUDICIAL DE CONSTITUCIONALIDAD* 144-145 (Buenos Aires, Ábaco, 2004). Congress also legislated on the very same economic emergency topic, without ratifying the decree (see Laws 25,587 and 25,820).

<sup>876</sup> 329 *Fallos* 5913 (2006).

<sup>877</sup> *Id.*

<sup>878</sup> Technically, there is no majority upholding “pesification”, as only three justices out of the five-justice plurality explicitly declared “pesification” constitutional, and as of 2006 when the Court was shrunk from 9 to 7 (and, in the future, 5) seats, a majority is constituted by four votes. Justice Fayt, who had previously voted for the unconstitutionality of the regime, stated that the Court need not decide the constitutional issue as there was no harm without a reduction of capital while Justice Argibay, a Kirchner appointee, concurred in the judgment but only insofar as the economic outcome was equivalent to declaring the emergency regime unconstitutional, as she thought it to be.

as the conversion formula, with a few judicial twists,<sup>879</sup> no longer resulted in a reduction of capital. Savers would be paid in *pesos* an amount equivalent to the free market value of the dollars originally deposited, thus reinforcing, as a practical matter, the well-extended idea was that capital could not be reduced, while maturities and interest rates could be altered.

Justices Lorenzetti, Highton de Nolasco and Zaffaroni signed a dry, succinct plurality opinion that ruled “pesification” constitutional for lack of harm to the savers’ property rights, with Lorenzetti adding a separate concurrence giving further explanations for his position that depositors suffered no harm under the ruling. Justice Fayt considered that the Court need not address the question of the constitutionality of “pesification”, given that the savers would receive an equivalent amount, even if in *pesos*,<sup>880</sup> although he reiterated “the view held in previous opinions”,<sup>881</sup> where he voted to strike down “pesification”. Justice Argibay, herself a Kirchner appointee, wrote what is basically a dissent, arguing the unconstitutionality of the compulsory conversion, but concurring in the judgment as, in her opinion, it led to the very same economic result as the plurality’s tweaked conversion formula.<sup>882</sup> Justice Maqueda, a supporter of the constitutionality of the emergency regime, decided to take no part in the decision.

The *Massa* decision aimed at bringing the long judicial struggle to an end, regardless of legal orthodoxies. Although it succeeded in its own terms, as lower courts

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<sup>879</sup> The decision doubled the interest rate set by the emergency regime and extended the application of the inflation-adjustment mechanism (C.E.R.) until the date of effective payment, thus eliminating losses of capital. The Court took advantage of a happy coincidence: the dollar price has remained stable for quite some time, while inflation had kept a steady rising march, therefore making converted *pesos* converge with the dollar price.

<sup>880</sup> 329 *Fallos* 5913 (2006), (Fayt, J., concurring, §22).

<sup>881</sup> *Id.*

<sup>882</sup> *Id.* (Argibay, J., concurring in the judgment, §11)

largely adhered to the ruling and both parties accepted it, it was obvious that decision would not leave everyone content. As one journalist put it, it was an unjust ending for the crisis, but one far less tragic than one could have predicted five years before.<sup>883</sup> Savers would receive the equivalent to the capital they had deposited, bearing the opportunity costs of a 5-year deprivation of the money.<sup>884</sup> They protested the decision, albeit to a much lesser extent than they had done with the previous *Bustos* case.<sup>885</sup> They never completely accepted the fact that the Court had not ruled “pesification” unconstitutional. Symbolisms do matter.

Bank depositors were not the only victims of “pesification”, nor the only ones who were vocal about their rejection of such way of dealing with the emergency. There were a fairly large number of small private lenders. Quite frequently, they were unemployed middle-aged individuals who had received a severage payment and who, in the face of the unlikelihood of getting a new job, had lent the money to people that could not have access to formal banking credit. These creditors, by far the most prejudiced by the emergency regime established by the Duhalde administration, as they were to be repaid one peso per each dollar lent, plus an inflation-adjustment index, also adhered to

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<sup>883</sup> Mario Wainfeld, “Qué verde era mi banco”, *Página/12*, December, 28, 2006 (available at <http://www.pagina12.com.ar/diario/elpais/subnotas/78339-25281-2006-12-28.html>; last visited 01/17/2013).

<sup>884</sup> The *Massa* decision did not contemplate the possibility of further compensations for the savers, except for Justice Fayt, who explicitly left open the possibility of new lawsuits where the savers could sue for the harms suffered due the protracted impossibility of using the money. See 329 *Fallos* 5913 (2006) (Fayt, J., concurring, §20).

<sup>885</sup> When the decision was handed down, a group of about 70 savers were protesting in front of the Supreme Court, with signs, drums and pans. Many wore stickers with the phrases “Remember. The banks stole from you, and they will do it again”. They complained bitterly that Court upheld Emergency Decree 214/02. See “Los ahorristas, de la esperanza al llanto”, *La Nación*, December, 28, 2006 (available at [http://www.lanacion.com.ar/nota.asp?nota\\_id=870900&high=fallo%20ahorristas](http://www.lanacion.com.ar/nota.asp?nota_id=870900&high=fallo%20ahorristas); last visited 01/17/2013). Some of them considered the decision “insufficient” as it did not provide for compensation of the *lucrum cessans*. See Anabella Quiroga, “Hay ahorristas que quieren pedir el lucro cesante”, *Clarín*, December, 28, 2006 (available at <http://www.clarin.com/diario/2006/12/28/elpais/p-00503.htm>; last visited 01/17/2013) (reporting the complaints of many of the savers protesting the Court’s decision).

the idea that property rights could be modified for emergency reasons, but not to the extent the administration had gone. One of them stated to *Clarín* that

"[u]ntil a fortnight ago, the situation was governed by Article 11 of Law 25,561 and the private mortgagees were negotiating with debtors, we did not lose hope for a solution. But Decree 214 pesified us 1-1 and deprived us of all hope"<sup>886</sup>

Interestingly, and contrary to the situation between depositors and banks, the dispute private creditors and debtors was not one of total and irreconcilable opposition. Perhaps it was so because both parties could empathize with each other. As *Clarín* reported, "these investors say it is not a fight between debtors and creditors"<sup>887</sup> "Here all contracts were broken. No one intends to take the house of another [person]. It is simply about giving the possibility of a *reasonable renegotiation* between creditors and debtors"<sup>888</sup>

The movement against the economic emergency measures even had its own apparent contradictions. Indeed, many people were against the "pesification" of bank deposits, even when they supported the "pesification" of debts. Depositors who argued against "pesification" and small debtors who claimed for it were sometimes together in their fights. Neighborhood assemblies proliferated in those days, and a document against Duhalde's economic policies was issued by "the indebted, the *acorralados* [those whose money was kept within the "corralito"], the ungoverned, the 'un-pesified' debtors, the lethargic, the hopeless, the bankrupt"<sup>889</sup> According to Ibope, fifty percent of the people

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<sup>886</sup> See "Quejas de algunos pesificados", *Clarín*, February, 13, 2002 (available at <http://edant.clarin.com/diario/2002/02/13/e-346489.htm>; last visited 01/03/2013) (quoting one Gustavo Schwob, one of these private lenders).

<sup>887</sup> *Id.*

<sup>888</sup> *Id.* Emphasis added.

<sup>889</sup> See "La popular y la platea, todos mojados por la misma lluvia", *Clarín*, January, 29, 2002 (available at: <http://www.clarin.com/diario/2002/01/29/p-340386.htm>; last visited 04/26/2012) (citing the document and arguing that the middle and lower classes claims were together for once, although in an instable tension).

thought that the “pesification” of bank deposits did not contribute to overcoming the crisis,<sup>890</sup> while exactly the same percentage supported the one-to-one “pesification” of debts.<sup>891</sup> But that cannot be a plausible position: banks cannot repay dollar deposits if they are not allowed to collect their dollar credits. You cannot have it both ways. Or can you?

The dominant emergency discourse was that in order to save families who were indebted in dollars from losing their homes, it was unavoidable to “pesify” bank deposits.<sup>892</sup> Therefore, savers who rejected “pesification” exhibited an unacceptably individualistic attitude and were trying to obtain unjust advantages, establishing themselves as a privileged class. Accordingly, the Central Bank argued to the Supreme Court that, if paid back in dollars, depositors would be enriched in a way “incompatible with the situation of the rest of the depositors and with the acute situation of economic and financial crises faced by the Nation”.<sup>893</sup> Powerful media, with stakes in the “pesification” of debts, pushed forward the emergency discourse, and tied up the destiny of dollar deposits in the financial system with that of dollar contracts between private individuals, thus instilling fear in the large group of small debtors who could not afford

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<sup>890</sup> According to the evidence in the text, many more people seemed to have thought that “pesification” of bank deposits was impermissible, whether it contributed to improving the situation or not.

<sup>891</sup> See Raúl Kollmann, “La gente aún no percibe resultados”, *Página/12*, February, 10, 2002 (available at: <http://www.pagina12.com.ar/diario/elpais/subnotas/1736-979-2002-02-10.html>; last visited 04/26/2012) (citing an Ibope poll). Of course, to think that any measure is not a solution to a certain problem is not the same as to support any given measure, so it is possible to think that the two questions were posed in too different terms in order for the answers to them to be comparable.

<sup>892</sup> See Brief for Defendant Central Bank of the Argentine Republic in case S.173.XXXVIII, *Provincia de San Luis v. Estado Nacional et al.*, on file with author, ruling on the merits in 326 *Fallos* 417 (2003) (arguing that it was necessary to “pesify” all bank deposits in order to allow the also necessary “pesification” of debts).

<sup>893</sup> See Brief for Defendant Central Bank of the Argentine Republic in case S.173.XXXVIII, *Provincia de San Luis v. Estado Nacional et al.*, on file with author, ruling on the merits in 326 *Fallos* 417 (2003)).

to repay in dollars.<sup>894</sup> Spokesmen for the Minister of Economy sought to install the idea that returning the dollars trapped in the *corralito* was an economically unfeasible idea, something financially irrational.<sup>895</sup>

Former President of the Central Bank, Javier González Fraga, was adamantly opposed to any de-“pesification” of deposits, and declared publicly that

“It would be very bad if [depositors] were given a national bond [...] A country where there is famine and three million people are marginalized cannot spend resources, neither now nor in the future, to compensate *savers who did not lose purchasing power*”<sup>896</sup>

In his view, due to the higher interest rates that were paid in Argentina, a typical saver would not have done better, had he deposited the money in, say, Miami.<sup>897</sup> And

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<sup>894</sup> “Deudores piden que se ratifique el alcance del fallo”, *La Nación*, March, 6, 2003 (available at <http://www.lanacion.com.ar/478788-deudores-piden-que-se-ratifique-el-alcance-del-fallo>; last visited 01/02/2013) (citing the president of *Fedecámaras*, the federation of chambers and centers of commerce, who filed a petition in the Supreme Court to get the justices to ratify that the ruling declaring the unconstitutionality of “pesification” only reached bank deposits and not other types of dollar-denominated obligations).

<sup>895</sup> Lorena Cobe *LA SALIDA DE LA CONVERTIBILIDAD. LOS BANCOS Y LA PESIFICACION* 69 (Buenos Aires, Capital Intelectual, 2009).

<sup>896</sup> “Para Fraga, es un engaño”, *Página/12*, December, 4, 2002 (available at <http://www.pagina12.com.ar/diario/elpais/subnotas/1-5535-2002-12-04.html>; last visited 01/14/2012).

<sup>897</sup> See “Defaulter of Last Resort”, 366 *The Economist* 38-39 (March, 8, 2003) (quoting Javier González Fraga). The full argument goes like this: since the average deposit was 5-year long, the high interest rates paid in Argentina would have compensated depositors by putting them, after the reduction of capital brought about by “pesification”, in the same situation they would have been, had they had their money deposited in Miami during the same 5 years. There are several problems in this argument, which I can only mention here. First, by 1996 the interest rate paid to depositors had fallen to international levels (see Francisco Buera & Juan Pablo Nicolini, above n. 777, at 232 (arguing that by the end of 1996 the passive interest rate —the rate paid by banks to depositors— had fallen to international levels)), therefore falsifying the assumption of González Fraga’s argument; second, even if it were true that a depositor in Miami would have been paid a lower interest, his money would have been exposed to far fewer risks —including risks other than conversion of the currency, devaluation, etc.—; third, the argument overlooks the fact that depositors in Argentina did sustain a loss, thus suffering in their legitimate expectations, due to “endowment effect” (see, e.g., Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, “The Endowment Effect, Loss Aversion, and Status Quo Bias”, 5 *J. Econ. Perspect.* 193 (1991)) and WTP-WTP divergence —basically, what Frank Michelman has called “demoralization costs” (Frank I. Michelman, “Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law”, 80 *Harv. L. Rev.* 1165, 1214 (1967))—; fourth, most small and medium savers did not have access to foreign accounts, had they preferred a lower interest rate with a correspondingly lower risk; last, but not least, the argument overlooks that banks had also enjoyed —throughout the ten years that convertibility lasted— of

the Administration did not miss an opportunity to stress that the savers did not really lose with the “pesification” of their deposits.<sup>898</sup>

Justices Belluscio and Maqueda followed trend, emphasizing that

“[F]rom the 2001 crisis nobody has come out unharmed. Without considering that there were even people who lost their lives in the street riots, many inhabitants of the country lost their patrimony or saw it diminished as a consequence of the crisis [...] in such a situation, *to allow that depositors get, without further delay, the same amount of foreign currency in which their deposits were registered would imply the creation of a privileged class [...]*”<sup>899</sup>

Justice Highton de Nolasco noted that:

“[...] the norms impose the necessity that *the consequences of the emergency are distributed fairly among all inhabitants*, so that no citizen benefits from another [...] Within a constitutional scheme where human rights have primacy, and where large sectors of the population remain with unfulfilled basic needs and are situated below the poverty line, *it is not possible to validate an individualistic claim [...]*”<sup>900</sup>

Once again, the question arises: were the burdens of the crisis distributed fairly?

As with the “Bonex plan”, those caught by the emergency trap were mostly small and medium savers. It is not hard to imagine that those who withdrew some 22,000,000,000 dollars from the banks throughout 2001 were depositors with better access to information and more sophisticated strategies of risk management. These qualities are usually correlated with the well-off. The “Intangibility of Deposits Act” must have been, for those versed in investment matters, the final signal needed to take their deposits out

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a spread substantially higher than the one they would have had, if they had lent money in Miami (see above n. 778).

<sup>898</sup> See, e.g., Jorge Remes Lenicov, “Pesificación, equidad para deudores y ahorristas”, *La Nación*, October, 11, 2002 (available at <http://www.lanacion.com.ar/439561-pesificacion-equidad-para-deudores-y-ahorristas>; last visited 02/15/2012) (stating that “pesification has protected savers” and there was no “confiscation of savings”). Remes Lenicov was the Minister of Economy who implemented “pesification”.

<sup>899</sup> 327 *Fallos* 4495 (2004), (Belluscio, Maqueda, JJ., concurring, §13). The italics are mine.

<sup>900</sup> 327 *Fallos* 4495 (2004), (Highton de Nolasco, J., concurring, §29).

of the Argentine banking system. On the other hand, laymen were probably reassured by Congress's formal declaration that deposits would be respected. Therefore, it should not be surprising that the profile of the average saver caught by the emergency regime be that of a small, relatively poor and politically-unconnected, depositor. Let us see what we find by looking at the numbers.

Of 1,137,682 dollar-denominated accounts that were caught in the restructuring and "pesification" established by Emergency Law 25,561 and Emergency Decree 214/2002, 1,030,333 accounts corresponded to amounts of 30,000 or less dollars.<sup>901</sup> That means a 90.56% of all accounts. If one considers only deposits of up to 5,000 dollars, they reach 48% of all deposits trapped in the emergency regime, which made up only 25% of the total deposits in December 2000.<sup>902</sup> Hardly enough to consider the holders part of the well-off. Even more importantly, the capital flight figures show that, predictably, the largest investors and foreign residents took their capitals out of the banks well before the emergency regime was in place. From December, 2000 to March, 2001, a significant decrease in dollar deposits is seen only in accounts of over 500,000 dollars and those owned by foreign residents.<sup>903</sup> Between March 2001 and November 2001, what one sees is the following: very small depositors converted their savings from *pesos* to dollars, as deposits of less than 5,000 pesos fell 11.3% while dollar deposits up to the same amount increased by 16.9%; small and medium savers took some of their deposits out of

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<sup>901</sup> "Información sobre tramos de depósitos", Estadísticas e Indicadores Monetarios y Financieros, Central Bank of the Argentine Republic, information as of July, 31, 2002 (available at: <http://www.bcra.gov.ar/estadis/es020200.asp>; selecting "Otras Informaciones sobre la actividad financiera"/"Tramos de Depósitos (serie trimestral)"; last visited 02/10/2012).

<sup>902</sup> *Id.* See also Marina Halac & Sergio L. Schmukler, "Distributional Effects of Crises: The Role of Financial Transfers", [World Bank Policy Research Working Paper No. 3173](#) at 35 (see figure 5) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=408100](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=408100); last visited 01/20/2012)

<sup>903</sup> Accounts between 100,000 and 500,000 dollars also show a very slight decrease of 0.9%. Accounts over 500,000 fell by 14.3% and those owned by foreign residents dropped a good 22.3%. See *Id.* at 34 (see figure 4).



the system, as deposits of up to 20,000 dollars dropped by 3.9% and those of up to 100,000 dollars decreased by 6%; large savers and investors incurred in heavy cash withdrawals, with a 15.2% drop in deposits between 100,000 and 500,000 dollars, a 23% drop in those over 500,000, and an impressive 62% fall in deposits owned by foreign residents.<sup>904</sup> At the same time, a similar trend is seen in *pesos* deposits, as large depositors—as well as foreign residents—rapidly abandoned their positions in national currency,<sup>905</sup> with the possibility that they converted them into dollars under the still-in-force convertibility regime and kept them in private vaults or sent them abroad. Between the third and fourth trimesters of 2001, when the “Intangibility of Deposits Act” was enacted,<sup>906</sup> there was a small but steady increase in the percentage of small fixed-term deposits (up to 10,000 dollars), over the total number of accounts.<sup>907</sup> There was a similar increase in the percentage the small accounts represent over the total stock, with accounts of up to 30,000 dollars increasing their relative portion of the pie.<sup>908</sup> Although the increases are small, they hint that the law instilled a greater degree of confidence in smaller savers. At the same time, it is significant that the number of transferences of money to foreign accounts made by individuals, as well as the total amounts they sent abroad, dropped significantly immediately after the enactment of the “Intangibility of

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<sup>904</sup> *Id.*

<sup>905</sup> Between March and November, 2001, pesos deposits fell by a 28.2% in the segment between 100,000 and 500,000 *pesos*, 49.4% in the segment of over 500,000 *pesos*, and 94.5% in the case of foreign-holder’s accounts. See Marina Halac & Sergio L. Schmukler, above n. 902, at 34 (figure 4).

<sup>906</sup> The law was enacted on August, 29, 2001.

<sup>907</sup> They rose 3.58%. See above n. 901.

<sup>908</sup> They rose 1.51%. See above n. 901.

Deposits Act”.<sup>909</sup> The phenomenon does not repeat if one observes transferences made by companies, which remained at a steady level, both in regard to the number of operations and to the amounts taken out of the country, before and after Congress passed the law.<sup>910</sup> This suggests, again, the possibility that people with less information and worse strategies to manage financial risks tended to believe Congress to a greater extent than those with better resources.

Moreover, large debtors lobbied furiously to get the Executive to expand “pesification” of debts way beyond the initial limited protection granted to small and medium debtors by Congress, and they got it.<sup>911</sup> A large percentage of debtors were large

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<sup>909</sup> During September and October, 2001, there were 2,205 operations (for a total of 123,930,552 dollars) and 3,238 operations (for a total of 328,145,852 dollars), respectively. In contrast, during July and August, the two months prior to the enactment of the Law #25,466, the system registered 6,989 operations (for a total of 683,055,353 dollars) and 6,734 operations (for a total of 555,877,753 dollars). See Comisión Especial Investigadora de la Cámara de Diputados *FUGA DE DIVISAS EN ARGENTINA: INFORME FINAL* 48-49 (Buenos Aires, Siglo XXI, 2005) (tables 10 and 11).

<sup>910</sup> *Id.*

<sup>911</sup> See Mario Rapoport, above n. 656, at 945 (arguing that “in order to join the beneficiaries [of pesification] large debtors reacted quickly and managed to exert an effective lobby together with the banking sector: powerful industrialists and bankers argued that debts could not be paid. An alliance led by the Productive Group, privatized utilities and foreign banks achieved the elimination of limits on the pesification of loans”). For a complete account of the lobby behind the “pesification” of the economy, see generally Lorena Cobe, above n. 895 (arguing that a joint lobby by the financial sector and the so-called “Grupo Productivo”, formed largely by industrial and farmer groups, determined the asymmetric “pesification”). See also “Las nuevas medidas apuntan hacia la pesificación total de los depósitos”, *La Nación*, January, 18, 2002 (available at <http://www.lanacion.com.ar/367550-las-nuevas-medidas-apuntan-hacia-la-pesificacion-total-de-los-depositos>; last visited 01/14/2012) (arguing that, as of January, 18, before the total “pesification” of debts, the official plan consisted in giving the savers the option to be paid in *pesos* at the official exchange rate or to keep their savings in dollars subject to a restructuring of maturities that deferred total recovery of the money for 3.75 years); Julio Nudler, “Cuando Remes desembucha”, *Página/12*, August, 17, 2002 (available at: <http://www.pagina12.com.ar/diario/economia/2-9007-2002-08-17.html>; last visited 01/14/2012) (arguing that then-Minister of Economy Jorge Remes Lenicov had admitted that generalized asymmetric “pesification” was a decision pushed by banks and large companies together); Alfredo Zaïat, “Macri, el visionario”, *Página/12*, February, 5, 2002 (available at <http://www.pagina12.com.ar/diario/elpais/1-1559-2002-02-05.html>; last visited 01/14/2012) (arguing that a Francisco Macri, a large businessman, had claimed for the nationalization of private debts and that “pesification” was the answer); Horacio Verbitsky, “El Clon”, *Página/12*, February, 17, 2002 (available at <http://www.pagina12.com.ar/diario/elpais/1-1961-2002-02-17.html>; last visited 01/14/2012) (listing the largest companies that benefitted from “pesification”); Horacio Verbitsky, “El primer licuador”, *Página/12*, February, 10, 2002 (available at <http://www.pagina12.com.ar/diario/elpais/subnotas/1724-968-2002-02-10.html>; last visited 01/14/2012) (arguing that the single largest debtors of the financial system, and main beneficiary of “pesification” was energy company Pecom Energy S.A.); Héctor Muller, “El camino de la pesificación”, *La Nación*, January, 26, 2002 (available at <http://www.lanacion.com.ar/196047-el-camino-de-la-pesificacion>; last visited 01/14/2012) (reporting the demands of the agricultural sector for the “pesification” of their debts).

companies or relatively wealthy individuals,<sup>912</sup> who in many cases had access either to dollarized income<sup>913</sup> or to dollarized assets,<sup>914</sup> due to a process of concentration of credit that was noted by economists in the years prior to the crisis.<sup>915</sup> Thus, the general “pesification” of all dollar-denominated obligations was, to a significant degree, a large transference of resources from small and medium savers to medium and large debtors<sup>916</sup>

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<sup>912</sup> See Eduardo Basualdo, Claudio Lozano & Martín Schorr, “Las transferencias de recursos a la cúpula económica durante la presidencia Duhalde. El nuevo plan social del gobierno”, 186 *Realidad Económica* (2002) (digital version available at <http://www.iade.org.ar/modules/noticias/article.php?storyid=695>; last visited 03/12/2012) (arguing that 1,221 debtors accounted for almost half of the total credits and that loans of 200,000 or less dollars accounted for only 5.9 percent of the total). See also Raúl Dellatorre, “El plan no es sólo para los grandes grupos”, *Página/12*, February, 5, 2002 (available at <http://www.pagina12.com.ar/diario/economia/2-1561-2002-02-05.html>; last visited 01/14/2012) (interviewing vice-Minister of Economy Jorge Tedesca, who was defending the plan, and arguing that a small group of 1,220 debtors represented almost 48% of the total stock of dollarized-debt that was “pesified”). The total loans to the private sector that were “pesified” reached 36,466,000,000 dollars (see Central Bank of the Argentine Republic, “Información diaria sobre principales activos de las entidades financieras (préstamos y otros)”, Year 2001, available at: <http://www.bcra.gov.ar/estadis/es020200.asp>; last visited 02/14/2012). Assuming that Dellatorre was referring only to loans to the private sector, the average debtor in the universe of 1,220 large debtors that accounted for almost half of the total stock of dollar-denominated debt, owed some 14.34 million dollars. The public sector, in turn, owed the banks 21,018,000,000 dollars (*Id.*). The one hundred largest private debtors of the financial system were companies that owed between 41 and 315 million dollars each, and there were 28 companies who owed 100 or more million dollars each. Together, these one hundred companies represented almost 10% of the total loans to the private sector (see Central Bank of the Argentine Republic, “Información de entidades financieras”, December, 2001, at 2-3, available at: <http://www.bcra.gov.ar/pdfs/entfinan/200112c.pdf>; last visited 02/10/2012).

<sup>913</sup> Sectors that regained external competitiveness due to the large devaluation, e.g. the agricultural sector, enjoyed a decade of high income in dollars at the same time that their dollar-denominated debts were “pesified”. See, e.g., Marina Halac & Sergio Shmukler, above n. 902, at 13 (mentioning the export firms as one of the main beneficiaries because “[w]hile the pesification converted their debts at par, the devaluation created strong income effects arising from their exports”).

<sup>914</sup> See, e.g., 330 *Fallos* 5345 (2007) (Lorenzetti, J., dissenting, §16) (arguing that a corporation that has a debt of 450,000 dollars does not need any special protection). *Id.*, at §17 (arguing that the market value of the mortgaged building had already exceeded that total amount of the dollarized debt); 331 *Fallos* 1040 (2008) (Lorenzetti, J., dissenting, §16-17) (arguing that a person who took a 180,000 dollars loan and bought a luxury apartment in one of the most expensive neighborhoods in Buenos Aires, whose price had already exceeded the value of the dollarized debt does not need special protection from the laws).

<sup>915</sup> See, e.g., Guillermo Rozenwurcel & Leonardo Bleger, above n. 682, at 171 (arguing in 1997 that during the preceding 5 years, the so-called “main debtors”, who had loans of over 250,000 dollars or among the 50 largest of any financial institution, concentrated in average 60% of the total loans in the system).

<sup>916</sup> See Marina Halac & Sergio Shmukler, above n. 902, at 13 (arguing that “[t]hose who ended with significant capital gains were probably high-income households with access to large credits, and also firms with substantial bank loans”). See also Carlos Escudé, above n. 59, at 142 (2006) (“As always, *debtors thrived*

who, on top of that, frequently got to keep in their power goods —frequently used as a collateral for the loan but also often purchased *with* the money of the loan— whose dollar value exceeded the amount of the debt in dollars or, directly, kept their dollars in foreign accounts.

A significant number of goods retained —or recovered— their prices in dollars even after devaluation.<sup>917</sup> This had an impact both on the impoverishment of “pesified” savers and the enrichment of many “pesified” debtors. It is hard to see how “pesified” savers who were claiming for the protection of the property rights may have been a privileged class. Especially, in light of who were the main direct beneficiaries of “pesification”. To see how regressive redistribution was and who were the real privileged, notice that 48% of restructured and “pesified” deposits were of 5,000 or less dollars, while 48% of the stock of “pesified” private debt averaged 14.34 million dollars per loan.<sup>918</sup>

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*while the savings of depositors were looted. Thus, the nationalization of private debts, massively orchestrated to an extent that not even De la Rúa had dreamed of, became the law of the realm. In an instant, two billion pesos were transferred to 25 privatized (formerly state-run) firms, which were among the 50 most indebted private businesses in the country”*; emphasis added).

<sup>917</sup> In February, 2004, dollar prices of real estate had largely returned to their pre-devaluation levels. See “Casi no hay referencia” (reproducing a note from *La Nación* and stating that in some areas of Buenos Aires real property had almost reached pre-devaluation dollar prices and that prices were generally tied to the dollar) (available at: [http://propiedades.com.ar/index.php?option=com\\_content&view=article&id=82:casi-no-hay-valores-dereferencia&catid=13:inversiones&Itemid=18](http://propiedades.com.ar/index.php?option=com_content&view=article&id=82:casi-no-hay-valores-dereferencia&catid=13:inversiones&Itemid=18); last visited 02/14/2012). In 2006 and 2007, the trend was even clearer, as reported by Justices Argibay and Lorenzetti. See above n. 793 and 914. By December, 2009, the dollar price had largely converged with the consumer prices index (measured by food and beverages prices). See Domingo Cavallo, “Los precios del dólar y del promedio de los bienes convergieron, pero...”, December, 26, 2009, at <http://www.cavallo.com.ar/?p=467> (last visited 02/14/2012) (stating that in December 2009 the 3,82 pesos per dollar exchange rate represented a rise of the dollar, with respect to Convertibility levels, that coincided exactly with the rise in consumer prices for the same period; in both cases a 282% rise was observed). See also Orlando J. Ferreres (director), above n. 307, at 567 (reporting a similar magnitude for the index of consumer prices —beverages and food—, with a rise of 262.2 points when comparing 2009 prices with 2001, pre-devaluation prices).

<sup>918</sup> See above n. 901 and 912.

One should also point out that the largest debtor of the financial system, the company Pecom Energía S.A., was also the player who transferred abroad the single largest amount of money during 2001. Pecom Energía S.A. owed the Argentine banks some 315 million dollars, as of the entry into force of the emergency regime.<sup>919</sup> It also sent abroad almost 1,900 million dollars during the prior 12 months.<sup>920</sup> YPF S.A., in turn, was the second largest debtor of the system, with some 306 million dollars,<sup>921</sup> and transferred abroad the third largest amount of money, almost 1,060 million dollars.<sup>922</sup> Telecom Argentina Stet France Telecom owed some 218 million dollars,<sup>923</sup> and transferred abroad almost 1,000 million dollars.<sup>924</sup> Nidera S.A. owed almost 50 million dollars,<sup>925</sup> and had no problem becoming responsible for the fifth largest outflow, of some 863 million dollars.<sup>926</sup>

These are just a few examples. The same phenomenon repeats itself with countless large companies. It is easy to see how the combination of capital flight and “pesification” benefitted these large players tremendously: they put their dollars safely

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<sup>919</sup> See Central Bank of the Argentine Republic, “Información de entidades financieras”, December, 2001, at 2 (available at: <http://www.bcra.gov.ar/pdfs/entfinan/200112c.pdf>; last visited 02/10/2012).

<sup>920</sup> See Comisión Especial Investigadora de la Cámara de Diputados, above n. 909, at 111 (table 45).

<sup>921</sup> See Central Bank of the Argentine Republic, “Información de entidades financieras”, December, 2001, at 2 (available at: <http://www.bcra.gov.ar/pdfs/entfinan/200112c.pdf>; last visited 02/10/2012).

<sup>922</sup> See Comisión Especial Investigadora de la Cámara de Diputados, above n. 909, at 111 (table 45).

<sup>923</sup> See Central Bank of the Argentine Republic, “Información de entidades financieras”, December, 2001, at 2 (available at: <http://www.bcra.gov.ar/pdfs/entfinan/200112c.pdf>; last visited 02/10/2012).

<sup>924</sup> See Comisión Especial Investigadora de la Cámara de Diputados, above n. 909, at 111 (table 45).

<sup>925</sup> See Central Bank of the Argentine Republic, “Información de entidades financieras”, December, 2001, at 3 (available at: <http://www.bcra.gov.ar/pdfs/entfinan/200112c.pdf>; last visited 02/10/2012).

<sup>926</sup> See Comisión Especial Investigadora de la Cámara de Diputados, above n. 909, at 111 (table 45).

abroad and then lobbied for the “pesification” that would liquefy their debts. Once “pesified”, their debts could be paid at three or more times less with the currency they had sent abroad before. Subsidies would come from the small and medium savers trapped by the emergency regime.

All large companies played this game, and companies in general account for the 87.35% of the money outflow.<sup>927</sup> It could be argued that they were just remitting profits and, where appropriate, paying dividends. It was not the case. They were actively engaged in a process of capital flight that would eventually be completed with the “pesification” of their dollarized debt.<sup>928</sup> As the special investigative commission appointed by the *Chamber of Deputies* of Congress points out

“The first ten companies that transferred the largest amounts accumulated net earnings in 2001 for 2,020 million dollars [...] transfers abroad amount to 9,085 million dollars, more than four times the net earnings for the year”<sup>929</sup>

Although they refused to accept any responsibility for overcoming the crisis, banks had a lot to do with its causation and made huge profits out of the conduct that fostered the crisis. Many private banks took low-interest rate loans in international markets, only to lend the same money (dollars) to the public and private sectors in Argentina at much higher rates.<sup>930</sup> This practice entailed enormous potential risks, as the borrowers were for the most part governments, companies and individuals whose

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<sup>927</sup> See Comisión Especial Investigadora de la Cámara de Diputados, above n. 909, at 57.

<sup>928</sup> See also Lorena Cobe, above n. 895, at 79 (arguing that, by presenting “pesification” not as a mere economic policy, but as the pillar of a new model of economic relations, the Minister of Economy “justified the pesification of the debts of large companies and high income sectors, i.e., the liquefaction of the liabilities of the most dynamic agents in the capital flight process”).

<sup>929</sup> See Comisión Especial Investigadora de la Cámara de Diputados, above n. 909, at 113. The commission used the published balances of the companies for the corresponding year (see 113, fn 17).

<sup>930</sup> Lorena Cobe above n. 895, at 27.

income was in pesos. Moreover, they carried out a policy of systematic preference for lending in dollars, despite the fact that there was a consistent flow of deposits in pesos. From November, 1996, on, the deposits in pesos exceeded the loans in pesos, with a maximum difference, in June-July, 1999, of 10,000 million pesos.<sup>931</sup> They did not lower interest rates in pesos nor gave more loans in pesos. This may show a regulatory deficit on the Central Bank's part, but it also points towards reasons that might have supported charging a substantial part of the costs of forcing banks to repay deposits in dollars, while collecting loans in pesos, on the banks themselves.

Plus, a significant portion of the dollar debts in Argentina could have been repaid in dollars, by debtors who had access to dollarized assets, in the country or abroad, and thus the economic reasons to "pesify" bank deposits are far weaker than what the official discourse would have us believe. It is far from evident that, once devaluation had been decreed, there was no other option but to fully "pesify" all bank deposits. To keep some sorts of debt "dollarized" was an economically, if not politically, feasible option.

But even in the context of complete "pesification" of bank credits, deposits could have been repaid in the original currency. In 2003, banks could afford to repay at least 67% of the total dollar amount of every deposit in the system, as acknowledged by the Emergency Decree 739/03.<sup>932</sup> *Massa* itself is an irrebuttable proof that, in 2006, deposits could be repaid in dollars (or, more precisely, the equivalent value). Other late Supreme Court rulings also acknowledged that other dollar-nominated contracts could be fulfilled

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<sup>931</sup> See Comisión Especial Investigadora de la Cámara de Diputados, above n. 909, at 123.

<sup>932</sup> Emergency Decree 739/03, issued right after the *San Luis* decision by the Supreme Court, offered the holders of term deposits forcibly restructured and "pesified" the option of receiving a new, free short-term deposit in pesos equivalent to roughly the 67% of the then-current free market value of the original dollar deposit, plus a 10-year maturity State bond in dollars to cover for the additional 33%. Therefore, the decree acknowledged that the financial system was capable of restituting about two thirds of the total deposits in dollars. The text of the decree, in Spanish, is available at <http://infoleg.mecon.gov.ar/infolegInternet/anexos/80000-84999/83686/norma.htm> (last visited 01/09/2013).

in accordance to their original terms.<sup>933</sup> Still, by and large, the system was “pesified” and there were winners and losers in that reshuffling of economic cards.

There cannot be any doubts that, once more, the distributive effects of the emergency regime were largely regressive, despite the cover up attempted through official discourse. Once again, one could wonder why is, then, important official discourse, if no one actually believes it. There are several reasons why it is important, despite the fact that at some point it may be largely inverosimile. First, official discourse implements a policy of “divide and conquer”. By presenting the claims of a particular sector of society, however extended such sector may be, as contrary to the “common good” or as deeply selfish, it poses sectors not directly affected by the emergency measures (perhaps unaffected, too, by the supposed “common good” whose achievement the other sector’s claims are allegedly hindering) against those affected by the regulations, thus helping cut any ties between social sectors that might oppose the Administration. Second, it occupies significant space in the public debate, aspiring to ultimately prevail when the regulated sector’s interest in the topic start to dim due to, e.g., the passage of time. This may help politicians in office in a later run for re-election. Third, as I said before, it helps deflect the attention from the fact that emergency regulations create opportunities for further enrichment of those already rich, at the expense of middle and lower classes. Alternatively, it may present such phenomenon as an unintended, yet inevitable, collateral effect of the only solution to the crisis. Fourth, it may help convince some of those who are left to bear the heaviest burdens that their sacrifice was inevitable.

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<sup>933</sup> See, e.g., *Benedetti*, 331 *Fallos* 2006 (2008) (holding that “pesification” of dollar-denominated social security annuities was unconstitutional); *Alvarez*, 332 *Fallos* 253 (2009) (holding that “pesification” of dollar-denominated retirement insurance contracts was unconstitutional).



## The True Countermajoritarian Difficulty and the Regressive Redistribution Difficulty.

So far, I have shown that many economic emergency decisions taken by the political branches have been very unpopular and have contradicted the most widespread conception of what the inviolability of property means. In line with the post-New Deal case law of the U.S. Supreme Court on economic matters, the Argentine Supreme Court's stance towards such regulations has been mostly lenient, giving the political branches substantial leeway for regulating property under emergency situation. Judges have occasionally tried to enforce a plausible common understanding of constitutional property, but when they have done so, they have been criticized by their peers<sup>934</sup> or by elected politicians<sup>935</sup> as unduly interfering with governmental tasks reserved to other branches. The “countermajoritarian difficulty” has been a common theme in the criticisms, even if it hasn't been put in those precise terms too often. The “technocratic objection” has also been present, although to a lesser extent.

What my historic survey shows is that, for the most part, “countermajoritarian” criticism has been misdirected: judges —and especially the Supreme Court— have often acted in a countermajoritarian fashion not by striking down economic emergency regulations, but by upholding them instead. When courts have stood up and made good on the constitutional promise of inviolability of private property, they have not contradicted popular will, but rather upheld it against the true countermajoritarian actors:

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<sup>934</sup> See above n. 76 and accompanying text.

<sup>935</sup> See, e.g., “Dura crítica del Gobierno al fallo contra la pesificación”, *Los Andes*, September, 15, 2002 (available at <http://www.losandes.com.ar/notas/2002/9/15/economia-49928.asp>; last visited 04/12/2013) (citing then-President Duhalde criticizing a decision by the Federal Chamber of Appeals that had struck down the “pesification” of bank deposits, arguing that “it is everybody's duty to help overcome the crisis”); “Duhalde le mete presión a la Corte”, *Página/12*, September, 16, 2002 (available at <http://www.pagina12.com.ar/diario/elpais/1-10238-2002-09-16.html>; last visited 04/12/2013) (citing then-President Duhalde criticizing judicial decisions striking down “pesification” and arguing that “if the measures taken by the Executive branch are not accompanied by the other two branches of government, there is no chance to get over [the crisis]”).

the elected branches. The classic argument for attacking judicial review loses much of its bite in the Argentine context of economic emergencies, once proper attention is paid to what the people, as opposed to their representatives', think about what it means to treat property with the inviolability promised by the Constitution, in each of the circumstances the country has gone through.

Perhaps there is nothing surprising about the Court's failure to stand up for popular constitutional meaning against elected branches' occasional-yet-momentous contradictions of popular will.<sup>936</sup> What may be more interesting to analyze is the effect this attitude of utmost judicial deference has had on the Judiciary's standing on the Argentine political system, how the legitimacy of the judges' has not been reinforced, but heavily undermined by the position advocated by today's conventional wisdom on the topic. I outlined the reasons for this phenomenon in the beginning of Part One of the dissertation, so there is no need for a lengthy restatement of my argument here. I will, however, probe a bit deeper into this topic and provide some empirical evidence to substantiate my claims.

One might wonder why is it that legitimacy is tied to the respect of certain understandings of one particular constitutional text. It would be easy to present convincing alternative conceptions of political legitimacy (and, of course, of the narrower idea of judicial legitimacy). What if the people at large agree that any particular phrase in the Constitution means "X", but still wants to do "Y", because they think it is a wiser option, all things considered? Why isn't a system that enforces such an option at least as legitimate as one that insists on sticking to an understanding of a text?

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<sup>936</sup> See, e.g., Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy Maker", 6 *J. Pub. L.* 279, 284-285 (1957) ("Under any reasonable assumptions about the nature of the political process, it would appear to be somewhat naïve to assume that the Supreme Court either would or could play the role of Galahad [...] The fact is, then, that the policy views dominant on the Court are never for long out of line with the dominant views among the lawmaking majorities"). Even if Dahl is talking about the United States Supreme Court, much of his argument—which is based on the frequency with which Presidents appoint Justices and, thus, contribute to shaping the Court— can be made with equal force in the case of Argentina.

Argentine history has much to say on the point. For all its shortcomings, the 1853 constitutional text has been the country's political safety net throughout its existence. When, contrarily to its own prescriptions, the Constitution was modified in 1860 to allow for the re-entering of Buenos Aires into the Republic, nobody would admit it was a violation of the Constitution, much less the exercise of a different constituent power. The rescue came from the idea that it was an open constitutional process that lasted for seven years, between 1853 and 1860.<sup>937</sup> During the twentieth century, early *de facto* presidents swore to uphold the Constitution.<sup>938</sup> When the Peronist Constitution of 1949 was illegally abrogated by the *coup d'état*, the 1853 text was put back in force. When the bloody dictatorship that began in 1976 came to an end in 1983, once again we resorted to the venerable text.

I have said elsewhere that much in the same way standard commercial contracts are used to make transactions easier by reducing transaction costs, the 1853 Constitution helped make the transition from dictatorship to democracy simpler.<sup>939</sup> We just had to sign the "new social contract," without having to negotiate what it would contain. The venerable historic Constitution provided an acceptable framework that people could subscribe to without much of a discussion —interpretive adaptations of certain clauses,

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<sup>937</sup> See, e.g., Germán José Bidart Campos, I *HISTORIA POLÍTICA Y CONSTITUCIONAL ARGENTINA* 312-319 (Buenos Aires, EDIAR, 1976) (explaining the idea of an open constituent power and holding that the original constituent power of 1853 remained open until 1860 with the incorporation of Buenos Aires to the Republic); Gregorio Badeni, I *TRATADO DE DERECHO CONSTITUCIONAL* 128-129 (Buenos Aires, La Ley, 2004) (explaining that while the 1853 constitutional text expressly provided that it could not be amended for ten years, the 1860 reform —carried out to allow for the incorporation of Buenos Aires— could hardly be regarded as unconstitutional because the definitive organization of the Argentine state only concluded in 1860, closing the constituent cycle that had begun in 1853, all of which explains that the national constitution is commonly referred to as “the 1853/1860 Constitution”).

<sup>938</sup> See, e.g., CSJN, *Acordada sobre reconocimiento del Gobierno Provisional de la Nación*, 158 *Fallos* 290 (1930) (acknowledging the *de facto* government of General Urriburu for, among other reasons, having demonstrated by means of public acts its disposition to uphold the Constitution and having sworn to enforce and abide by the Constitution).

<sup>939</sup> José Sebastián Elías, “Constitutional Changes, Transitional Justice, and Legitimacy: The Life and Death of Argentina’s ‘Amnesty Laws’”, 31 *Hastings Int’l & Comp. L. Rev.* 587, 601-602 (2008).

to smooth out transitions to contemporary understandings of some problems, were always at hand—. For better or worse, the 1853 text had been the symbol to which Argentines had resorted many times in the past even in the midst of institutional disruption. Every time there was discontent with the pending political and institutional situation, mainly because the power was held by the dictators, the people appealed to the 1853 Constitution, and asked for a return to its full observance. In this way, the original Constitution has been the "political safety net" that we relied on when our democracy stumbled and fell.<sup>940</sup>

It is, then, a text that matters as a text and despite its inevitable imperfections and despite any debates that there may be about any given clause. At the same time, the people value very highly compliance with such constitutional text. According to one very comprehensive study on constitutional culture, carried out in November, 2004, some 89% of the Argentine people consider the Constitution as either "important" (37%) or "very important" (52%).<sup>941</sup> The same study concluded that "perception of the law as a universal abstract value is highly positive and its importance to the Argentine society is evident. There is a clear tendency of support for legality".<sup>942</sup> A majority of the people (68%) prefers a leader respectful of the laws, even if not too strong, over a strong leader who was less respectful of the laws.<sup>943</sup> Thus, "perceptions about authority and its legitimacy are related to a rational view of power, attached to the norms, rather than with

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<sup>940</sup> *Id.*

<sup>941</sup> Antonio M. Hernández, Daniel Zovatto & Manuel Mora y Araujo, *ARGENTINA: UNA SOCIEDAD ANOMICA —ENCUESTA DE CULTURA CONSTITUCIONAL—* 87 (México, Universidad Autónoma Nacional de México-Asociación Argentina de Derecho Constitucional-Idea Internacional, 2005). See also *id.* at 135 (table 71). For the remaining of this chapter, I will draw heavily on the results presented by this study.

<sup>942</sup> *Id.*, at 45.

<sup>943</sup> *Id.*, at 66.

the charisma of a leader”.<sup>944</sup> When asked whether there are occasions in which laws should be disregarded, some 56% of the people replied negatively,<sup>945</sup> which may hint at a negative historic experience with emergency regimes. When, in turn, people were asked about what kinds of measures would strengthen democracy—in itself, a highly supported form of government—some 40% replied that respect and adherence to the laws would bring about such a result—it was the most chosen option—.<sup>946</sup> According to the authors of the study, “there is a great demand for legality, the Constitution is highly valued, and there is a demand for leaders capable of acting with adherence to the laws”.<sup>947</sup>

But there is also a very widespread perception of a generalized lack of compliance with the Constitution. Some 85% of the people think that there is “little” or “no compliance” with the constitutional text, a perception that cuts across all population groups polled.<sup>948</sup> Another study, carried out in 2010, points out that, comparatively, Argentines exhibit a low degree of trust in the political system as guarantor of basic individual rights.<sup>949</sup> These observations undermine, of course, the legitimacy of the whole political system and its actors. Still, it is interesting to notice that while politicians, police

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<sup>944</sup> *Id.*

<sup>945</sup> *Id.*, at 84. See also *id.* at 126 (table 28).

<sup>946</sup> *Id.*, at 144 (table 100).

<sup>947</sup> *Id.*, at 98.

<sup>948</sup> *Id.*, at 88. See also *id.* at 136 (table 73).

<sup>949</sup> See results of the Americas Barometers, by the Latin American Public Opinion Project at Vanderbilt University, for the year 2010. The results are presented in Germán Lodola & Mitchell Seligson *CULTURA POLÍTICA DE LA DEMOCRACIA EN ARGENTINA 2010* 116 (Universidad Torcuato Di Tella-Americas Barometer-LAPOP, 2011) (available at <http://www.vanderbilt.edu/lapop/argentina/2010-culturapolitica.pdf>, last visited 04/03/2013).

officers and public servants all come first in the list of those who violate the laws more often according to public perceptions, judges come in a comfortable fourth place, with 41% of the people choosing them as the most frequent violators.<sup>950</sup> Some 90% of the people believe that they are not adequately protected against abuses of authority by the State.<sup>951</sup> Relatedly, people largely believe that it is the *Defensor del Pueblo* —ombudsman—, and not the judges, who is in charge of protecting individual rights.<sup>952</sup>

Admittedly, it is hard to establish a direct relationship between the judges' relatively low standing in the eyes of the population and their behaviour regarding property rights in emergency situations. Many other instances of perceived disregard of law by judges, i.e. their attitudes towards other important constitutional rights, must surely be at play here. Moreover, perceptions of cronyism —especially, in the case of Supreme Court justices—, as explained above,<sup>953</sup> and of corruption<sup>954</sup> are very likely candidates for a prominent role in any causal explanation of this sort. But my aspiration is not (never was) to provide an explanation of the Judiciary's loss of legitimacy *exclusively*

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<sup>950</sup> See Antonio M. Hernández, Daniel Zovatto & Manuel Mora y Araujo, above n. 941, at 128 (table 42).

<sup>951</sup> *Id.*, at 87.

<sup>952</sup> Some 63% of the respondents chose *Defensor del Pueblo* as the officer charged with protecting individual rights, while 22% chose the judges for that role. *Id.*, at 72-73.

<sup>953</sup> See above n. 756 and accompanying text. See also, e.g., Jonathan M. Miller, "Evaluating the Argentine Supreme Court Under Presidents Alfonsín and Menem (1983-1999)", 7 *Sw. J.L. & Trade Americas* 369, 395-396 (2001) (holding that "Personal statements and conduct by the judges only worsened the Court's reputation. During his nomination hearings, one of President Menem's later appointees to the Court, Judge Adolfo Vazquez, openly described himself as "a friend of the President," and used the phrase "the functions are three, but the power is one" to describe his judicial philosophy —that all exercises of power are essentially political and must complement the government. Moreover, most of the other Menem appointments were also on the Court due to their personal connection to the President").

<sup>954</sup> See Jonathan M. Miller, above n. 953, at 398 (reporting the case of the "stolen decision" as well as other well-founded instances of corruption in the Supreme Court during the Menem administration). See also Pablo Abiad & Mariano Thieberger, above n. 824, at 50, 130 (recounting clear attempts by the Administration to exercise undue influence on the Supreme Court and to get it to decide cases according to its wishes during the Kirchner administration).

in terms of the judges's stances towards property rights. All I set out to do was to prove that courts' behavior has often been paradoxically "countermajoritarian" —when it upheld regulations— and that such behavior played *some* (I believe significant) role in undermining the Judiciary's legitimacy.<sup>955</sup> That much, I think, can be proven in a fairly uncontroversial way with the evidence gathered so far. Let us see.

The people value the Constitution very highly, and they think that, by and large, it is not complied with. They have a cherished aspiration of constitutional compliance. When it comes to evaluating judges' performance, the people believe that they are not very good in upholding the Constitution, and that the main protector of individual rights is the ombudsman, not the courts. This belief may come, partially at least, from observing what courts have done in concrete instances, as the constitutional text does assign them —not the *Defensor del Pueblo*— a central role as enforcers of *individual* constitutional rights.<sup>956</sup> In such concrete instances, as I have shown above, courts have often upheld regulations that contradicted the dominant popular conception of constitutional property. Either such judicial rulings or the economic emergency regulations whose validity they sustained have been met with extended popular criticism. Moreover, economic emergency regulations have also been perceived, often, as abuses of authority by the State —recall, for instance, the "pickpocket State"—. The people largely perceive that they are not well-protected against abuses of authority by the State. By

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<sup>955</sup> *Id.*, at 395-396 (arguing that "the Supreme Court packed by President Menem changed traditional Argentine doctrine to defer to the Executive and manipulate political situations to the Executive's advantage in extraordinarily blatant fashion [...] sometimes the doctrinal shifts and scandals reported in the Press can be so blatant that conclusions about loss of legitimacy really do not require a sophisticated model"); *id.*, at 399 (distinguishing "five categories of decisions that look sufficiently problematic in legal or social terms that they likely affected the Court's reputation" during the Menem years and mentioning prominently the expansion of presidential powers in the *Peralta* decision).

<sup>956</sup> The *Defensor del Pueblo* has constitutional duties of protection of human rights and constitutional rights, but its main tool for such protection is having standing before courts. Moreover, the *Defensor del Pueblo* has a more important role in the protection of collective constitutional rights ("derechos de incidencia colectiva"). See articles 43 and 86, Const. Arg.

failing to uphold constitutional rights, as conceived by popular understandings of the text, judges are failing to fulfill their mission and, thus, are losing legitimacy.<sup>957</sup>

Additional evidence can be mustered to strengthen the argument. The last two great economic crises involved the exercise of legislative power by the Executive branch. Such exercises determined how and when savings deposited in banks would be returned to their owners. Some 57% of the people disagree with frequent delegations of legislative power to the Executive, and 53% of the people think it is not good that the President issues emergency decrees instead of sending bills to Congress.<sup>958</sup> Another study, conducted in 2010, further reinforces the idea, as some 76% of the respondents rejected the idea that when Congress hinders the administration's work, presidents should govern alone, without Congress.<sup>959</sup> And while other constitutional rights are considered to be

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<sup>957</sup> Jonathan Miller has suggested a partially different explanation for the Judiciary's loss of legitimacy following the abandonment of strict enforcement of economic liberties and property rights. The difference, however, is important. In his view, a shift from "autonomous law" to "responsive law" in the Supreme Court case law, starting in the 1930s, implied a turn away from a mode of "rational authority", where courts could point towards clearly established constitutional rules as grounds for their decision, and towards a mode where courts "responded" to social needs and pressures in a fairly open way and relatively unbounded by texts. In Miller's account, lacking "charismatic authority" or other sources of authority, Argentine courts were left in the wilderness as regards to their authority. My work here, in addition to providing a wealth of evidence that supports Miller's conclusion about a noticeable decline in the legitimacy of courts, incorporates a degree of "responsiveness" —in Miller's terms— into the analysis of what he would call "autonomous law": it is not that "responsiveness" *per se* undermined judicial authority; it is, if one wants to put it in such terms, the adoption of the wrong kind of "responsiveness" that brought about such result. Interpretation necessarily implies some "responsiveness": legal conceptions are shaped by social understandings that depend, partially, on needs and circumstances. Whatever any given constitutional clause says, what it means will be determined by the interpreter's conceptions of the concepts at stake. And the correctness of the interpreter's decision will hang on the acceptability of her own conceptions within the relevant interpretive community. Still, the problem is, as I have argued at length in this dissertation, that courts were often "responsive" to political and economic elites' needs, and significantly less so to evolving text-based popular conceptions of constitutional rights. This led to the perception of illegitimate judicial behavior.

<sup>958</sup> See Antonio M. Hernández, Daniel Zovatto & Manuel Mora y Araujo, above n. 941, at 148-149 (tables 135 and 136).

<sup>959</sup> See Germán Lodola & Mitchell Seligson, above n. 949, at 136-137.



violated *more frequently*, property rights and its close companion of the right to free exercise of commerce and lawful trades still feature prominently in the top five.<sup>960</sup>

Moreover, the majority of the people (52%) consider the Supreme Court justices as enjoying “little” (35%) or “no independence” (17%) from the Administration.<sup>961</sup> The perception did not change substantially when the question was narrowed to the level of independence of the “new” Supreme Court, as reconstituted by President Kirchner. Some 30% of the respondents held that this Court enjoys little independence and some 14% thought that it enjoys no independence at all.<sup>962</sup> Additionally, 67% of the people think that the probabilities of prevailing in a lawsuit against the State are low or none at all.<sup>963</sup>

It must be remembered that the poll was conducted in November, 2004, a few days after the *Bustos* decision, upholding “pesification” of bank deposits, was handed down. The ruling received wide coverage in the media, so it is possible to infer that this particular decision had a substantial influence in the people’s replies to the poll. Especially when Kirchner’s appointments, as opposed to Menem’s, had been generally praised as they fell on a number of prestigious lawyers, judges and law professors who

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<sup>960</sup> See Antonio M. Hernández, Daniel Zovatto & Manuel Mora y Araujo, above n. 941, at 88 and 114. Interestingly, property rights violations are not as frequent as they are deep. The question was framed in terms of frequency of violations. Some rights that ranked higher than property —e.g., the right to move freely and travel through the territory and the right to protest and petition— were in almost constant tension at the time the poll was conducted. Daily pickets made traffic in the cities (and in some freeways) very difficult, which accounts for the high ranking of the right to freely move and circulate. At the same time, occasional repression of pickets may account for the perception of frequent violations of the right to protest. One can only speculate what the responses could have been, and whether property would have ranked higher, had the question been framed in different terms —i.e., depth of encroachments—.

<sup>961</sup> *Id.*, at 77. See also *id.* at 132 (table 64).

<sup>962</sup> *Id.*, at 78.

<sup>963</sup> *Id.*

were not perceived as cronies.<sup>964</sup> Kirchner had made a point of increasing the transparency in the appointment process and had held publicly that “we are not interested in shaping up an addicted Court”.<sup>965</sup> He even limited himself as regards his constitutional powers of appointment by issuing a decree that set a series of limits and established open procedures where citizens in general, civil society organizations, professional and academic associations can express their opinions about the nominees.<sup>966</sup> In this context, it is remarkable that the majoritarian position among the people was that the Court showed little or no independence and was, in this regard, no better than its predecessor. It is also noteworthy that almost 7 out of 10 Argentines think that it is very hard to sue the State and win. The decision to uphold “pesification” of bank deposits, which came after a long judicial struggle of the savers against the banks and the State and ended in the defeat of the weaker party, must have played a large role in shaping up the general opinion about the Court.

It is hard to deny, then, that the ultradeferential stance often displayed by the Judiciary has backfired in terms of its own legitimacy and, ultimately, power.<sup>967</sup> The Court

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<sup>964</sup> Eugenio Raúl Zaffaroni was a highly regarded criminal law scholar and professor, as well as a former judge, and Elena Highton de Nolasco —the two appointees who had already taken their seats on the bench by the time of the *Bustos* ruling— was a respected appellate civil court judge with an expertise on Civil Code regulations on property. Carmen Argibay and Ricardo Lorenzetti —who would only take part in the *Massa* decision, and with positions largely against “pesification”— were one a former judge in a domestic criminal court and a judge in the International Criminal Tribunal for the former Yugoslavia, and the other a successful practitioner and Civil Law treatise writer, respectively. See, e.g., Sebastián Schwartzman, “La reducción de la Corte”, *La Mañana de Córdoba*, June, 13, 2005 (available at [http://www.lmcordoba.com.ar/ed\\_ant/2005/05-06-13/33\\_opinion\\_04.htm](http://www.lmcordoba.com.ar/ed_ant/2005/05-06-13/33_opinion_04.htm); last visited 01/15/2013) (stating that the appointment mechanism established by the Kirchner administration “had helped the Court to regain some legitimacy”).

<sup>965</sup> See, e.g., “Kirchner limitó por decreto su facultad de nombrar nuevos jueces de la Corte”, *Clarín*, June, 19, 2003 (available at <http://edant.clarin.com/diario/2003/06/19/um/m-576928.htm>; last visited 01/15/2013).

<sup>966</sup> Executive Decree 222/03 (available at <http://www.infoleg.gov.ar/infolegInternet/anexos/85000-89999/86247/norma.htm>; last visited 01/15/2013).

<sup>967</sup> See, e.g., Tom R. Tyler, above n. 108, at 377 (arguing that “legitimacy is an additional form of power that enables authorities to shape the behavior of others”).

has not been “countermajoritarian” by striking down economic emergency legislation, but by upholding it. If we take “countermajoritarianism” seriously, the Court has indeed fitted such bill quite often, although in the perhaps paradoxical sense noted above. If, on the other hand, one believes —as many scholars do— that “the countermajoritarian difficulty” exists whenever unelected, life-tenured judges contradict what the representatives of the people have decided democratically, whatever the opinions of the people on the topic,<sup>968</sup> then the judicial record shows that, at best, we have faced a “not-so-countermajoritarian” difficulty. That is, judges who have scarcely defied political majorities to uphold popular conceptions of constitutional property. They have done so at their own peril, indeed, as the evidence offered here shows.

Interestingly enough, more than the courts’ sociological legitimacy —and the ensuing political power than such popular perception of the courts entails— may be at stake here. The very idea of a binding Constitution and the general belief in the rule of law suffer as a consequence of the judicial reluctance to enforce the dominant conception of constitutional property. Carlos Rosenkrantz has held that in Argentina the normativity of law is closely related to the possibility of its enforcement through state coercion.<sup>969</sup> In his view, legal norms that lack judicial enforceability lose part of its normative power, in a sort of sociological devaluation of the norm. At the same time, there is some empirical evidence that shows that Argentina is a country where citizens

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<sup>968</sup> See, generally, Or Bassok, “The Two Countermajoritarian Difficulties”, 31 *Saint Louis U. Pub. L. Rev.* 333 (2012) (describing two senses of the “countermajoritarian difficulty”: a traditional one and a literal one).

<sup>969</sup> Carlos F. Rosenkrantz, “La pobreza, la ley y la Constitución”, *SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers* 7 (2002) (available at [http://digitalcommons.law.yale.edu/yls\\_sela/15](http://digitalcommons.law.yale.edu/yls_sela/15); last visited 01/15/2013).

exhibit “a high degree of tolerance and respect” for their fellow citizens’ rights,<sup>970</sup> at least as an aspiration, and where individuals actively demand the enforcement of their rights.<sup>971</sup> If both Rosenkrantz and the empirical studies I have just cited are right, then a paradoxical dynamic may be at play when courts adopt an ultra-deferential stance in economic matters.

Given that the Constitution contains a very clear provision protecting property rights and that Argentine citizens seem to be eager to claim for the protection of their rights, and assuming that the political culture tends to regard as rights only those that are effectively enforced, clear underenforcement of the property clause may initially create more, rather than less, demand for judicial review of emergency measures. This paradox breaks at the point when the public no longer holds the hope that the Judiciary may be an effective and independent guardian of rights based on the constitutional text. Then, the demands on courts for the security of individual property should fall dramatically, but so should the symbolic power of the Constitution and the general belief in the rule of law.

We are not quite there yet, but some evidence points in that direction. Some 62% of the people think that it is hard to abide by the law when many people do not abide by it,<sup>972</sup> 86% think that Argentina is a country that “lives outside the law most of the time”,<sup>973</sup> 88% believe that Argentines are “rather disobedient of law”,<sup>974</sup> and courts are perceived

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<sup>970</sup> See Antonio M. Hernández, Daniel Zovatto & Manuel Mora y Araujo, above n. 941, at 53.

<sup>971</sup> According to Latinobarómetro, 7 out of 10 Argentines demand the enforcement of their rights. See Corporación Latinobarómetro, *INFORME 2011* 53 (Santiago, Corporación Latinobarómetro, 2011) (available at <http://www.latinobarometro.org/latino/LATContenidos.jsp>; last visited 01/15/2013).

<sup>972</sup> See Antonio M. Hernández, Daniel Zovatto & Manuel Mora y Araujo, above n. 941, at 127 (table 40).

<sup>973</sup> *Id.*, at 133 (table 68).

<sup>974</sup> *Id.*, at 134 (table 69).

as being among the most frequent violators of law.<sup>975</sup> In such a context, the Supreme Court reluctance to protect individual property, despite the clear constitutional text and the popular conception of constitutional property, may be contributing to the perceived general lack of compliance with the laws and, worryingly, perhaps also with the widely spread self-justifying assertion that it is hard to comply with the law when many people do not do it. “Why am I to abide by the Constitution, if the supposed guarantor of the individual rights, the self-proclaimed “supreme guardian” of the constitutional rights,<sup>976</sup> does not abide by it?” might be a reasonable question for an individual to ask herself. Courts should have, then, one more reason to take protection of property rights seriously.

But I have said before that courts have occasionally attempted to enforce a popular conception of constitutional property and that they have drawn from such conception when building its economic emergency jurisprudence. Surely, this should have had some positive impact, which is not readily apparent from the evidence surveyed in this chapter. Enter the “regressive redistribution difficulty”.

People have perceived that, at least during the last few crises —the times of “permanent emergency”—, economic emergency measures have often instantiated regressive redistributions. This is a matter of perceptions, not necessarily facts, although I think the evidence I have provided so far substantiates such perceptions. Hernández, Zovatto and Mora y Araujo’s empirical study again provide some additional support to my claims. According to the study, individual economic situation is the main cause why

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<sup>975</sup> See above n. 950 and accompanying text.

<sup>976</sup> See, e.g., 279 *Fallos* 40 (1971); 297 *Fallos* 238 (1977); 307 *Fallos* 2236 (1985); 310 *Fallos* 1771 (1987); 310 *Fallos* 1979 (1987); 318 *Fallos* 978 (1995) (Fayt, J., concurring); 319 *Fallos* 3378 (1996) (Fayt, Belluscio, Bossert, Petracchi, JJ., dissenting); 327 *Fallos* 2669 (2004) (Vázquez, J., concurring); CS, 02/13/2007, L. 733. XLII, *Lavado, Diego Jorge y otros v. Mendoza*.

citizens believe their rights are not respected.<sup>977</sup> As I explained before, those with fewer resources were the large majority of those reached by the severe emergency regulations in both 1989-1990 and 2001-2002. The study shows that the people have been keenly aware of this fact.<sup>978</sup>

Recent studies based upon empirical evidence suggest that judgments about the distributive justice of the economic system (considered as outcomes), as well as about the economic procedural justice (considered as procedures by which economic rewards are distributed), play a significant role in the construction of legitimacy.<sup>979</sup> If that's true for Argentina, then the Supreme Court's emergency caselaw, which not only allowed regressive redistributions to take place but also allowed them to take place by mere Executive fiat, poses a double obstacle for the Court in its legitimacy-building enterprise.

The interplay between what I have considered to be the "true countermajoritarian difficulty" (the fact that judges have frequently contradicted the dominant popular conception of constitutional property) and the "regressive redistribution difficulty" (the fact that the measures upheld by the Court had a regressive distributive effect) account

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<sup>977</sup> See Antonio M. Hernández, Daniel Zovatto & Manuel Mora y Araujo, above n. 941, at 53 (holding that economic situation —37%— and educational level —24%— are the two variables the citizens perceive as more explicative of situations of disrespect of their rights and citing, in addition to their own study's results, results from the 2002 document *Aportes para el desarrollo humano de Argentina* prepared by the United Nations Development Programme).

<sup>978</sup> Of course, the question in the study is general and encompasses violations of any constitutional right. Still, when these results are crossed with the evidence offered above regarding the unpopularity of the measures and the public perception of their regressive character, it seems fair to assume that the people have been aware of the "regressive redistribution difficulty" and the results offered by Hernández, Zovatto and Mora y Araujo reinforce such conclusion, whatever other constitutional rights are perceived to be disrespected on economic grounds.

<sup>979</sup> See, e.g., James R. Kluegel & David S. Mason, "Fairness Matters: Social Justice and Political Legitimacy in Post-Communist Europe", 56 *Eur. Asia Stud.* 813 (2004) (arguing that evidence from East European countries supports the idea that perceptions of distributive justice and economic procedural justice are important components of political legitimacy). *Id.*, at 817 (defining the measure of distributive justice as reflecting "people's assessments of how fairly economic outcomes are allocated among groups in a society" and the measure of economic procedural justice as involving the people's "perceptions of the process or mechanisms by which economic rewards are distributed in society and whether or not such rewards may be fairly achieved").

for the puzzling lack of even partial positive effects of the Court's attempts to incorporate insights from the common understandings of constitutional property into its economic emergency caselaw. In order to understand the dynamic at play, we need to delve deeper into the Supreme Court's jurisprudential stances on economic emergency. What the Court has attempted to do, why it has done so, why the Court has not achieved greater success in its own terms and what implications its case law has for several important topics in constitutional law is the subject matter of the next part of this dissertation.

**C. Part Two: Property and the Court. Walking a Fine Line? (The Supreme Court's Theorization of Emergency Powers and Property Rights)**

The previous part of the dissertation dealt, mainly, with the common understandings of the Argentine Constitution's main property clause —what I have called the “popular conception of constitutional property”. Popular perceptions took the center of the stage, and the Court's deeds were seen under the light of their reception by the public. In this part, I will focus on the relevant caselaw from the Court's own perspective. I will analyze the theoretical underpinnings of the justices' stances on some of the central cases dealing with economic emergency. Building on the extensive historic narrative presented in Part One, this last part will, on the one hand, aim at making sense of what the Court has done in the second part of the Twentieth Century and early part of the Twenty-First Century, and, on the other hand, will expose the shortcomings on the judges' more usual positions. Such deficiencies have significant implications for a number of important constitutional law topics.



## Explaining the Unexplainable? The Court's Attempt to Take the Perspective of the Ordinary Observer.

### a. Defining the “Inviolability of Property” Through the Ordinary Observer’s Eyes.

In quite a few instances throughout its history, the Supreme Court has flirted with the idea of defining categorically the limits of permissible state interference with private contracts in times of economic emergency. In doing so, it has seemingly taken the stance of the Ordinary Observer, to borrow Bruce Ackerman’s terminology once more, and has attempted to incorporate insights from the conception of constitutional property that gained more sustained support during the Twentieth Century.

Early on, the justices embraced the somewhat ambiguous idea that it is constitutional to alter contracts or even judgments if their “substance” is not altered. In *Avico*, a case decided in 1934, they said:

“The Court has recognized, in emergency situations, the constitutionality of laws that temporarily suspend the effects of contracts freely agreed by the parties, as well as the effects of final judgments, provided that they do not alter the substance of either”<sup>980</sup>

Such doctrinal assertion has been afterwards repeated tirelessly, whatever the effects caused by the decisions citing the doctrinal formula. The idea of a “substance” of a contractual right seemed plausible at the time and was not too dissimilar to the old right/remedy distinction in contract clause doctrine in the U.S,<sup>981</sup> going back to the 1819

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<sup>980</sup> See, e.g., CSJN, *Ángel Russo v. C. de Delle Donne*, 243 Fallos 467 (1959) (citing *Avico*, from 1934, and *Ciarrapico*, from 1946, as authorities supporting the assertion).

<sup>981</sup> For an account of the use of the distinction by U.S. courts during the nineteenth century, see James W. Ely, Jr., “The Protection Of Contractual Rights: A Tale Of Two Constitutional Provisions”, 1 *N.Y.U. J.L. & Liberty* 370, 375-376 (2005) (arguing that “[C]ourts amplified the right/remedy distinction throughout the nineteenth century” and that “The elusive rights/remedy gave courts a degree of flexibility in Contract Clause cases and allowed judges to uphold some statutes that arguably amounted to contractual infringements”).

case of *Sturges v. Crowninshield*.<sup>982</sup> Some central “core” of the right should be respected, while relatively less important aspects of it could be modified for emergency reasons. The trick, of course, lies in what is considered to be merely “remedial”, and not central to the right.<sup>983</sup> The dividing line, as Justice Cardozo put it in *Worthen v. Kavanaugh* (1935), “is at times obscure”.<sup>984</sup> In *Avico* merely a deferment of maturities and a reduction of interest rates were at stake. There was no “haircut” or diminution of capital, and even in regard to interest rates, the Court argued that changed economic circumstances (i.e. deflation) made the lowered rate equivalent to the contractual rate, as measured in purchasing power terms,<sup>985</sup> so that there was no actual reduction in this regard either. Although the trick was embedded in the lengthy quotation from the contemporary *Blaisdell* U.S. Supreme Court decision that made “whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end”<sup>986</sup> key to the test of constitutionality, *Avico* struggled to show that creditors suffered no reduction of capital and, thus, it attempted to echo the then-consolidating popular conception of constitutional property.

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<sup>982</sup> 17 U.S. (4 Wheat.) 122 (1819).

<sup>983</sup> For an analysis of the (lack of) centrality of certain aspects of contracts, see *City of El Paso v. Simmons*, 379 U.S. 497, 514 (1965) (“We note at the outset that the promise of reinstatement, whether deemed remedial or substantive, was not the central undertaking of the seller, nor the primary consideration for the buyer’s undertaking”). See also *id.* at 529-530 (Black, J., dissenting) (criticizing the majority’s assessment of the centrality of the obligation allegedly impaired by the legislation at stake in the case).

<sup>984</sup> 295 U.S. 56, 60 (1935).

<sup>985</sup> See 172 *Fallos* 21 (1934) (arguing that if Congress had not provided for the reduction of interest rates, mortgage lenders that received their capital in a currency that, due to the emergency, had seen an extraordinary increase in value in the domestic market, would acquire a much higher purchasing power than the one they lent, and that the same would occur with amounts to be paid in interests, because –given the decrease in prices of goods and real estate- a 6% -the rate fixed by the emergency legislation challenged in the case- would be equivalent to a [rate of the] 9, 10 or more percent, in purchasing power).

<sup>986</sup> *Id.* (quoting from 290 U.S. 398, 438).

Even in 1922, in *Ercolano* —the first national economic emergency case to ever reach the Supreme Court — the majority had made a conscious effort to argue that the rent freeze —which actually effected a reduction in rent prices back to their level a year and a half before the enactment of the emergency law— was not “confiscatory” and, therefore, it did not violate property. To do so, the majority argued that it had not been proved that the rent set by the law did not correspond to the normal rental value of the property in question.<sup>987</sup> It went on arguing that

“Congress would not have [the power] to set an arbitrary price, a price that did not correspond to the rental value of the room, under normal conditions, for it would be tantamount to remedying an abuse with a larger and more disastrous contrary abuse, and above all, because it would amount to a confiscation of property”<sup>988</sup>

Much closer in time, in the 1990 case of *Peralta*, the Court insisted on *Avico*’s rhetoric and held that the property clause of the Constitution is not violated when the State

“[...] enacts, by reasons of necessity, a rule which does not divest the private individuals of lawfully recognized economic benefits nor does it deprive them of their property, but only limits temporarily the collection of such benefits or restricts the uses of such property”<sup>989</sup>

The majority struggled to square the decision with its precedents by arguing that the measure implied a robust deferment of maturities, but not a reduction of capital,<sup>990</sup> as

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<sup>987</sup> See 136 *Fallos* 161 (1922).

<sup>988</sup> *Id.*

<sup>989</sup> 313 *Fallos* 1513 (1990), §38 and §56.

<sup>990</sup> See, e.g., 329 *Fallos* 5913 (2006) (Argibay, J., concurring in the result, §5) (arguing that the *Peralta* majority struggled to make the decision fit within the “traditional” emergency caselaw by insisting that the measure only implied a deferment of maturities).

a “superficial analysis” might lead one to think.<sup>991</sup> By doing so, the Court was, once again, at least pretending to embrace the basic idea that capital cannot be diminished by emergency measures.<sup>992</sup>

The same idea appears over and over again in different decisions. Thus, in *San Luis* the various concurring opinions emphasized the constitutional permissibility of establishing deferments of maturities,<sup>993</sup> while recalling that “haircuts” —diminutions of capital— are forbidden.<sup>994</sup> Justice Fayt, declaring unconstitutional the compulsory conversion of dollar deposits into pesos, stated the doctrine clearly:

“It cannot be disputed that the challenged legislation has operated a *transformation in the substance of the right* [of property] which makes it invalid before the Constitution. The conversion of bank deposits of foreign currency into pesos [...] allows the depositary [...] to fulfill his obligation [...] by returning roughly half the amount of currency that he received [...] The ‘haircut’ —borrowing the expression used in 313 *Fallos* 1513 [the *Peralta* decision]—, which reaches approximately 50% of the deposited dollars [...] becomes, thus, *irredeemably confiscatory*. The facts of the case reveal a situation in which, paradigmatically, the State does not provide a remedy to alleviate an emergency situation, but decides to transform the substance or essence of the vested right; it decides, in sum, to take the assets of the depositors without any compensation whatsoever.”<sup>995</sup>

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<sup>991</sup> 313 *Fallos* 1513 (1990), §52.

<sup>992</sup> I use the word “pretending” because *Peralta* seems to acknowledge the possibility of reductions of capital produced by mechanisms such as a compulsory conversion of bank deposits into long-term state bonds, by equating them to the effects of currency devaluations, which —arguably— have never been ruled unconstitutional. See 313 *Fallos* 1513 (1990), §55.

<sup>993</sup> See 326 *Fallos* 417 (2003) (Moliné O’Connor, López, JJ., concurring, §53; Fayt, J., concurring, §31, 33, 37)

<sup>994</sup> *Id.* (Moliné O’Connor, López, JJ., concurring, §39, 41; Nazareno, J., concurring, §40-41; Fayt, J., concurring, §39; Vázquez, J., concurring, §6.c, 19). It must be born in mind, however, that the position of Justices Moliné O’Connor, López and Nazareno does not seem to forbid the possibilities of “haircuts” in an absolute way: they speak of “inadmissible diminution” of the capital and they insist that while the State may limit the right to property, it may not diminish “substantially” its value.

<sup>995</sup> *Id.* (Fayt, J., concurring, §39). Emphasis added.

Justice Fayt’s position is instructive, as he signed *Peralta*’s majority opinion and is often credited as its author.<sup>996</sup> In *Massa*, the decision that closed the long judicial battle over the “pesification” of bank deposits, Fayt argued that

“By virtue of the result achieved, it must be concluded that the application of the emergency regime [...] does not currently cause an injury to the property rights of the plaintiff, given that the substance of the purchasing power of its personal right has been preserved, regardless of the currency in which it has been expressed”<sup>997</sup>

In another case dealing with the latest round of emergency measures, where the “pesification” of judicial deposits was at stake, he insisted

“Capital must—in this case too— remain intact, *since any mandatory conversion—insofar as it effects a ‘haircut’— would be confiscatory* and, thus, it would become irredeemably unconstitutional”<sup>998</sup>

In *Della Ghelfa*, a precedent analyzing the constitutionality of “pesification” as applied to dollar deposits made in voluntary mutual benefit organizations—in a way analogue to banks—, Justice Fayt summarized his jurisprudence on the topic:

“It is true that extraordinary events call for extraordinary remedies; however, mechanisms designed to overcome the emergency are subject to a limit, and this is its reasonableness, with *the resulting impossibility to alter or distort the economic significance of the rights of individuals. The restitution of property may be delayed until the emergency is over*, but it must necessarily be returned to the owner, who is entitled to claim any damages suffered”<sup>999</sup>

While the question of the possibility of claiming damages suffered by the “freezing” of property is not settled and Justice Fayt’s *dicta* on the issue was not shared

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<sup>996</sup> See, e.g., Horacio Verbitsky, *HACER LA CORTE: LA CONSTRUCCIÓN DE UN PODER ABSOLUTO SIN JUSTICIA NI CONTROL* 29 (Buenos Aires, Planeta, 1993) (arguing that Fayt wrote the opinion that upheld the freezing of bank deposits by decree).

<sup>997</sup> 329 *Fallos* 5913 (2006) (Fayt, J., concurring, §20).

<sup>998</sup> 330 *Fallos* 971 (2007) (Fayt, J., concurring, §12). Emphasis added.

<sup>999</sup> 330 *Fallos* 2074 (2007) (Fayt, J., concurring, §6). Emphasis added.

by a majority of his colleagues, the references to the impossibility of altering or distorting “the economic significance” of the individual’s rights clearly resonated with a majority of the justices, in different cases.

Justice Argibay concluded in *Massa* that “pesification” of bank deposits was unconstitutional, a position extended in *E.M.M.* and *Della Gbelfa* to different sorts of deposits in banks.<sup>1000</sup> Justice Lorenzetti held in *Massa* that “pesification” was constitutional because: a) the depositors could get an amount in *pesos* equivalent to the 100% of the original amount in dollars; b) courts should not rule unconstitutional norms when a constitutional solution can be found within the applicable legal order; c) the emergency regime had been enacted pursuant to a long line of lenient Supreme Court precedents that could not be changed retroactively, even if they should be corrected for the future; d) the consequences of striking down “pesification”, after so many years of being in force, would be very negative.<sup>1001</sup> The important point is that Lorenzetti emphasized the importance of the full restitution of the deposit and of the constitutional protection of property. In *E.M.M.*, he —along with Justice Zaffaroni— held that the guarantee of property had to be respected in the case of judicial deposits and that “no diminution of value of the good received in custody” should be accepted.<sup>1002</sup>

But even those justices who fully supported “pesification” of dollar-denominated obligations of different kinds felt obliged to argue that the value of the deposits had not been affected:

“That the right to property is guaranteed by Art. 17 of the Constitution cannot be put into question, but what must be examined is whether the economic

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<sup>1000</sup> See 329 *Fallos* 5913 (2006) (Argibay, J., concurring in the judgment); 330 *Fallos* 971 (2007) (Argibay, J., concurring); 330 *Fallos* 2074 (2007) (Argibay, J., dissenting).

<sup>1001</sup> 329 *Fallos* 5913 (2006) (Lorenzetti, J., concurring, §24).

<sup>1002</sup> 330 *Fallos* 971 (2007) (Lorenzetti, Zaffaroni, JJ., plurality opinion; §11).

measures—in short, the suspension of the repayment of bank deposits and the option for depositors between the reimbursement in Argentine currency, within certain payment terms and with monetary correction, or in the original currency in longer payment terms and in marketable securities affects such right [...] Pesification appears as reasonable, *as long as the amount to be returned has equal or greater purchasing power than the original deposit had*, as it causes no harm to the creditor”<sup>1003</sup>

One could argue that the “pesified” sums to be returned to depositors did not have “equal or greater purchasing power than the original deposit”, and of course that the “Intangibility of Deposits Act” had promised them that the State would not alter banking contracts in any way, but the interesting point is that supporters of “pesification” felt compelled to defend it in terms of the “haircut” versus “deferment” distinction. Such distinction has been an important part of the Court’s doctrine on economic emergency. Justice Argibay has put the point in clear terms:

“[...] this line of cases, either in the Argentine version or in the version followed by the U.S. Supreme Court, despite all its meanderings and interruptions, has kept in place a continued limitation to the restrictions that the government can introduce, for emergency reasons, on the property of individuals, namely: any restriction must affect the terms for judicial enforcement of said rights and the agreed-upon returns or yields, but it must not affect the capital as such, i.e., the “substance” of the right [...] So reads the corresponding cliché with the list of requirements that emergency laws must fulfill [to be considered constitutional]. Regarding, especially, the interference of contracts between private individuals, the vast majority of decisions upheld legislation that established delays in the enforceability of certain rights and limited rents [...] The noticeable effort that can be observed in the *Peralta* judgment (313 *Fallos* 1513, paragraphs 40 to 44 and 52) to present the restrictions under analysis as a mere ‘restructuring’ and, thus, to keep their validation within the traditional framework, rests on *the implicit premise that even an emergency measure may be unconstitutional, as a violation of property, if it affects rights in a ‘substantial’ and definitive manner*”<sup>1004</sup>

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<sup>1003</sup> 327 *Fallos* 4495 (2004) (Belluscio, Maqueda, JJ., plurality opinion, §9). Emphasis added. Justice Belluscio retired shortly after the *Bustos* decision and took no part in the decisions that finally resolved the “pesification” question more generally. Justice Maqueda consistently voted for upholding “pesification” as enacted by Congress or the President, respectively.

<sup>1004</sup> 329 *Fallos* 5913 (2006), (Argibay, J., concurring in the result, §5). Emphasis added.

The Court has embraced a distinction of broad popular appeal, one that —I have argued in the first part of this work— is the minimum core of the dominant popular conception of constitutional property. In doing so, it has stepped into the layfolks’ shoes and has adopted their perspective. Rhetorically, at the very least, the Court has looked at constitutional property through the Ordinary Observer’s eyes. It has frequently elaborated the concepts of nonlegal conversation (“substance”, “distortion” of property, etc.) to illuminate the meaning of legal rules whose content was controversial (the property clause), reflecting —partially at least— social expectations regarding constitutional meaning.<sup>1005</sup> But, does it make sense that it has taken such a step?

Several commentators have criticized the Court’s jurisprudential stance as untenable. Carlos Rosenkrantz, for instance, has held such a position. In his view, given that any deferment implies a diminution in value of any credit, “haircuts” and “deferments” are financially equivalent and, therefore, they should receive identical constitutional treatment.<sup>1006</sup> The sound financial notion of present value is the foundation of Rosenkrantz’s argument.<sup>1007</sup> Carlos Azize, building his argument upon the same notion, holds that only in cases where the deferment includes sufficiently high interest rates, which compensated the lesser present value of the credit, a deferment might not be equivalent to a “haircut”.<sup>1008</sup> Since such cases are indeed very rare, if they ever exist, one

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<sup>1005</sup> See Bruce A. Ackerman, above n. 28, at 15.

<sup>1006</sup> See Carlos F. Rosenkrantz, “Prólogo. El derecho de propiedad según la Corte Suprema de Justicia de la Nación y la ADC”, in Asociación por los Derechos Civiles (Buenos Aires, Argentina), *LA CORTE Y LOS DERECHOS, 2005-2007: CÓMO IMPACTAN EN LA VIDA DE LOS CIUDADANOS, LAS DECISIONES DEL MÁXIMO TRIBUNAL* 341, fn 2 (Buenos Aires, Siglo XXI Editores, 2008) (arguing that “the constitutional distinction between a ‘haircut’ and a deferment is untenable, for the simple reason that their effects are identical”).

<sup>1007</sup> See Richard A. Brealey & Stewart C. Myers, above n. 726, at 16-21, 669-699 (explaining the concepts of present value, net present value, the opportunity cost of capital, and the general mechanics of debt valuation).

<sup>1008</sup> See Carlos A. Azize, “La espera como quita en el concurso preventivo”, 2000-D L. L. 1269.



should assume that Rosenkrantz's argument holds well for the large majority of situations.

Similarly, Juan Cianciardo and Pilar Zambrano have held that the judges' reluctance to admit the hypothetical possibility of a "haircut" is not justified.<sup>1009</sup> Their argument proceeds as follows: once the constitutional feasibility of deferment is admitted, it does not seem that a reduction of capital is, *prima facie*, more severe or harmful to the creditor than the former; in fact, it may perfectly be the case that a haircut be less harmful than a deferment. A basic understanding of the notion of opportunity costs provides some grounding to the argument.<sup>1010</sup>

What the critics are doing is, basically, attacking the justices for lack of sophistication in their reasoning. They are, in a way, aiming precisely at the heart of the jurisprudential notion of "inviolability of property", as constructed by the Court from its Ordinary Observer's position. Why would the justices adopt a position that, once a few financial-economic insights are grasped, is hard to maintain? Surely, they are well-educated lawyers who should know better than that. Indeed, as George Priest has argued, "The form of the change made by the state is less important than the extent to which the change raises or lowers the value of the contract right to the various parties".<sup>1011</sup> But is there any way to save the Court from its critics? As the reader may have already guessed, I think there is. Daniel Kahneman, Amos Tversky, and other social scientists' work may come to the rescue and account for the Court's seemingly unexplainable position.

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<sup>1009</sup> See Juan Cianciardo & Pilar Zambrano, "El caso 'Massa'. La interpretación constitucional en casos difíciles y el derecho de propiedad", 2007-IV *Jurisprudencia Argentina* 1151.

<sup>1010</sup> See Richard A. Brealey & Stewart C. Myers, above n. 726, at 15 (explaining the concept of opportunity cost as the return foregone by making one investment rather than another).

<sup>1011</sup> See George L. Priest, "Law and Economic Distress: Sangamon County, Illinois, 1837-1844", 2 *J. Legal Stud.* 469, 492 (1973) (criticizing the distinction between obligation and remedy).

**b. Prospect Theory, Endowment Effect, and the Interaction Between the Court and the People: the “Haircut” vs. “Deferment of Maturities” Distinction.**

Resort to some basic insights provided by the prospect theory and, additionally, by its derivative endowment effect theory, goes a long way towards explaining the justices’ behaviour throughout long decades of apparent contradiction of basic financial and economic notions.

Prospect theory, as advanced by Daniel Kahneman and Amos Tversky, is a theory that explains how people make decisions between alternatives that involve risk. It holds that the choice process has two stages: an editing phase, where individuals make preliminary analysis of the offered prospects, and an evaluation phase, where individuals assess the prospects and choose whichever has a highest value.<sup>1012</sup> The theory asserts that people normally perceive outcomes as gains and losses, rather than as final states of welfare or wealth, as referred to a neutral reference point which usually corresponds to the current asset position.<sup>1013</sup> Thus, changes in wealth or welfare are the true carriers of value.<sup>1014</sup> A distinctive characteristic of attitudes to changes in welfare (or wealth), according to Kahneman’s and Tversky’s findings, is that losses loom larger than gains.<sup>1015</sup> “The aggravation that one experiences in losing a sum of money appears to be greater than the pleasure associated with gaining the same amount”.<sup>1016</sup> Additionally, people

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<sup>1012</sup> See Daniel Kahneman & Amos Tversky, “Prospect Theory: An Analysis of Decision Under Risk”, 47 *Econometrica* 263, 274 (1979).

<sup>1013</sup> *Id.*

<sup>1014</sup> *Id.*, at 277.

<sup>1015</sup> *Id.*, at 279.

<sup>1016</sup> *Id.*

overweigh outcomes that are considered certain, relative to merely probable outcomes — what Kahneman and Tversky called the “certainty effect”—.<sup>1017</sup>

Endowment effect, a derivative theory initially proposed by Richard H. Thaler, holds that individuals perceive parting with an endowed good as a loss that is greater than a potential gain from acquiring another good of otherwise equal value.<sup>1018</sup> The endowment would basically set the reference point according to which changes are perceived as losses or gains. Exchange asymmetries, where a divergence between the willing-to-pay and the willingness-to-accept a given amount of money for the same good is observed for the same individuals, is attributed to the “endowment effect”. The main effect of endowment is not to enhance the appeal of what one owns, only the pain of giving it up.<sup>1019</sup> Accordingly, people often neglect opportunity costs, as foregone gains are less painful than perceived losses.<sup>1020</sup> Perceptions of fairness regarding economic actions are strongly dependent on whether an issue is framed as a reduction in a gain or as an actual loss.<sup>1021</sup>

Ideas such as the status quo bias —a preference for the current state of affairs— and loss aversion —the disutility of losing is greater than the utility of gaining— are central in this theoretical framework.

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<sup>1017</sup> *Id.*, at 265.

<sup>1018</sup> See Richard Thaler, “Toward a Positive Theory of Consumer Choice”, 1 *J. Econ. Behav. Organ.* 39, 44 (1980).

<sup>1019</sup> See Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, “The Endowment Effect, Loss Aversion, and Status Quo Bias”, 5 *J. Econ. Perspect.* 193, 197 (1991). For purposes of my argument, it does not matter whether the effect is caused by the mere parting up with a good (or losing it) or by the failure to anticipate the utility caused by owning another good as a replacement of the one given up (or lost). For a review of the different explanatory theories of the “endowment effect”, see Ivo Bischoff & Jurgen Meckl, “Endowment effect theory, public goods and welfare”, 37 *J. Socio-Econ.* 1778 (2008).

<sup>1020</sup> See Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, above n. 1019, at 203.

<sup>1021</sup> *Id.*

While the endowment effect theory has been challenged,<sup>1022</sup> and its explanatory power has been completed with more nuanced accounts,<sup>1023</sup> it is now widely accepted that there is an asymmetry in the hedonic experience of gains and losses.<sup>1024</sup> It has been argued that prospect theory preferences have an evolutionary origin, and therefore, they are hard-wired into our cognitive apparatuses.<sup>1025</sup> Some lines of research in neuroscience have advanced a series of hypothesis regarding prospect theory's likely neural basis.<sup>1026</sup>

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<sup>1022</sup> See, e.g., Charles R. Plott & Kathryn Zeiler, "Exchange Asymmetries Incorrectly Interpreted as Evidence of Endowment Effect Theory and Prospect Theory?", 97 *Am. Econ. Rev.* 1449, 1463 (2007) ("[...] endowment effect theory does not seem to explain observed exchange asymmetries. While gaps occasionally are observed, our results demonstrate that observed gaps are inconsistent with endowment effect theory. Either no 'endowment effect' of the sort predicted by prospect theory exists, or the effect is sufficiently weak that other phenomena easily swamp it"); see also Gregory Klass & Kathryn Zeiler, "Against Endowment Theory: Experimental Economics and Legal Scholarship", *Georgetown Public Law and Legal Theory Research Paper No. 13-013* (2013) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2224105](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2224105); last visited 02/25/2013) (questioning the existence of the effect, based upon more recent studies, and explaining the spread of the theory in legal scholarship).

<sup>1023</sup> See, e.g., Guido Ortona & Francesco Scacciati, "New experiments on the endowment effect", 13 *J. Econ. Psychol.* 277, 292 (1992) (arguing that although the endowment effect is supported by "overwhelming experimental evidence", it may be displaced by rational behaviour if the gains are stake are worthwhile); Eric J. Johnson, Anat Keinan & Gerald Haubl, "Aspects of Endowment: A Query Theory of Value Construction", 33 *J. Exp. Psychol. Learn.* 461, 471 (2007) (arguing that "Despite its importance, empirical robustness, and explanatory power, there is only a limited amount of research on, and little agreement about, the psychological mechanisms underlying the endowment effect, particularly as compared with the number of empirical demonstrations of the effect" and that "[A]lthough significant incentives alone are not enough to diminish the endowment effect, a subtle manipulation — simply reversing the order of two questions about the possible exchange — does"); Chien-Huang Lin, Shih-Chieh Chuang, Danny T. Kao & Chang-Yung Kung, "The role of emotions in the endowment effect", 27 *J. Econ. Psychol.* 589, 595 (2006) (arguing that "a transient emotional state can affect the magnitude of the endowment effect").

<sup>1024</sup> See, e.g., Rose McDermott, James H. Fowley & Oleg Smirnov, "On the Evolutionary Origin of Prospect Theory Preferences", 70 *J. Polit.* 335, 337 (2008) ("Several findings prove quite robust experimentally, including framing effects, shifts in risk propensity based on domain, and loss aversion, meaning that losses hurt more than equal gains please"); Charles R. Plott & Kathryn Zeiler, above n. 1022, at 1462 ("While we challenge the general accuracy of endowment effect theory, we do not challenge prospect theory, which has been explored in different experiments").

<sup>1025</sup> See Rose McDermott, James H. Fowley & Oleg Smirnov, above n. 1024, at 336 ("Our particular evolutionary model provides a parsimonious explanation for why individuals may possess hard-wired tendencies to make choices consistent with the predictions of prospect theory. Although this model suggests that human cognitive architecture evolved to solve particular adaptive problems related to finding sufficient food resources to survive, we argue that this same architecture persist").

<sup>1026</sup> See, e.g., Christopher Trepel, Craig R. Fox & Russell A. Poldrack, "Prospect theory on the brain? Toward a cognitive neuroscience of decision under risk", 23 *Cognitive Brain Res.* 34, 41-46 (2005) (outlining a set of "preliminary hypothesis regarding the neural systems that may underlie some of the specific features of prospect theory").

In a way, modern science has just confirmed what David Hume, Jeremy Bentham and other early liberals had observed a few centuries ago, with a less sophisticated toolkit but with impressive accuracy nonetheless: that liberal men (and women) “are not so much obsessed by the quest for gain as [...] frightened by the ever-present prospect of loss”.<sup>1027</sup> As the pains of deprivation weigh far more than the pleasures of acquisition, the liberal individual “emerges as a being supremely sensitive to the specific form of pain produced by the loss of wealth”.<sup>1028</sup>

The “haircut”-“deferral-of-maturities” distinction fits nicely within this framework. It echoes prospect theory’s and endowment effects’ basic insights. A reduction of capital is perceived as an actual loss,<sup>1029</sup> and since losses loom larger than gains, the disutility it produces is greater than the utility any alternative use of the reduced capital may have. Therefore, the people are generally averse to “haircuts” as remedies for emergency situations. Deferrals of maturities, on the other hand, are not perceived as losses but, at most, as foregone gains, things that the owner could have done with her money while it was unavailable. Whatever the actual losses deferrals may inflict on any given individual, the perceived disutility is lesser than the one caused by a reduction of capital. Hence, they are generally preferred over “haircuts” as emergency tools. Moreover, due to a phenomenon called the isolation effect,<sup>1030</sup> when comparing the

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<sup>1027</sup> Sheldon S. Wolin, *POLITICS AND VISION (EXPANDED EDITION)* 294 (Princeton, Princeton University Press, 2004).

<sup>1028</sup> *Id.*

<sup>1029</sup> The reference point is usually the asset’s current position.

<sup>1030</sup> See Daniel Kahneman & Amos Tversky, above n. 1012, at 271 (“In order to simplify the choice between alternatives, people often disregard components that the alternatives share, and focus on the components that distinguish them”).

alternatives of a “haircut” and a deferment, individuals tend to focus on what distinguishes both alternatives and disregard what they have in common. Thus, while both alternatives may imply a decrease in the credit’s worth, the individual focuses on what makes them different: in the case of the “haircut”, the loss is certain and definitive; in the case of deferments, it may be temporary. Since people are generally risk-seeking to avoid losses that are certain,<sup>1031</sup> whatever risks of losses may be involved in the deferment option will be generally preferred over the certain and definitive loss imposed by the “haircut”. Additionally, when comparing the alternatives, individuals tend to, first, strongly prefer to remain at the status quo<sup>1032</sup> (where the capital remains untouched) and, second, amplify any differences favoring the “deferment” due to the fact that both alternatives are perceived as disadvantages<sup>1033</sup> (individuals are likely to perceive being subject to the emergency regime as a disadvantage).

But there is a question of fairness at stake, too. Not only are deferments preferred over reductions of capital, but they are also perceived as fairer as well, due to the fact that the former are thought to involve a reduction of gain, as opposed to the actual loss perceived in the latter.<sup>1034</sup> Needless to say, a professional investor, or even a moderately sophisticated saver, endowed with the requisite financial savvy, surely does

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<sup>1031</sup> *Id.*, at 268-269 (explaining that “[I]n the positive domain, the certainty effect contributes to a risk-averse preference for a sure gain over a larger gain that is merely probable” while “[I]n the negative domain, the same effect leads to a risk seeking preference for a loss that is merely probable over a small loss that is certain”).

<sup>1032</sup> See Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, above n. 1019, at 197-198 (“One implication of loss aversion is that individuals have a strong tendency to remain at the status quo, because the disadvantages of leaving it loom larger than advantages. Samuelson and Zeckhauser have demonstrated this effect, which they term the *status quo bias*”).

<sup>1033</sup> *Id.*, at 200 (“In general, a given difference between two options will have greater impact if it is viewed as a difference between two disadvantages than if it is viewed as a difference between two advantages”).

<sup>1034</sup> *Id.*, at 203.

not experience “haircuts” and deferments in this way.<sup>1035</sup> But they do not constitute the bulk of the people.

For the same reasons stated above, alterations on expected profits —i.e., reductions of interest rates— may be also perceived as less severe, and thus more acceptable, than reductions of capital.

While it is true that the reference point for monetary outcomes is usually the status quo, the assets’ current position,<sup>1036</sup> it is also true that “by varying the description of options, one can influence how they are perceived [...] People may actively reframe prospects, adopting aspirations as reference points, or persisting in the adoption of old reference points”.<sup>1037</sup> Early on, Kahneman and Tversky emphasized that, although for most choice problems the reference point is the status quo, “there are situations in which gains and losses are coded relative to an expectation or aspiration level that differs from the status quo”.<sup>1038</sup> Can this possibility affect the general explanatory power of my argument here? I think not. By embracing the “haircut”-“deferment of maturities” distinction, the justices have contributed to cement people’s expectations of preservation of capital and, hence, to anchor the reference point in the status quo. In a way, there may

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<sup>1035</sup> Moreover, certain individuals, situated in specific circumstances, will be less likely to perceive “haircuts” and “deferments” in the way suggested in the text. As Kahneman and Tversky noticed early on, “the derived value (utility) function of an individual does not always reflect ‘pure’ attitudes to money, since it could be affected by additional consequences associated with specific amounts” —i.e., utility thresholds. Therefore, not everybody will experience “haircuts” and “deferments” in the way I suggest in the text. See Daniel Kahneman & Amos Tversky, above n. 1012, at 278-279.

<sup>1036</sup> See Daniel Kahneman & Amos Tversky, above n. 1012, at 274 (holding that “[T]he reference point usually corresponds to the current asset position”); see also Christopher Trepel, Craig R. Fox & Russell A. Poldrack, above n. 1026, at 34 (pointing out that “For monetary outcomes, the status quo generally serves as the reference point distinguishing losses from gains”).

<sup>1037</sup> See Daniel Kahneman & Amos Tversky, above n. 1012, at 274 (arguing that “the location of the reference point, and the consequent coding of outcomes as gains or losses, can be affected by the formulation of the offered prospects, and *by the expectations of the decision maker*”; emphasis added); see also Christopher Trepel, Craig R. Fox & Russell A. Poldrack, above n. 1026, at 39 (citing various sources).

<sup>1038</sup> See Daniel Kahneman & Amos Tversky, above n. 1012, at 286.

be a self-reinforcing dynamic at play: the Court builds its economic emergency jurisprudence upon some insights taken from the dominant popular conception of constitutional property, which in turn reflects prospect theory and endowment effect theory preferences for “deferments” over “haircuts”, and its caselaw provides lay individuals with additional reasons to perceive “deferments” as reductions of gains and “haircuts” as actual losses.

As may be already apparent, these social science tools play a dual explanatory role in my account: they explain why the people at large might have settled for a conception of constitutional property that makes the preservation of the owner’s capital central as well as why the justices have adopted the Ordinary Observer’s position and have tried to incorporate elements from the popular conception into their jurisprudence.

Regarding the first explanatory function, these theories provide additional support for my argument about what the dominant conception of constitutional property, as per the first part of this dissertation, is. To the historical-sociological evidence I offered above, we can add solid psychological theorization that, based upon empirical observations, provides an explanation for the behaviour observed in Part One of this work. Thus, the “haircut”-“deferment of maturities” distinction, however untenable from the financial standpoint, makes perfect psychological sense.

While the critics of the Court’s jurisprudence may be quite right that, under certain (admittedly, not implausible) circumstances, reductions of capital and deferments of maturities are financially equivalent, it is a different thing altogether to say that they should be *constitutional* equivalents, as Rosenkrantz argues. The two things do not follow logically from each other.

Granted, someone might object that, whatever the soundness of the psychological hypothesis that grounds the distinction, there is no right to be treated in accordance to one’s psychological perceptions of reality, however inaccurate they might



be. If what social sciences describe is nothing but “mechanisms that cause nonrational or boundedly rational decisionmakers to afford weight to the way things are —weight that is arbitrary or excessive according to some background account of rational decisionmaking”,<sup>1039</sup> am I not giving a similarly undeserved weight to these findings and theories in attempting to account for the Argentine justices’ jurisprudence? Why would the Court incorporate and defend the “haircut”-“deferment of maturities” distinction if it is financially untenable and,<sup>1040</sup> surely, there is no right to be treated in ways one perceives as more satisfactory (or less unsatisfactory)? Why would the justices grant normative power to allegedly nonrational (or limitedly rational) psychological traits? The second explanatory role I have given to prospect theory and endowment effect seems harder to justify.

I will advance four arguments as to why the Supreme Court has frequently attempted to follow this path. They are *the textualist argument*, *the broadly consequentialist argument* (or the *cultural cognition* argument), *the utilitarian argument*, and *the legitimacy argument*. Notice that the last three arguments are consequentialist, while the first one is not.

The *textualist* argument is very straightforward, and I will not spend much time on it. Basically, it suggests that the justices have supported the distinction between reductions of capital and deferments of maturities because the latter squares much better with the relevant constitutional text. “Property is inviolable”, reads Article 17 of the Argentine Constitution. Deferments, insofar as they are perceived as mere deprivations of future gains, and therefore, not as actual losses, do not seem to encroach upon the inviolability of property. Constitutional property, as per the dominant common

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<sup>1039</sup> Adrian Vermeule, “Connecting Positive and Normative Legal Theory”, 10 *U. Pa. J. Const. L.* 387, 393 (2008) (describing in such a way status quo bias, opportunity-cost neglect, and endowment effect).

<sup>1040</sup> See George L. Priest, above n. 1011, at 492 (arguing that the similar, although not completely identical, distinction between obligation and remedy is untenable).

understanding, encompasses capital, not necessarily gains. Therefore, the “semantic resistance of the text”,<sup>1041</sup> according to the relevant interpretive conventions of the Argentine community, accommodates deferrals but not reductions of capital. This argument relies on an “internalist” judicial attitude.<sup>1042</sup>

The *broadly consequentialist* argument (or *cultural cognition* argument) builds upon consequentialist canons of constitutional interpretation that are widespread among high courts charged with the task of constitutional review. In Argentina the Supreme Court has put it in clear terms:

“[...] when interpreting and applying the law, judges cannot disregard the consequences that follow from each [possible interpretive] criterion, as they are one of the most reliable indicators to verify the reasonableness of [any given] norm as well as its consistency with the [normative] system it is enshrined in”<sup>1043</sup>

Such interpretive mandate imposes on judges the duty to ponder over the likely consequences of adopting one or another interpretation of any constitutional clause, including the property clause. How does this relate to prospect theory, endowment effect theory, and the “haircut”-“deferral of maturities” distinction? The idea of “cultural cognition” may help bridge the gap. Dan Kahan has explored, in a series of papers co-authored with a number of social scientists,<sup>1044</sup> such idea. According to their work,

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<sup>1041</sup> See 328 *Fallos* 2056 (2005) (Zaffaroni, J., concurring, §24) (using the idea to delimit what is properly an interpretation of a legal norm and to distinguish it from what is not); 328 *Fallos* 3399 (2005) (majority opinion, §21; Fayt, J., concurring opinion, §7) (taking up Justice Zaffaroni’s expression in *Simón*).

<sup>1042</sup> See John Ferejohn, “Positive Theory and the Internal View of Law”, 10 *U. Pa. J. Const. L.* 273, 293 (2008) (defining an internal judicial orientation to the law as the individual commitment of judges to answering the legal questions posed to them in ways that are maximally faithful to received legal norms and arguing that such an internalist attitude is owed to potential litigants).

<sup>1043</sup> See, e.g., 302 *Fallos* 284 (1980); 303 *Fallos* 917 (1981); 307 *Fallos* 1018 (1985); 310 *Fallos* 267 (1987); 315 *Fallos* 158 (1992); 318 *Fallos* 79 (1995); 323 *Fallos* 1406 (2000); 326 *Fallos* 2095 (2003); 331 *Fallos* 1262 (2008).

<sup>1044</sup> See, e.g., Dan M. Kahan & Donald Braman, “Cultural Cognition and Public Policy”, 24 *Yale L. & Pol’y Rev.* 149 (2006); Dan M. Kahan, David A. Hoffman, & Donald Braman, “Whose Eyes Are You Going to Believe? *Scott v. Harris* and the Perils of Cognitive Illiberalism”, 22 *Harv. L. Rev.* 837 (2009); Dan M. Kahan & Paul Slovic, “Cultural Evaluations of Risk: “Values” or “Blunders”?”, 119 *Harv. L. Rev.* 1110 (2006).

cultural cognition is a “psychological disposition of persons to conform their factual beliefs about the instrumental efficacy (or perversity) of law to their cultural evaluations of the activities subject to regulation”.<sup>1045</sup>

If judges are to evaluate the likely consequences of possible interpretations of constitutional property, they may be hard-pressed to avoid following their fellow citizens’ ideas regarding “haircuts” and “deferments”, no matter how well they understand the likely equivalent financial effects of both types of measures. Here, the influences of prospect theory-endowment effect preferences operate at a different level. It is not that they make judges intuitively embrace the distinction in question. Rather, they are an important part of an extended cultural background against which judges have to assess the consequences of adopting one or another constitutional interpretation. Sophisticated lawyers may well grasp the economic and financial insights that lie at the heart of Rosenkrantz’s, or Cianciardo’s and Zambrano’s, criticisms of the distinction, and still find the distinction constitutionally compelling for consequentialist reasons. Such reasons may appear as persuasive, according to the consequentialist canon of interpretation, because of the cultural baggage that serves as a background for evaluating possible legal solutions.

Take, for instance, the issue of whether protecting strong property rights is, all things considered, the best path for the country to follow due to its alleged fostering of investment and promotion of sustainable growth. Let’s assume for a moment that protection of capital, as opposed to a moderate and transitory regulation of profit-making potential, is considered to be instrumentally central to bringing about the beneficial effects in investment and growth. If the cultural background—in which judges

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<sup>1045</sup> Dan M. Kahan & Donald Braman, above n. 1044, at 151-152.

are immersed— tends towards such a belief, it may well be that judges consider the consequences of allowing reductions of capital as deleterious in the long-term. Given that the most widespread popular conception about constitutional property values the protection of capital highly, it is not far-fetched to suppose that many people link such protection to systemic benefits. Or let's assume a slightly different, but equally feasible, cultural background: financial and banking activities are considered as low-risk ventures for bankers and brokers, as well as for skilfull investors, but risky for the layfolks who just need a bank to put their savings in to be kept and earn a small profit. Argentine history is plentiful of examples where bankers have come out relatively unharmed from emergency regulations, while small and medium savers have borne the heaviest burden in overcoming the crisis. In such a cultural background, judges may consider the preservation of the saver's capital as producing the best consequences (which can be, of course, just minimizing the damage). There are several examples of these kinds of arguments in the Court's caselaw.

In *San Luis*, where the emergency measures, as applied to a bank deposit in dollars, effected a reduction of close to fifty percent of the plaitinff's capital, it was held that

“[t]o circumvent the operation [of the property clause], whatever the reasons to enervate its proper content, would imply the withdrawal of the Republic from the concert of civilized nations that provide for [the protection of] property rights as one of the pillars of the protection of personal rights and as a formidable driving force for the progress of nations [...]”<sup>1046</sup>

It was also held that

“[t]he country's progress was due, in large measure, to the lucid constitutional text that offered protection of their lives and property to nationals and foreigners alike, [thereby] attracting a migratory flow that contributed to the settling of the deserted territory and to the spreading of valuable investments all over it since

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<sup>1046</sup> 326 *Fallos* 417 (2003) (Moliné O'Connor, López, JJ., concurring, §41; Nazareno, J., concurring, §41; Vázquez, J., concurring, §19).

the late nineteenth century. The continuing permanence of such constitutional bases of progress and growth cannot be disregarded due to circumstantial setbacks that can only be overcome with the maturity of peoples respectful of their laws. The fracture of the constitutional order would only aggravate the crisis, affecting not only the rights herein injured, but all others protected by the Constitution, until the achievement of the goals of ‘establishing justice’ and ‘promoting the general welfare’, upon which the institutional order rests, are rendered impossible”<sup>1047</sup>

In *Massa*, where the same emergency regime was deemed constitutional as —after judicial tweaking— it no longer effected a reduction of capital for savers, Justice Lorenzetti, the president of the Supreme Court, offered his own reasons to explain such an unorthodox a decision. In order to support the decision to force banks to repay in *pesos* the equivalent to the full free-market value of the original amount deposited in dollars, he argued that

“[...] The judges’ interpretations of the constitutional protection of contracts and of property rights have very important effects on the future evolution of the [Argentine] institutions [...] It is necessary to identify the principles governing our constitutional system, whose compliance must be the basis to avoid the future repetition of the grave events that the Republic lived and that affected its citizens [...] contracts and property rights have constitutional protection in the Argentine legal order and any limitation upon them must be interpreted restrictively [...] The study of the main precedents of this Court regarding the extension of admissible restrictions on contractual rights due to economic emergency reasons shows a clear predominance of an interpretation that admits broad restrictions [...] It is necessary to establish criteria of correction for a stable interpretation, compatible with constitutional values and fit to become a solid foundation for the future of the Nation [...] all individuals are holders of fundamental rights with a minimum content that allows them to develop their eminent value as autonomous moral agents. Savings made by the citizens to guard themselves against [eventual] future hardships or to increase their assets must be protected by the judges, whatever the legitimate purposes of the depositor might be. This rule is the basis of the peace of mind that our people has the right to enjoy in an organized society, it is the foundation of mutual respect, and it is the main driving force of the economic growth that can only be achieved within a framework of stable institutions”<sup>1048</sup>

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<sup>1047</sup> *Id.* (Moliné O’Connor, López, JJ., concurring, §43; Nazareno, J., concurring, §43).

<sup>1048</sup> 329 *Fallos* 5913 (2006) (Lorenzetti, J., concurring, §24-29).

In *Rinaldi*, a case involving a mortgage loan between two private individuals, Justices Lorenzetti and Zaffaroni insisted that

“[t]he strong protection of the creditor’s contractual position strengthens legal certainty and is a solid foundation for a market economy. The history of the precedents of this Court shows a stance that has been too lenient regarding the permissible restrictions [and] that needs to be corrected because its institutional effects have been devastating”<sup>1049</sup>

One reading of these excerpts could be that they embrace the preservation of capital due to cultural cognitive biases in the evaluation of the consequences of alternative possible constitutional interpretations as well as of the kind of activity regulated by the challenged regimes. This is, of course, merely a tentative suggestion that, ultimately, may be impossible to prove. The legal decisionmaking environment may well be

“[...] too complex —too poly-centric and multivalent— to support the Kahneman and Tversky research methodology, at least with the level of purity and clarity that those researchers were able to achieve with respect to the ultimate interpretation of results [...] any attempt to replicate the Kahneman and Tversky research methodology within the context of realistic legal decision tasks may either fail to yield determinate cognitive inferences or fail to capture what is distinctively legal about the assigned tasks.”<sup>1050</sup>

Another, more cynical, reading of the transcribed passages would have the justices making grandiose statements about the importance of property rights only *pour la gallerie*, to appease the public regardless of the actual effects of the rulings on the protection of individual rights and independently of the justices’ belief (or disbelief) in such principles. But even this reading is well-captured by the *cultural cognition argument*.

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<sup>1049</sup> 330 *Fallos* 855 (2007) (Lorenzetti, Zaffaroni, JJ., concurring, §14). It must be noticed that in *Rinaldi* a “haircut” was admitted, as the creditor was to get one peso per original dollar, plus 30% of the exchange rate between the *peso* and the dollar, plus a legally-fixed interest rate. The argument, contradictory as it seems, was that although the emergency regime was in principle unconstitutional, it effected a re-adjustment of the contract in terms that were not obviously unconstitutional.

<sup>1050</sup> Douglas A. Kysar, “The Jurisprudence of Experimental Law and Economics”, 163 *J. Inst. Theor. Econ.* 187, 196 (2007).

Notice that this instrumental use of the “haircut”-“deferments” distinction would rely on the fact that the people believe in the distinction. In proper “cultural cognitivist” fashion, the justices would be varnishing their decisions with social meanings congenial to the citizens’ cultural values, in order to make them receptive to the decision’s underlying policies.<sup>1051</sup>

A third sort of argument that can explain the justices’ concern with keeping the “haircut”-“deferment of maturities” distinction alive is the *utilitarian argument*. Utilitarian considerations are ubiquitous in property rights theorization,<sup>1052</sup> so it shouldn’t be surprising that they make a cameo in my explanation of the Argentine Supreme Court’s jurisprudence on the topic. As the *textualist argument*, it is also very straightforward. It poses that the justices have tried to embrace the distinction because of its widespread appeal. Given that the popular conception of constitutional property seems to have been centered around the idea that reductions of capital are impermissible, while deferments are not, whatever the actual effects of the challenged emergency measures, the justices may have well thought that by defending (sometimes only the rhetoric of) the distinction, they would be maximizing utility. In short, according to this argument, even if the Court had thought that “haircuts” and “deferments” are financially equivalent and might well deserve equal constitutional treatment, it chose to treat them differently because the

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<sup>1051</sup> See Dan M. Kahan & Donald Braman, above n. 1044, at 171 (arguing that those interested in helping citizens to converge in support of empirically sound policies should focus “less on facts and more on social meaning. It’s only when they perceive that a policy bears a social meaning congenial to their cultural values that citizens become receptive to sound empirical evidence about what consequences that policy will have”).

<sup>1052</sup> See, e.g., Lawrence C. Becker, above n. 6, at 57-74; Stephen R. Munzer, above n. 181, at 191-226 (explaining the important role of considerations of utility and efficiency in the theory of property); Joseph Sax, “Takings, Private Property and Public Rights”, 81 *Yale L. J.* 149, 186 (1971) (arguing that “rather than fumbling with doctrinal labels and legal accusations, we can put our energy into trying to determine what resolution of conflicting uses is likely to *maximize total net benefits* for us”; emphasis added); Frank I. Michelman, above n. 897, at 1165 (analyzing the problem of compensation in takings from a standpoint incorporating important utilitarian elements); Bruce A. Ackerman, above n. 28, at 41-70 (explaining utilitarian adjudication of takings claims).

people perceive them as different. Such public perception leads to greater utility if capital is preserved. This is, undoubtedly, a highly-stylized argument, as carrying out an empirically-accurate utility calculation of this sort is extremely complex and, it might be argued, it is far from clear that, in each instance, the disutility arising from the violation of prospect theory-endowment effect theory preferences actually exceeded the potential utility that would have been brought about by accepting reductions of capital. But it is a potential explanation.

The last argument I want to offer is the *legitimacy argument*. In a nutshell, the idea is that justices have often defended the “haircut”-“deferment of maturities” distinction because they were engaged in the task of (re)building their own legitimacy and political power. Since the distinction is, I have argued, a central part of the dominant popular conception of constitutional property, embracing it should have helped the Court to build legitimacy in two closely-related ways. First, by interpreting the property clause in a way amenable to the layfolks’ view, the Court could credibly argue that it was doing nothing but applying the constitutional text. Such attitude seems to have been an important part of the Court’s success during its early years.<sup>1053</sup> Second, even if the constitutional text were taken out of the picture completely, the fact that the Court’s decisions aimed at satisfying the common intuitions regarding losses and gains, intuitions that are closely linked to perceptions of fairness,<sup>1054</sup> should have increased its sociological legitimacy. Under this light, the Court should have appeared to be doing “the right thing”, in the layfolks’ eyes, regardless of any knowledge (or lack of) the constitutional text.

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<sup>1053</sup> Jonathan M. Miller, above n. 75, at 79-80 (arguing that the main source of the Argentine Supreme Court’s authority and independence and, at least, a partial explanation of its initial relative success, was its ability to point to clearly established constitutional rules as grounds for its decisions).

<sup>1054</sup> See above n. 979 and accompanying text.



The *utilitarian*, the *cultural cognition* and the *legitimacy* arguments are closely related. They are all consequentialist and, in one reading of the cultural cognition argument at least, each of them aims to please the audience by appealing to a distinction that is generally accepted. They differ, however, in their ultimate goals. While the *cultural cognition* story has the judges aiming to make citizens receptive to what they believe are sound policies, the *utilitarian* explanation puts judges in a position of trying to simply maximize utility by vindicating the layfolks' view, and the *legitimacy* argument shows them attempting to build their own legitimacy and increase their political capital. The *textualist* explanation, on the other hand, is non-consequentialist and appeals to a much more traditional view of the judges' role. It is, as I said before, an "internalist" explanation.

Which of them offers the most persuasive account of the Court's jurisprudence? It is very hard to say, and the best answer is likely to be that all of the arguments have played a role. If we could have more substantial evidence, we would probably find a rather untidy mix of reasons, perhaps with different justices, at different times, being guided for reasons of one or another sort (as well as for reasons beyond the ones I have roughly offered here). The *textualist argument* finds some support in our legal culture and historical experience. Argentina has a strong continental, civil law tradition, where texts are very important. Judges are socialized in such juridical culture. Moreover, Jonathan Miller has argued persuasively that some sort of textualism has been an important part of the Court's argumentative arsenal and that it has been instrumental to its initial success. A plausible case could be made that Argentine judges feel some level of textual constraint. A recent strand of empirical research on lay people's attitudes towards judicial decisionmaking lends support to all three consequentialist arguments. Dan Simon and Nicholas Schuric have found that the acceptability of the courts' decisions are generally highly contingent on whether the outcomes are congruent with the individual's preferred outcome. However, lay people seem to be especially sensitive to the kind of reasons

given by decisions with which they disagree on the merits.<sup>1055</sup> If that's true, it makes sense to cover decisions that may be unacceptable on the merits with argumentative layers that show the Court's attentiveness to the lay folk's conception of constitutional property.<sup>1056</sup> This applies to *utilitarian*, *cultural cognitivist* and *legitimacy* approaches, as it satisfies either's goals.

Additionally, and this time pointing mainly towards the *legitimacy argument*, courts are keenly aware of the fact that they possess “neither force nor will, but merely judgment”, as The Federalist 78 famously put it,<sup>1057</sup> and thus, are very much interested in what the people at large think about their decisions.<sup>1058</sup> Justices Petracchi and Bacqué have called our attention to the point in the Argentine context

“The *lasting effect of judicial decisions depends on the arguments they contain and on their acceptance by the public opinion*, with which judges stand in a different dialectical relationship than the legislature. This relationship is also relevant because courts have no other means of imposing [their decisions] than the one that derives from the recognition of the argumentative and ethical authority of its judgments, as well as the propriety of their actions”<sup>1059</sup>

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<sup>1055</sup> See Dan Simon & Nicholas Scurich, “Lay Judgments of Judicial Decision-Making”, 8 *J. Empirical Legal Stud.* 709, 715 (2011) (showing findings that “when the participants’ preferred outcome was congruent with the court’s outcome, participants appeared to be insensitive to the type of reasons given by the court. Yet, when the court’s outcome contradicted their preferred outcome, they were attentive to the reasoning offered”).

<sup>1056</sup> For a defense of such strategic uses of legal arguments, see Michael L. Wells, above n. 107, at 1014 (arguing that “putting an attractive face on its rulings may serve the Court’s vital institutional need for public confidence”).

<sup>1057</sup> See Alexander Hamilton, “The Federalist No. 78”, in Jacob E. Cooke (editor), *THE FEDERALIST* 523 (Middletown, Connecticut, Wesleyan University Press, 1961).

<sup>1058</sup> “The Court’s power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means, and to declare what it demands”, 505 U.S. 833, 865 (1992) (O’Connor, Kennedy, Souter, JJ., plurality opinion).

<sup>1059</sup> See, e.g., 308 *Fallos* 2268 (1987) (Petracchi, J., concurring, §7); 311 *Fallos* 1499 (1988) (Petracchi, Bacqué, JJ., dissenting, §7). Emphasis added.

It has been demonstrated that legitimacy is an effective influence strategy,<sup>1060</sup> so the justices might well have resorted to the polemic distinction for legitimacy-building purposes. The fact that people believe the Judiciary is a credible independent guarantor of rights makes it more likely that it actually be so. By expanding the justices' political capital (and, thus, power), public belief in them puts the Court in a position where it can actually perform such expected role better (or where it has better chances of performing it). In order to be regarded as credible independent guardians of rights, courts need to appear as if they were defending the rights at stake, as perceived by the public. Whether true or not that the justices are defending the citizens' property by engaging in "haircut"- "deferment" distinctions, it makes sense that they do. Assuming, somewhat simplistically, that this is a "self-fulfilling prophecy" type of situation,<sup>1061</sup> the potentially driving force of appearances to improve reality may justify appearances management.<sup>1062</sup>

In an excellent recent book, Diana Kapiszewski has argued that Argentina's Supreme Court never adopted a support-building approach to decision making in the economic emergency cases covered by her study. In her view, "popular opinion regarding *a case* was never a decisive factor in its decision making".<sup>1063</sup> While I readily accept that a complex host of factors have been at play in the Court's decisionmaking, I

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<sup>1060</sup> See, e.g., Tom R. Tyler, above n. 108, at 392. See also, from a different perspective, Douglass C. North, above n. 4, at 44 (arguing that "the measurement costs of constraining behavior are so high that in the absence of ideological convictions to constrain individual maximizing, the viability of economic organization is threatened"; thus, "[i]nvestment in legitimacy is as much a cost of economic organization as are the measurement and enforcement costs [...]").

<sup>1061</sup> Adam M. Samaha, "Regulation for the Sake of Appearance", 125 *Harv. L. Rev.* 1565, 1578 (2012) (defining "self-fulfilling prophecies" as "situations in which a belief is the basis for behavior that pushes reality toward that belief over time").

<sup>1062</sup> *Id.*, at 1593-1596 (arguing that under "self-fulfilling prophecies" situations "a good appearance/bad reality situation [...] becomes less urgent compared to a bad appearance/good reality situation [...]; the former is self-correcting while the latter threatens a downward spiral" and that causation questions about the likelihood of the "self-fulfilling prophecies" assume a central role).

<sup>1063</sup> See Diana Kapiszewski, above n. 579, at 139. The italics are in the original.

still defend the position that acknowledges a significant space to the *legitimacy argument* as presented in this work, in shaping up the economic emergency case law. First of all, Kapiszewski's study covers only the period between 1986 and 2003 and, therefore, it leaves out a large number of prior and later important cases in which the Court has defended the "haircut" vs. "deferral of maturities" distinction and where the *legitimacy argument* cannot be discarded offhand.<sup>1064</sup> My analysis, which covers almost one hundred years, points in a different direction than hers. Second, and of particular significance, her study does not cover any decisions of the Supreme Court under its current line-up. The current Supreme Court, in particular under the presidency of Justice Lorenzetti, has shown a very special interest in building up channels of communication with the public opinion: it has begun a practice of holding public hearings in very important cases; it has started to accept *amicus curiae*; it runs a website dedicated to the Court's, as well as lower courts', most important decisions and news; among other initiatives. Some of the economic emergency decisions handed down by the Court's current incarnation exhibit a clear interest in reaching a broader audience for their reasoning —see, e.g., Justice Lorenzetti's concurring opinion in *Massa*, where he explicitly invokes the need for the citizens to know the reasons of the judicial decisions that affect their rights as a rationale for his expanded opinion—. Such attitude on the Court's part seems hard to reconcile with the idea that public opinion about a case played no role at all in the justices' decisions. Third, Kapiszewski argues that the public opinion was not a decisive reason in any of the economic emergency cases actually *decided* by the Court. But here what the Court did not do is as important as what it did. Kapiszewski fails to recognize the importance of the instances in which the Court did not decide a case, based largely on

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<sup>1064</sup> Notice that Kapiszewski acknowledges a different role for a legitimacy argument. In her view, the Court's weak perceived legitimacy did play a role in shaping interbranch interactions. Specifically, the Court's lack of legitimacy led it to issue rulings that challenged the elected branches' preferred policies even absent an expectation of compliance. See *Id.*

public opinion and, likely, in order to build up support for itself. There existed quite a few important instances in which the Court, unable to decide cases in a way at least amenable to the popular conception of constitutional property, did not decide them at all. *Bustos* is a good example. Embraced enthusiastically by the Kirchner administration, in so far as it validated *pesification*, but strongly rejected by the public —and professional— opinion, the Court could not gather a majority to apply its doctrines to the hundreds of thousands of analogue cases that were pending at the time, even when a majority of the seating justices had been appointed by the same administration.<sup>1065</sup> Last, but not least, even if, as a general matter, Kapiszewski's position were plausible, it would only undermine the *legitimacy argument's* value as an explanation of the Court's behaviour for the period covered in her study, but it would still be worth exploring the effects that such decisions had in the overall legitimacy of the Judiciary and, more generally, in its capacity to act as an independent guarantor of the Constitution.

In any case, the Court does build constitutional meaning drawing upon the views of large segments of the (regulated) population. Sometimes it does it openly, sometimes in the shadows. But it does it.<sup>1066</sup> Justices Lorenzetti and Zaffaroni have admitted as much in a fairly recent decision regarding economic emergency measures where they argued that

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<sup>1065</sup> Of course, a different reading of such cases is also plausible: the Court couldn't reach a majority, and thus it did not decide cases, not because it was mindful of public opinion, but because the justices couldn't reach an agreement on the merits, regardless of public opinion. For instance, one could argue that *Bustos* could not be generalized to the hundreds of thousands of pending cases, not because public opinion resisted the decision, but because some justices —Lorenzetti and Argibay— were not willing to endorse the *Bustos* doctrine for legal reasons. The evidence offered in this dissertation strongly points towards public opinion having a significant role in preventing the generalization of *Bustos*, regardless of any individual justice's legal stance in the issues at stake.

<sup>1066</sup> For an argument that the U.S. Supreme Court often resorts to majoritarian sources when it interprets the Constitution, see Barry Friedman, above n. 118, at 607 (arguing that an “abbreviated tour through parts of the Bill of Rights demonstrates that the Court often defines those rights from a highly majoritarian perspective. The Court's decisions are hardly always majoritarian. But employment of majoritarian sources is unquestionably common”).

[t]he *real mission* of the Tribunal in cases of institutional relevance is not to find the truth, nor to practice syllogisms, but to adopt a decision that, based on *reasonable and verifiable constitutional arguments that take into account the prevailing social consensus*, allows for the pacification of conflicts”<sup>1067</sup>

We should not forget, either, that as early as 1944, the Court cited as evidence of the reasonableness of an interventionist measure the broad support shown by large segments of the regulated sector.<sup>1068</sup>

Perhaps none of this should be surprising, given that

“[t]he effort to create and maintain legitimacy [...] leads institutions to have a focus upon those who are being led, and their conceptions of justice and fairness. Widespread legitimacy will exist only when the perspectives of everyday members are enshrined in institutions and in the actions of authorities”<sup>1069</sup>

By attempting to incorporate elements from the Ordinary Observer’s perspective into their jurisprudence, the justices may well have been making their decisions more “law-like”,<sup>1070</sup> and in that regard, more legitimate than by openly embracing a Scientific Policy-Maker stance.<sup>1071</sup>

Whether sound or not from a variety of theoretical perspectives, the “haircut”-“deferment of maturities” distinction is very much ingrained in the common

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<sup>1067</sup> 330 *Fallos* 855 (2007) (Lorenzetti, Zaffaroni, JJ., concurring, §13). Emphasis added.

<sup>1068</sup> 199 *Fallos* 483 (1944), §7.

<sup>1069</sup> See Tom R. Tyler, above n. 108, at 392.

<sup>1070</sup> See, e.g., Jennifer Nedelsky, above n. 83, at 238-239 (arguing that the U.S. Supreme Court “seems to be using the means of the ‘policy maker’, but guided by the ends of the layman: they are using the bundle of rights language and analytic exercises [...] to *bring their practices more in line with what they see as the ordinary understanding of property. And they enhancing the ‘law-like’ (as opposed to policymaking) image of their decisions at the same time*”; emphasis added).

<sup>1071</sup> See Michael L. Wells, above n. 107, at 1045 (arguing that —in the U.S. context— sociological legitimacy demands arguments with “straightforward and indisputable links to constitutional text, history and structure”); see also Jonathan M. Miller, above n. 75, at 79-80 (arguing that pointing towards clearly established constitutional rules, which did not look like policymaking exercises by the Court, was an important part of the Argentine Supreme Court initial success in terms of legitimacy).

understanding of property, and as such, it is a fact judges need to deal with. Facticity has a normative power that judges would ignore at their own peril.

### **c. The Failures of the Court's Approach.**

Some attentive readers may be wondering whether I am not missing something in this story. I have mentioned throughout this dissertation that, on the one hand, the Judiciary has often contradicted majority's will as enshrined in what I have called the popular conception of constitutional property and, on the other hand, that it has built its economic emergency jurisprudence drawing upon some basic insights of such popular conception. Am I not incurring in a glaring contradiction by affirming both propositions at the same time? Furthermore, if the Court has aimed to please the People regarding the constitutional contours of property, how can it be that such attitude has had no apparent success in increasing the Court's legitimacy? I will explain why there is no such contradiction. Some additional nuances are needed to fully understand this seeming paradox.

It is convenient to treat the two questions separately. The Court has failed, at least partially, in its attempt to elaborate an economic emergency jurisprudence that is responsive to popular ideas because of three different reasons. First, it has been more consistent in the rhetoric than in the outcomes. Thus, the people have perceived, via the media and other intermediaries between the Court and the people,<sup>1072</sup> much less responsiveness to their ideas about what it is just and fair to do in certain emergencies than the justices probably intended. Second, the "haircut"- "deferments of maturities"

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<sup>1072</sup> See, e.g., Barry Friedman, above n. 81, at 2632 ("[...] the public cannot possibly follow the actual content of opinions, and largely knows about opinions what the media or opinion leaders tell them"); Dan M. Kahan, "Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law", 125 *Harr. L. Rev.* 1 (2011) (highlighting the role of the media and other cultural intermediaries in the public's knowledge of the Court's opinions).

distinction has some inherent limits beyond which it cannot hold. If the deferment conditions are too burdensome, the popular perception will likely be closer to the perception of a financially-educated person and tend to deem the deferment as unacceptable. Third, judgements about the fairness of economic emergency measures<sup>1073</sup> are often complicated by additional factors, such as the existence of explicit official promises regarding the respect for property that are ultimately ignored and the distributive effects of the emergency regimes.

Whatever the grandiose rhetoric of protection of capital, the truth of the matter is that the Court has often validated reductions of capital.<sup>1074</sup> It has done so in a more open fashion in the case of contracts where the debtor was not a financial institution and in the case, which I do not analyze in-depth in this dissertation, of the restructuring of sovereign debt, while it has followed a more covert procedure in cases like *Peralta*. In doing so, the Court has acted in proper “countermajoritarian” fashion, contradicting the popular conception.

In *Galli*,<sup>1075</sup> for instance, the Court upheld the emergency decree that “pesified” —at an arbitrary rate which did not reflect the free-market value of the dollar sum originally owed— State bonds subject to Argentine law and reduced the interest yielded by the bonds. The “haircut” for creditors of the State, many of whom had invested a

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<sup>1073</sup> Fairness perceptions, in economic matters, are closely related to the “haircut”-“deferments” distinction, as I have shown above. See above n. 979 and accompanying text.

<sup>1074</sup> This has also been the case in the U.S. Supreme Court caselaw. See, e.g., *Perry v. United States*, 294 U.S. 330 (1935); *Norman v. Baltimore & O.R. Co.*, 294 U.S. 240 (1935); *Nortz v. United States*, 294 U.S. 317 (1935). The prevention of unforeseen windfall benefits on the creditor’s part has been considered a reasonable basis for sustaining legislation. See, e.g., 431 U.S. 1, 31 (1977). See also *City of El Paso v. Simmons*, 379 U.S. 487, 515 (1965) (“Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract”). For an argument framing the *Gold Clause Cases* as dealing with the elimination of windfall benefits, see Kenneth W. Dam, above n. 557, at 520-525.

<sup>1075</sup> 328 *Fallos* 690 (2005).



lifetime's savings, severance payments and other substantially important personal resources in financing the State, was evident.<sup>1076</sup> In *Rinaldi*,<sup>1077</sup> a case involving mortgage loans of less than 100,000 dollars between private individuals and where the debtor was at risk of losing her only home, the Court validated an outcome that effected a reduction of about 65% of the contractually-owed sums (considering a diminished, international-level, interest rate).<sup>1078</sup> In *Bezzi*,<sup>1079</sup> a case identical to *Rinaldi*, the Court improved a little bit the situation of the creditor, but still allowed a loss of close to 45% of the original credit plus reasonable interest.<sup>1080</sup> In *Fecred*,<sup>1081</sup> a case where the loan was larger than 100,000 dollars and the debtor's only home was at risk, the Court tolerated a loss of about 37% to fall on the creditor's shoulders.<sup>1082</sup> In *Longobardi*,<sup>1083</sup> a case involving a loan

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<sup>1076</sup> See, e.g., Carlos Gustavo Liendo & Horacio Tomás Liendo (h), "El ius variandi en los contratos de empréstito público. Del caso "Brunicardi" al caso "Galli"", 2005-E *La Ley* 189 (arguing that in *Galli* the Court upheld not a reasonable and temporary deferment in the exercise of the creditor's rights, but a definitive encroachment on the property rights of the bondholder).

<sup>1077</sup> 330 *Fallos* 855 (2007). Justice Fayt did not participate in the decision, and there were no dissents.

<sup>1078</sup> See Emilio A. Ibarlucía, "Pesificación de obligaciones no vinculadas al sistema financiero", 2008 *La Ley Supl. Const.* 19 (explaining that the Court's solution, for a hypothetical credit of 10,000 dollars, imposed the creditor a loss of about 65%, given that the "pesification" and adjustment index —24% total, plus 2,5% of annual interest rate for 6 years— validated by the Court returned a result of 14,454 *pesos*, while the capital in dollars, plus a 6% annual interest rate, was 13,725 dollars which —converted at the then-current exchange rate of 3 *pesos* per dollar— amounted to some 41,175 *pesos*).

<sup>1079</sup> 330 *Fallos* 4001 (2007).

<sup>1080</sup> See Emilio A. Ibarlucía, above n. 1078 (explaining the economic result of the Court's solution and its impact on the creditor's rights, which amounted roughly to 45% percent of their original value plus interests).

<sup>1081</sup> 331 *Fallos* 1040 (2008).

<sup>1082</sup> See Emilio A. Ibarlucía, above n. 1078 (explaining the economic result of the Court's solution and its impact on the creditor's rights, which amounted roughly to 37% percent of their original value plus a 6% annual interest rate).

<sup>1083</sup> 330 *Fallos* 5345 (2007). The case has three dissents, by Justices Lorenzetti, Fayt and Argibay.

of over 100,000 dollars where the unit to be foreclosed was not the debtor's only home, the Court validated a "haircut" of about 30% of the capital plus reasonable interests.<sup>1084</sup> Significantly, in all cases the Court took pains to show that property had been protected, despite the overwhelming contrary evidence.<sup>1085</sup>

In some instances, the "haircut"- "deferments" distinction is less likely to play its role in accordance to the popular conception, because its limits are overstretched. Despite its inherent psychological appeal, the distinction is still subject to the economic laws, and the longer the deferment, the more likely that the people perceives it as unfair and even as a reduction of capital, an actual loss.<sup>1086</sup> This is an objective limit, which depends partially on the conditions of the deferment (terms, interest rate, etc.) and on the surrounding economic circumstances (inflation rate, etc.). One notable example might be the Law 23,982 ("Public Debt Consolidation Law").<sup>1087</sup> It provided for the payment of all public debt with long-term maturities bond that stretched full restitution over sixteen years, with no payments at all during the first six years. For retirees who were creditors of

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<sup>1084</sup> See Emilio A. Ibarlucía, above n. 1078 (explaining the economic result of the Court's solution and its impact on the creditor's rights, which amounted roughly to 30% percent of their original value plus a 6% annual interest).

<sup>1085</sup> Again, a reader might object that, according to what I have argued, future interests are not central to the popular conception of constitutional property, so they shouldn't be considered either to assess the Court's decisions in terms of their perception by the people. While this is true, two things must be taken into account. The first is that estimates of creditor's losses have used a modified, reduced interest rate (as per *Avico*). The second is that even if interest rates were eliminated from the estimates, and they were carried out considering only the original capital in dollars, the results produced by the Court's decisions would still imply a reduction of such capital (although of a lesser extent, obviously). See Emilio A. Ibarlucía, above n. 1078.

<sup>1086</sup> Such popular perception is sometimes reflected on judicial opinions as well. See, e.g., *Worthen v. Kavanaugh*, 295 U.S. 56, 62 (1935) ("A state is free to regulate the procedure in courts even with reference to contracts already made, and moderate extensions of the time for pleading or for trial will ordinarily fall within the power so reserved. *A different situation is presented when extensions are so piled up as to make the remedy a shadow*"; internal citations omitted, emphasis added).

<sup>1087</sup> Full text available at <http://infoleg.gov.ar/infolegInternet/anexos/0-4999/381/norma.htm> (last visited 02/07/2013).

the State due to judicially-recognized social security debts, the law provided for payments with a 10-year maturity bond which would not return any money during the first six years. Finally, there is also a subjective limit, which I will analyze in further detail in the next chapter, but which, in a nutshell, has to do with the personal circumstances of the group of creditors who see themselves subject to a deferment scheme. For some of them (sometimes for most of them), the deferment will be an effective *definitive* reduction that violates the popular conception. Such situation relates to what I have called the “regressive redistribution” difficulty.

The lack of success in building legitimacy is a complicated matter. As I explained before, presidential and congressional tampering with the Court’s personnel has had a strong impact on the public image of the institution. A number of personal scandals, as well as founded perceptions of cronism, have certainly played an important role in undermining the Supreme Court’s stance. After the enlargement of the Court in 1990, its public image was so bad that even rulings that were akin to the popular conception of constitutional property and that aligned with popular humor were received with skepticism and failed to make a substantial improvement on the Court’s sociological legitimacy. Thus, while both very popular as far as outcomes were concerned, neither the *Smith* decision, handed down in the peak of the crisis and which meant for thousands of savers the possibility of getting a significant portion of their deposits back, nor the *San Luis* ruling, which cemented the position in favor of the savers, were enough to turn back the tide and improve the Court’s image to a point where the people would defend it from the political branches. Not even the staunchest defenders of those trapped in the *corralito* ran to defend the now strangely solicitous Court. Simply one among many other examples, El *Cacerolazo*, a magazine that defended the cause of those affected by the

emergency regimes, severely criticized all nine justices right after they had decided *Smith*.<sup>1088</sup>

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<sup>1088</sup> “Los jueces menemistas”, *El Cacerolazo*, March, 2002, at 6-10 (chastising all nine justices for different reasons, and disbelieving in their motives).

## The Redistribution Game at the Court.

### a. Fear of Property Rights: A Misplaced Concern for the Poor and the Jurisprudence of Regressive Redistribution.

Constitutions are often concerned with distributive questions, to varying degrees. They run all the gamut, from texts explicitly aiming at achieving particular redistributions of resources<sup>1089</sup> to texts bent on creating free competitive markets and preserving their outcomes.<sup>1090</sup> Argentina's text finds itself, after the 1994 Constitutional Convention,

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<sup>1089</sup> Section 25 of the South African Constitution, for instance, is a carefully worded provision that contains a broad permission for redistributive schemes. The text provides as follows: "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. (2) Property may be expropriated only in terms of law of general application- *a*) for a public purpose or in the public interest; and *b*) subject to compensation, the amount of which, and the time and manner of payment of which, have either been agreed to by those affected or decided or approved by a court. (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including- *a*) the current use of the property; *b*) the history of the acquisition and use of the property; *c*) the market value of the property; *d*) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and *e*) the purpose of the expropriation. (4) For the purposes of this section- *a*) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and *b*) property is not limited to land. (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress. (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1). (9) Parliament must enact the legislation referred to in subsection (6)". See also Matthew Chaskalson, "Stumbling Towards Section 28: Negotiations Over The Protection of Property Rights in the Interim Constitution", 11 *S. Afr. J. on Hum. Rts.* 222, 229 (1995) (arguing that during the negotiations over property rights in the Interim Constitution, "Once the ANC recognised that the Bill of Rights would contain a clause to protect existing property rights, it identified two crucial objectives in respect of the property negotiations: the property clause should not be able to frustrate a programme of restitution of lands to the victims of forced removals under apartheid, and the state had to have the power to regulate property without incurring an obligation to compensate owners [...] Ultimately, the ANC was able to secure these objectives quite effectively").

<sup>1090</sup> See, e.g., Jennifer Nedelsky, above n. 83, at 30-31 (explaining Madison's views, largely reflected in the U.S. Constitution, according to which "unequal possessions were the natural result of liberty; the protection of liberty implied the protection of possessions [...] redistributive schemes [were] iniquitous violations of both liberty and justice [...] what seemed so clearly iniquitous [...] was that their purpose was redistribution—and substantial redistribution— using the power of the state to change the terms of exchange and entitlement in order to take from some and give to others"). *Id.* at 181 ("[T]he social consequence of a market economy is a 'permanent division between dependent laborers and independent employers' [...] The problem of the rights of persons, property, and participation was critical because that division was inevitable. The Constitution was designed to make republican government work and the market secure *given* that division"; emphasis in the original). But see George L. Priest, "Economic

admitting various distributive concerns.<sup>1091</sup> One could mention the promotion of general welfare,<sup>1092</sup> and Congress's constitutional duty to provide for the "prosperity of the country", "the advance and welfare of all the provinces",<sup>1093</sup> as well as for "everything relevant to human development, economic progress with social justice, the growth of the national economy, the creation of jobs".<sup>1094</sup> Equality is the basis for taxation and the distribution of public burdens.<sup>1095</sup> But, at the same time, the Constitution has kept its firm commitment to the protection of private property.<sup>1096</sup> Any judges charged with applying constitutional review on the basis of such provisions will find it hard to avoid distributive arguments. Even more so if the case at hand involves economic emergency, where scarcity is usually intensified and demands for redistribution of wealth are high. The Argentine Supreme Court's caselaw has often returned outcomes that arguably contradict constitutional commitments to both property *and* equality.

Admittedly, private property is a difficult right to deal with. To the extent that it provides control over material resources indispensable to human life, thereby stabilizing

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Rights...", above n. 26, at 8-9 (arguing that while the U.S. Constitution "places some constraints on the ability of the states to impair the market", "the federal majority is not constrained in exactly similar ways" and, thus, these federal constitutional restrictions presuppose, rather than create, a market).

<sup>1091</sup> See, generally, Lucas S. Grosman *ESCASEZ E IGUALDAD: LOS DERECHOS SOCIALES EN LA CONSTITUCIÓN* (Buenos Aires, Librería, 2008) (arguing that the reformed constitutional text embodies the constitutional ideal of the structural equality of opportunities).

<sup>1092</sup> Preamble, Argentine Constitution.

<sup>1093</sup> Article 75.18, Argentine Constitution.

<sup>1094</sup> Article 75.19, Argentine Constitution.

<sup>1095</sup> Article 16, Argentine Constitution.

<sup>1096</sup> Articles 14, 17 and 28, Argentine Constitution. Neither of these provisions were modified in the 1994 Constitutional Convention and, as a matter of fact, they were expressly excluded from the amendment process by Congress when, in accordance to Article 30 of the Constitution, it called for a constitutional convention (Law 24,309).

people's expectations, it is a bedrock of personal autonomy and, thus, a right that should be enjoyed by as many people as possible.<sup>1097</sup> Under this light, property is undeniably an important right, deserving of a significant measure of respect, and therefore a suitable candidate for strong constitutional protection by judges. But insofar as private property gives individuals exclusive control over scarce resources, it spawns a series of well-known, hard-to-solve problems. Resources may not be abundant enough to satisfy everyone's needs or even to allow everyone to have their share of resources,<sup>1098</sup> regardless of the extent of their needs or of what share of resources we deem just. It is frequently argued that the possibility of excessive accumulation of property by individuals is problematic, even if everyone does have a share of social wealth, "for a person's effective share depends on what he can do with what he has, and that depends not only on how much he has but on what others have and on how what others have is distributed".<sup>1099</sup> Control over items of social wealth means power,<sup>1100</sup> and power can be exercised over others in unacceptable ways.<sup>1101</sup> Moreover, property seems to display a peculiar "normative resiliency" that makes it difficult to re-arrange existing entitlements, even if they cannot be fully justified from a normative perspective.<sup>1102</sup> These, along with other

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<sup>1097</sup> See Jeremy Waldron, above n. 2, at 131 (arguing that "If private property rights are something that each person needs for the satisfactory development of his autonomy, then it should be a matter of deep concern if the distribution of these rights is such that some people end up with none"). There are, of course, several strands of argument that aim at justifying private property. I will not enter this debate here.

<sup>1098</sup> Thus, the so-called "lockean proviso". See John Locke, above n. 33, at § 27 (arguing that labor is a title for private property, "at least where there is enough and as good left in common for others").

<sup>1099</sup> Gerald A. Cohen, above n. 18, at 12.

<sup>1100</sup> See J.W. Harris, above n. 180, at 4, 26, 31 (arguing that the capacity to dictate the use of resources endows owners with power over other individuals).

<sup>1101</sup> Gerald A. Cohen, above n. 18, at 10, 12-13.

<sup>1102</sup> See Jeremy Waldron, above n. 20, at 174 (arguing that "there is a range of cases in which the condemnation of an open taking as dishonest does not depend on any judgment on the justification of the

features, have given private property a bad name among those worried by distributive concerns.<sup>1103</sup> It has been called “the fundamental right of the well-to-do”,<sup>1104</sup> and it has sparked claims that economic liberties should not be just for the rich.<sup>1105</sup>

Modern left-leaning liberal thinkers, thus, are wary of property’s potential for freezing entitlements, a quality they claim hinders the search for social justice.<sup>1106</sup> There is a widespread view that the legislator —acting as a “scientific policymaker”—<sup>1107</sup> should enjoy wide latitude in regulating property rights in accordance with appropriate standards

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property right in question” and calling such a phenomenon “the normative resilience of property”); see also Emily Sherwin, above n. 15, at 1938-1941 (arguing that property rights’ resistance to change is tied to their social functions, thus there is a connection between their prospectivity and their “normative resilience” and stating that “[E]xisting property rights may be morally unjust, as measured by a patterned standard of distributive justice or by historical standards of justice in acquisition and justice in transfer. At the same time, disruption of established legal property rights may be a moral wrong to those who have arranged their lives around them [...]”)

<sup>1103</sup> There are, of course, exceptions, and progressive property theorists are by no means an extinct species. See, e.g., Gregory S. Alexander, Eduardo M. Peñalver, Joseph W. Singer & Laura S. Underkuffler, “A Statement of Progressive Property”, 94 *Cornell L. Rev.* 743 (2009).

<sup>1104</sup> Danny Nicol, *THE CONSTITUTIONAL PROTECTION OF CAPITALISM* 128-151 (Oxford & Portland, Hart Publishing, 2010) (arguing that in the context of the European Union the language and concepts of human rights have been appropriated by neoliberalism to try to protect the privileges of the rich and the powerful from democratic redistribution).

<sup>1105</sup> Erwin Chemerinsky, “Under the Bridges of Paris: Economic Liberties Should Not be Just for the Rich”, 6 *Chap. L. Rev.* 31 (2003).

<sup>1106</sup> See, e.g., Jennifer Nedelsky above n. 83, at 262 (arguing that to the egalitarian vision “[t]he freedom to use and acquire property and the security of one’s acquisitions are no longer defining elements of liberty and justice, but the potential objects of regulation and redistribution —aimed at assuring justice and liberty [...] Far from requiring respect for the boundaries defined by property, the egalitarian conception of liberty and justice requires incursions on traditional property rights”); see also Gregory S. Alexander, above n. 3, at 26 (arguing that progressives generally oppose the constitutional protection of property on the grounds that it may frustrate the realization of a just society as well as it may undermine some citizen’s possibilities of practicing democratic citizenship due to lack of the required wherewithal); John Tomasi, above n. 71, at 54-56 (explaining the position of “high liberalism” as committed to a thin conception of economic liberties which should be subordinated to a conception of substantive justice based on a thick notion of equality).

<sup>1107</sup> See Bruce A. Ackerman, above n. 28, at 10-20 (defining the “scientific policymaker” as someone who “manipulates technical legal concepts so as to illuminate the relationship between disputed legal rules and the Comprehensive View he understands to govern the legal system”, as opposed to the “ordinary observer”, and defending “scientific policymaking” as the proper approach to constitutional property questions).



of justice. The now standard deferential judicial position in U.S. property cases,<sup>1108</sup> epitomized by decisions like *Ferguson v. Skrupa*,<sup>1109</sup> enjoys broad support.<sup>1110</sup> These ideas

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<sup>1108</sup> See, e.g., George L. Priest, “Economic Rights...”, above n. 26, at 11-12 (describing the situation in the following terms: “over the years, we have seen substantial manipulation of the structure of economic activity by various legislative majorities in the U.S [...] vast majoritarian adjustments to the structure of U.S. contract law” as well as a “large range of direct economic regulation that majorities have implemented across the U.S. economy”). See also James W. Ely, Jr. *THE GUARDIAN OF EVERY OTHER RIGHT* 133 (New York, Oxford University Press, 1992) (explaining the constitutional shift occurred during the New Deal and arguing that, from then on, “the Court gave great latitude to Congress and state legislatures to fashion economic policy, while expressing only perfunctory concern for the rights of individual property owners. After 1937 [...] the justices routinely accepted legislative statements of policy, no matter how implausible, as a basis for upholding regulatory measures”); Daniel A. Farber & Philip P. Frickey, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 63 (Chicago & London, The University of Chicago Press, 1991) (“Since the New Deal, the Supreme Court has given Congress a free hand in economic regulation”); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 61 (1977) (Brennan, J., dissenting) (“In more recent times, however, the Court wisely has come to embrace a coherent, unified interpretation of all such constitutional provisions, and has granted wide latitude to ‘a valid exercise of [the States’] police powers, even if it results in severe violations of property rights”).

<sup>1109</sup> 372 U.S. 726, 729-730 (1963) (arguing that “Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy [...] We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws [...] Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to “subject the state to an intolerable supervision hostile to the basic principles of our government [...]”).

<sup>1110</sup> See, e.g., Richard H. Fallon, Jr. *THE DYNAMIC CONSTITUTION* 90 (New York, Cambridge University Press, 2004) (arguing that “Property and contract rights need to be defined before they can be protected [...] With property rights needing to be defined, Congress, the state legislatures and city councils all have a role in defining them [...] The enduring lesson of the *Lochner* debacle is that economic rights invite specification and adjustment by the political branches of government [...] and not merely interpretation by the courts”); Cass R. Sunstein *AFTER THE RIGHTS REVOLUTION* 167-168 (Cambridge & London, Harvard University Press, 1990) (arguing that the Supreme Court’s post-New Deal’s reluctance “to use the Constitution’s explicit protection of property and contract in a way that would significantly interfere with social and economic regulation” is due in part to the Court’s “understanding that in the post-New Deal period interferences with private contract and private property have considerable *popular support*”; emphasis added); Jonathan R. Macey, “Some Causes and Consequences of the Bifurcated Treatment of Economic Rights and ‘Other’ Rights Under the United States Constitution”, in Ellen Frankel Paul, Fred D. Miller, Jr. & Jeffrey Paul *ECONOMIC RIGHTS* 141, 168-170 (Cambridge-New York-Melbourne-Sydney-Ohio, Cambridge University Press & The Social Philosophy and Policy Foundation, 1992) (arguing that “the best explanation for the dichotomous treatment of economic and noneconomic rights by the Supreme Court is that this dichotomous treatment best reflects *the views of the legal culture* from which these justices came [...] the *growing acceptance within the legal culture of the proposition that economic liberties were less worthy of protection* than other sorts of liberties found its final and most complete expression in the twentieth century jurisprudence of the Supreme Court”; emphasis added); David E. Bernstein *REHABILITATING LOCHNER* 122 (Chicago & London, The University of Chicago Press, 2011) (emphasizing that although some liberal scholars hold the view that the “in completely abandoning liberty of contract, the Supreme Court has left important economic rights vulnerable to government overreaching”, it is a “distinctly minority position”); Stephen Macedo, “Majority Power, Moral Skepticism, and the New Right’s Constitution”, in James A. Dorn & Henry G. Manne (editors) *ECONOMIC LIBERTIES AND THE JUDICIARY* 111, 132 (Fairfax, George Mason University Press, 1987) (arguing that “Most commentators on the left applaud the Court’s shift from protecting economic values to protecting noneconomic ones”); John Rawls, above n. 4, at 174-176 (holding that economic regulation corresponds to the legislative, and not the constitutional, stage because “on many

have also been accepted in Argentina's caselaw, at least when economic emergency is at stake.<sup>1111</sup>

While defenses of strong protection of economic liberties on the grounds that they benefit the least well-off are fairly common in the classical liberal and libertarian fronts,<sup>1112</sup> my dissertation has provided additional empirical evidence that supports such claims and casts doubts on the wisdom of the dominant liberal position, at least in contexts of emergency.

The Argentine Supreme Court, I have argued, has frequently embraced the “haircut”-“deferment of maturities” distinction in order to align its jurisprudence with some widespread conception of constitutional property. Still, it has failed to gather consistent public support, and some of its central decisions using the distinction have

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questions of [...] economic policy we must fall back upon a notion of quasi-pure procedural justice: laws and policies are just provided that they lie within the allowed range, and the legislature, in ways authorized by the constitution, has in fact enacted them”). Interestingly enough, conservatives have also come to hold the view that property rights should not enjoy much judicial protection. See, e.g., Macedo, above at 111 (arguing that the New Right's constitutional vision implied a fundamental narrowing of judicial protections for individual rights generally); Antonin Scalia, “Economic Affairs as Human Affairs”, in Dorn & Manne *supra* at 32-34 (arguing that the Supreme Court's general refusal to grant substantive protection to economic liberties is “good”); Bernstein, above at 112-120 (describing the process by which conservatives came to reject a stronger role for Courts in the protection of economic rights).

<sup>1111</sup> See, e.g., 313 *Fallos* 1513 (1990) (majority opinion, §54) (rejecting a constitutional challenge to economic emergency measures and arguing that such rejection “[...] does not mean that [...] the rights of those who claim to have been affected [...] should not be taken into account, but it must be accepted that [their scope] has been determined by the Government in accordance to the role such rights played in the economy”); 327 *Fallos* 4495 (2004) (Zaffaroni, J., concurring, §3) (upholding economic emergency measures and arguing that “[T]he republican principle prevents this Court from assuming functions reserved to other branches of Government and from interfering with their exercise, but the same principle imposes that this Court exercises review in cases of *extreme irrationality or dysfunctional* measures that result in unjustified injuries to rights guaranteed by the Constitution”, emphasis added).

<sup>1112</sup> See, e.g., George L. Priest, “Poverty...”, above n. 26, at 12 (arguing that “the promotion of economic growth and the removal of market impediments is the surest method of increasing the income and wealth of those citizens with the lowest skills”); John Tomasi, above n. 71, at 125-140 (analyzing the works of several authors in the classical liberal and libertarian traditions and arguing that “while rejecting the idea of distributive justice, they defend their preferred institutional forms by predicting that these institutions will produce distributional patterns that benefit the poor”).

been severely criticized by large segments of the population. Why has it been so? A major flaw in the Court's caselaw has been not giving enough weight to the profile of those affected by the measures whose validity it upheld. It has applied the distinction without regard to the particular situation of the large majority of the regulated population and, thus, it has permitted the imposition of actual, definitive losses on them, with corresponding gains going to the well-off. It has, in sum, incurred in the "regressive redistribution difficulty".

During the last two great economic crisis (1989-1990 and 2001-2002), the profile of the bank depositor trapped by the emergency regimes has been clear. Small and medium savers have been, by and large, the sector affected by the measures. Remember that in 1989, the median depositor must have had somewhere about 2,000 dollars, while in 2001 almost half of the savers caught by "pesification" had deposits of 5,000 or less dollars. This data from 2001-2002 mirrors closely the information available from judicial sources regarding savers who actually litigated against the measures. Anecdotal evidence, taken from sources at the Supreme Court, points towards a 70 percent of the lawsuits involving deposits of 30,000 or less dollars,<sup>1113</sup> a result that is supported by a survey of 244 cases decided by the Supreme Court in 2010 and 2011, which return a 62% of cases involving deposits of 30,000 or less dollars.<sup>1114</sup> And a very similar proportion of the lawsuits —61.88%— involved cases where the life or physical integrity of a person was at risk or depositors were older than 75 years.<sup>1115</sup> Even more importantly, a substantial

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<sup>1113</sup> Off-the-record interview with judicial sources.

<sup>1114</sup> The sample is made up of 244 cases where the issue had been decided on the merits after December, 2006, and where issues of attorneys' fees had been raised afterwards and were decided between 2010 and 2011.

<sup>1115</sup> 151 out of 244 cases were decided by the Supreme Court by a short citation of the precedent *Rodríguez Ramona*, 331 Fallos 901 (2008), which was applicable for people who faced a true necessity and generally fitted into the categories of: 1) depositor older than 75; 2) depositor or close relative in need of the money for serious health reasons; 3) small amounts. One should be cautious, though, due to the fact that *Rodríguez*

part of the lawsuits involving larger amounts of money also fell in the category of needy depositors: 45% of cases involving deposits between 30,000 and 100,000 dollars, and 50% of cases involving more than 200,000 dollars. Therefore, the Court's jurisprudence, despite its emphasis on deferments and its apparent rejection of "haircuts", has the inherent potential to impose reductions of capital on small (or otherwise needy) players who are, in turn, the bulk of the regulated population. This reduction of capital might be (and frequently is) accompanied by a corresponding gain by a well-off player. Let us analyze *Peralta*, perhaps the landmark case on the topic, briefly.

The gist of the majority's decision, as far as property rights are concerned, is that the property clause of the Constitution is not violated when the State

"[...] enacts, by reasons of necessity, a rule which does not divest private individuals of lawfully recognized economic benefits nor does it deprive them of their property, but only limits temporarily the collection of such benefits or restricts the uses of such property"<sup>1116</sup>

As previously stated, the majority struggled to square the decision with its precedents by arguing that the measure implied a robust deferment of maturities, but not a reduction of capital,<sup>1117</sup> as a "superficial analysis" might lead one to think.<sup>1118</sup> The Court

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was decided some sixteen months after *Massa* (the precedent applicable to standard cases which did not involve needy or elderly depositors), which may account partially for an overrepresentation of this sort of cases in the sample (cases similar to *Massa* had been coming out of the Supreme Court for a while when cases similar to *Rodriguez* began to be decided).

<sup>1116</sup> 313 *Fallos* 1513 (1990), §38 and §56.

<sup>1117</sup> See, e.g., 329 *Fallos* 5913 (2006) (Argibay, J., concurring in the result, §5) (arguing that the *Peralta* majority struggled to make the decision fit within the "traditional" emergency caselaw by insisting that the measure only implied a deferment of maturities).

<sup>1118</sup> 313 *Fallos* 1513 (1990), §52.

argued that the plaintiffs would not suffer any losses, because hyperinflation was rapidly eroding the value of their *australes*, a crisis that the measure aimed to control.<sup>1119</sup>

This part of the Court's reasoning may be understood as containing two different arguments. One is a counterfactual argument, aiming at denying that the plaintiffs had sustained any losses: what would have happened if the *australes* of Luis Arcenio Peralta had been subject to further erosion by hyperinflation?<sup>1120</sup> Would that money be less than what Mr. Peralta could get at the time of the decision by selling his bonds below par? From the perspective of the individual rights at stake, the argument does not really work because if Mr. Peralta and his fellow right-holders had been paid their deposits at the original maturity date, they could have resorted to the proper devices to avoid erosion of their capital, i.e., they could have bought dollars. Of course, one could adopt a different, more society-oriented standpoint, and argue that such individual conduct would have pushed the dollar's price higher, therefore fueling inflation, with the ensuing harm to the community. But if one is making this sort of utilitarian calculations, then it is fairly irrelevant whether depositors suffered any losses of capital. All that matters is whether those losses are justified by counteravailing greater gains. So this counterfactual argument about the merely apparent character of the depositor's losses does not do any real work.

A more plausible argument is that capital losses are allowed as long as they are temporary and not definitive. In other words, deferments of maturities may be allowed, while reductions of capital are not. As any postponement of payments implies a reduction of the present value of a credit, they are equal to a temporary reduction of capital, which is permissible. But this argument does not work when applied to needy involuntary bondholders: if forced to sell, they undergo a loss of capital, not a mere

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<sup>1119</sup> *Id.*

<sup>1120</sup> *Id.*, §54.

deferment of maturities. In other words, they sustain a definitive, as opposed to a merely temporary, loss. And this is forbidden by the same argument. Problematically, a substantial majority of the individuals affected by the measures are usually relatively poor and needy<sup>1121</sup> and, hence, likely candidates for early, well-below-par sales of their bonds.<sup>1122</sup> Almost by definition, purchasers must be subjects with enough spare resources to invest and bear the wait. So the Court's argument, by allowing re-structuring of maturities without any attention to the particular situation of the affected, opens the door for very regressive redistributions in the wake of economic emergency regulations.

#### **b. And So What? Distributive Justice in Emergency Contexts.**

Someone might argue that even if I am right that economic emergency measures often instantiate regressive redistributions, they may well be justified nonetheless.<sup>1123</sup> The debates over the justification of property rights normally display a fair amount of utilitarian arguments,<sup>1124</sup> so it should come as no surprise that such considerations

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<sup>1121</sup> For additional empirical evidence confirming this common sense intuition as well as my own findings, see Marina Halac & Sergio L. Shmukler, "Distributional Effects of Crises: The Financial Channel", 5 *Economia* 1, 45-48 (2004) (showing statistics that prove that "while richer households are more likely to have savings, the poorer households with savings have a higher probability of being harmed from the crisis and its resolution").

<sup>1122</sup> The Court was well-aware of this fact in *Peralta*, where it rejected the claims of two retirees who were demanding the equivalent of 1,400 dollars, and closed the doors to claims based upon the neediness of the plaintiffs by saying that while the Court was aware of the "[...] regrettable situation in which many of those affected [by the decree] may find themselves. It would seem, however, that if the problem has any solution at all, it must be sought in the future, rather than attempting to find it in the past through the demand, at any cost, of formerly recognized rights", see 313 *Fallos* 1513 (1990), §59.

<sup>1123</sup> See, e.g., Eldar Sarajlic, "Distributive Justice in Crisis", 6 *C.E.U. Political Science Journal* 458, 462-463 (2011) (arguing that there is a distinct normative principle that, under conditions of crisis, prescribes that "the distribution of resources [...] prioritize actors that are essential for the recovery of the economic system", even if they are the richer part of the population).

<sup>1124</sup> See, e.g., Lawrence C. Becker above n. 6, at 57-74 (analyzing the role of utility arguments in the justification of property rights); Stephen R. Munzer above n. 181, at 191-226 (explaining the important role of considerations of utility and efficiency in the theory of property).

assume a central role in emergency debates, where consequences generally displace, at least partially, other considerations.<sup>1125</sup>

Someone might say, for instance, that in a situation of the “too-big-to-fail” type, like a banking system bail-out, the relatively weak and poor receive in-kind compensation<sup>1126</sup> by the continued existence of businesses owned for the most part by wealthy people —i.e., banks. Or, along the same lines, that in high inflation contexts, the worse-off are benefitted, perhaps more than others, by the abatement of inflation.<sup>1127</sup> There are a number of possible versions of this argument. All of them can be gathered under the *in-kind compensation* banner.

Another possible line of argument is that re-arrangements of property rights sometimes foster economic growth<sup>1128</sup> which, all other things being equal, seems to be a pretty compelling prospect from the standpoint of society. This argument can have, at least, two versions. One focuses strictly on the effects of encroachments upon existing

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<sup>1125</sup> See, e.g., Michael J. Sandel, *JUSTICE* 13 (Farrar, Straux & Giroux, New York, 2009) (arguing that in the recent financial crisis in the U.S. “the welfare of the economy as a whole seemed to outweigh considerations of fairness”).

<sup>1126</sup> Frank I. Michelman, above n. 897, at 1225 (analyzing the practice of compensation as a whole, including non-compensable harms, and arguing that “it seems we are pleased to believe that we can arrive at an acceptable level of assurance that *over time* the burdens associated with collectively determined improvements will have been distributed “evenly” enough so that everyone will be a net gainer”); Richard A. Epstein, above n. 98, at 195-215 (developing a theory of when implicit in-kind compensation satisfies the requirement of “just compensation” under the U.S. Constitution).

<sup>1127</sup> See, e.g., Pablo Gerchunoff & Lucas Llach, above n. 656, at 443 (arguing that the virtual elimination of the “inflationary tax” by the 1991 “Convertibility Plan” had a progressive distributive effect).

<sup>1128</sup> See, e.g., Douglass C. North, above n. 4, at 172 (arguing that, in the context of the transition between the First and the Second Economic Revolutions, a society’s ability to realize its productive potential required a basic restructuring of property rights). See also Jennifer Nedelsky, above n. 83, at 226 (arguing that during the nineteenth century, judges in the U.S. changed the rules of property, contract and tort, and destroyed vested rights in the process, all “in the name of progress, economic development, and the common good”); James W. Ely, Jr., above n. 1108, at 6 (arguing that “[e]conomic development was a primary objective of Americans in the nineteenth century, but steps to promote growth frequently clashed with the interests of particular property owners [...] As a consequence, legislators and courts have often compelled existing property arrangements to give way to new economic ventures and changed circumstances”).

property entitlements on promoting growth, without any explicit distributive concerns. In this reading, strong property rights, at least in some instances, can be formalistic hindrances to the pursuit of the general welfare.<sup>1129</sup> Given that after the 1989 compulsory swap of bank deposits into long-term bonds, and after the general “pesification” of all contracts in 2002, there followed phases of significant growth,<sup>1130</sup> the argument justifies a weak protection for property rights, whatever the seeming distributive effects of the emergency measures. This version of the argument, at least as roughly described, could be considered, somewhat loosely, as utilitarian. Another version of this argument has a more explicit concern for distributive outcomes and pays close attention to the situation of the poor: economic growth benefits the least well-off by diminishing absolute poverty.<sup>1131</sup>

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<sup>1129</sup> See, e.g., Jean Baechler, “Liberty, Property, and Equality”, in J. Roland Pennock & John W. Chapman, above n. 6, at 276-277 (arguing that in a capitalist environment individual property is problematic, and that, occasionally, it may become a hindrance to economic development). Such an argument may find support in certain revisionistic strands in the Law and Development literature that call into question the conventional wisdom regarding the importance of property rights in fostering economic growth. See, e.g., Frank B. Upham, “Chinese Property Rights and Economic Growth”, 39 *Hong Kong L. J.* 611, 619 (2009) (arguing that “[...] no one is enforcing property rights, and yet China continues to grow faster than any other significant economy in the world. Would China grow faster if property rights were enforced? No one can answer that question, but it seems unlikely. Indeed, the lack of property rights arguably accelerates the process”). But see Thomas W. Merrill & Henry E. Smith, *THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY* 232-233 (New York, Oxford University Press, 2010) (“[...] notwithstanding the weak legal and political checks on government interference with property rights, China has had little difficulty in recent years attracting large amounts of capital from foreign investors [...] The best answer would seem to be that Chinese administrators in the post-Mao era have developed a strong norm against interfering with the expectations of foreign investors [...] Whatever the explanation, the recent history of China suggests that caution is in order before concluding that strong legal rights enforced by courts are a necessary precondition for creating the degree of government forbearance needed for investment in property to flourish”).

<sup>1130</sup> See, e.g., Jerome Booth, above n. 766, at 484 (arguing that the stabilization that followed the so-called “Convertibility Plan” of 1991 led to an investment-led boom and strong economic growth in Argentina); Christopher Wylde, “Post Crisis Recovery and Developmentalism: Argentina and Malaysia in Comparative Perspective” (arguing that “after the crisis of 2001-02 [Argentina] experienced a dramatic and sustained recovery, with growth rates of 8-9 percent”) (available at [www.csetranspennine.files.wordpress.com/2012/06/wylde.pdf](http://www.csetranspennine.files.wordpress.com/2012/06/wylde.pdf); last visited 04/01/2013); Vicky Baker, “Ten years after economic collapse, Argentina is still in recovery”, *The Guardian*, December, 14, 2011 (available at: <http://www.guardian.co.uk/commentisfree/2011/dec/14/10-years-argentina-economic-collapse>; last visited 04/12/2013) (arguing that the Argentine “[...] economy appears to be booming, with a real GDP growth of 9.1%. Unemployment is down to a 20-year low. Some have been holding it up as an example for Greece [...]”).

<sup>1131</sup> See George L. Priest, “Poverty...”, above n.. 26, at 1 (arguing that “there is increasing acceptance of



It could be argued, in a more crudely utilitarian fashion, that even if the vulnerable are not compensated in kind, the mere fact that their enduring losses does not cause great social (or “systemic”) harm, as opposed to the losses that big players would otherwise suffer, justifies a distributively-regressive policy.<sup>1132</sup>

The first two arguments have an apparent Rawlsian flavor: one might argue that the redistribution caused by emergency measures —let’s call this state-of-affairs “C”, where the worse-off have “x minus y percent” wealth— is objectionable only if compared to state-of-affairs “A”, which is prior to the crisis and where the worse-off have an “x” amount of wealth, but not when compared to state “B” —a hypothesis where the emergency measures are not taken and the crisis is let run its course— where the worse-off are left with less than in “C”. So, no matter how much richer the wealthy and powerful are made by the emergency measures, the situation still satisfies the difference principle, insofar as it puts the worse-off in a better situation than they would otherwise be.<sup>1133</sup>

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the proposition that economic growth is closely related to the reduction of absolute poverty”). The argument can be understood in broadly utilitarian terms, where the sum of utility—including the poor’s utility—is greater when economic growth is achieved, or in non-utilitarian, Rawlsian terms, as I explain below.

<sup>1132</sup> See, e.g., Carlos F. Rosenkrantz, “Restrictions to Property Rights in Circumstances of Scarcity”, *SELA papers 2008*, at 6-8 (justifying “pesification” of bank deposits and, at the same time rejecting “pesification” of loans between private individuals, on grounds that in the former, but not the latter, case restrictions on property rights of creditors brought about large systemic benefits) (available at <http://www.law.yale.edu/documents/pdf/sela/Rosenkrantz.pdf>; last visited 01/17/2012). Spanish version in Paola Bergallo (editor) *DERECHO Y PROPIEDAD* 38-50 (Buenos Aires, Libreria, 2009). “Systemic” benefits, in Rosenkrantz’s theory, are benefits to the “system of acquisition, protection and distribution of resources” and, if large enough, they may compensate restrictions on individuals’ property rights. For a slightly different argument, see David A. Strauss, “Why Was *Lochner* Wrong?”, 70 *U. Chi. L. Rev.* 373, 385 (2003) (arguing that whatever its merits as a matter of social policy, “the legislature might be warranted in concluding that despite the regressive effect of the minimum wage, the gains to those who benefit from it outweigh the harm to those who lose out”).

<sup>1133</sup> For one such reading of Rawls’ difference principle and an application to a similar case, see Eldar Sarajlic, above n. 1123, at 469-470. Of course, the Rawlsian scheme may impose some limits to how much richer the wealthy can be made by any given measure, despite its contributing to the improvement of the situation of the worse-off, due to the priority of liberty. See, e.g., John Rawls, above n. 4, at 70 (arguing that “[...] there is a maximum gain permitted to the most favored on the assumption that, even if the difference principle would allow it, there would be unjust effects on the political system and the like excluded by the priority of liberty”).

The *economic growth* argument is also susceptible of a Rawlsian reading: by reducing absolute poverty, economic growth improves the life prospects of the worst-off in myriad ways that include, but exceed, their income.<sup>1134</sup> Whatever inequalities in income exist, the argument might go, are justified under the difference principle, as they work to the benefit of the worst-off.<sup>1135</sup>

The utilitarian arguments, instead, have a built-in bias towards favoring the rich: given that they usually own important resources, whose proper functioning often has a large social impact, it is likely that a crisis principle that prioritizes “systemic” gains (or short term overall growth, in the *economic growth* argument) will point in the direction of regressive redistributions.

One could tackle all four arguments on their own terms. The Rawlsian variants must be contextualized. The difference principle “dictates that social and economic policies be aimed at maximizing *the long-term expectations* of the least advantaged”.<sup>1136</sup> So even if a committed Rawlsian needs not be particularly worried by the fact that members of a relatively worse-off class —as small (or otherwise needy) savers— are harmed by emergency regulations, insofar as those at the very bottom are benefitted,<sup>1137</sup> in cases where regressive redistributions for emergency reasons are a repeated phenomenon, the

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<sup>1134</sup> See George L. Priest, “Poverty...”, above n. 26, at 3 (arguing that economic growth leads to a general increase in life expectancy, which should be embraced by every moral system); *id.*, at 12 (arguing that the promotion of economic growth and the removal of markets impediments are “the surest method of increasing the income and wealth of those citizens with the lowest skills”).

<sup>1135</sup> The limits set by the priority of liberty in the Rawlsian scheme are, of course, also applicable to the economic growth argument.

<sup>1136</sup> John Rawls, above n. 4, at 175. The italics are mine.

<sup>1137</sup> *Id.*, at 70-71 (explaining “chain connection” as the situation where any rise in the expectations of those at the very bottom of the social scale is accompanied by a corresponding rise in the expectations of groups situated in the middle of the social scale and arguing that “[t]he difference principle is not contingent on these relations being satisfied”).

long-term expectations of the worse-off are diminished.<sup>1138</sup> And this would violate the difference principle.

Moreover, there is the undeniable fact that, at least during the two most recent crises, the universe of individuals directly affected by the emergency regulations has been very similar, with a clear, repetitive pattern of affecting small, medium or otherwise needy savers. Even if my rough empirics cannot show that any given individual was affected, and turned out to be a loser, in *both* the 1989 bank deposits freeze and in the 2002 “pesificación”, the fact that the profile of the affected was extremely similar in both crises is significant. The same people, although surely not all the same individuals, were to bear the heaviest burden of controlling the crisis. In such a context, Michelman’s argument about a long-term even distribution of burdens that makes everyone a net gainer simply does not hold.<sup>1139</sup>

The utility (“systemic gains”) argument, as well as the economic growth argument in any of its versions, need to take into account the effects of recurrent disruptions of property rights in the larger scheme of things. While drastic re-arrangements of property rights may well be instrumental in establishing economic policies that allow for the taming of the crises, and even for the beginning of a process of growth,<sup>1140</sup> they come at

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<sup>1138</sup> The general point was made early on by Allen Buchanan. See Allen Buchanan, “Distributive Justice and Legitimate Expectations”, 28 *Philos. Stud.* 419, 424 (1975) (arguing that “the prospects of the worst off include their prospects of ascending to higher positions, of enjoying the benefits of those positions, and of being able to continue to enjoy those benefits. Maximizing their expectations, then, will require taking into account the stability of institutional arrangements, since liability to future disruptions decreases their present expectations, other things being equal”).

<sup>1139</sup> See Frank I. Michelman, above n. 897, at 1225.

<sup>1140</sup> Arguably, the “Bonex Plan” —in itself a failure in its claimed objective of taming inflation— paved the way for the “Convertibility Plan” that ultimately controlled inflation and led to a phase of growth. See above n. 758.

a high cost. A long-term view is needed to assess this kind of arguments fairly, as *sustainable* growth seems to require strong property rights.<sup>1141</sup>

Some literature describes property rights functioning “at their best” when, among other conditions, they are not readily reconfigured by a judge or other government decision-maker.<sup>1142</sup> Contrarily, they are “at their worst”, among other situations, when “their contours can be changed either only at the discretion of government actors or too easily at the discretion of government actors”.<sup>1143</sup> When “at their best”, property rights “promote economic growth, competition, and jobs”.<sup>1144</sup> Empirical evidence backs up such claims.

“Countries with greater constraints on politicians and elites and more protection against expropriation by these powerful groups have substantially higher income per capita (i.e., higher long-run growth rates), greater investment rates, more credit to the private sector relative to gross domestic product, and more developed stock markets”<sup>1145</sup>

When property rights are subject to recurrent attacks in the name of emergency (and/or the general welfare, the ultimate actual or rhetorical reason for the emergency regulation) the players perceive the opportunities for redistribution via the political

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<sup>1141</sup> See Douglass C. North, above n. 4, at 23 (highlighting the “widespread tendency of states to produce inefficient property rights and hence fail to achieve *sustained* growth”; emphasis added). *Id.*, at 148 (finding in the nature of the property rights developed in each emerging nation-state in Europe during the seventeenth century the reason for their differential growth rates). See also Daron Acemoglu & Simon Johnson, “Unbundling Institutions”, 113 *J. Polit. Econ.* 949, 988 (2005) (finding “robust evidence that property rights institutions have a major influence on *long-run economic growth*, investment, and financial development”; emphasis added).

<sup>1142</sup> See, e.g., Stephen H. Haber, F. Scott Kieff & Troy A. Paredes, “On the Importance to Economic Success of Property Rights in Finance and Innovation”, 26 *Wash. U. J. L. & Pol’y* 215, 216 (2008).

<sup>1143</sup> *Id.*

<sup>1144</sup> *Id.*

<sup>1145</sup> Daron Acemoglu & Simon Johnson, above n. 1141, at 953.

process. The structures of incentives promote investment in rent-seeking activities.<sup>1146</sup>

Rent-seeking is harmful for economic growth, as it is a wasteful, unproductive activity.<sup>1147</sup>

As one economist scholar explains:

“[t]here are three basic negative consequences for economic growth as a result of weak protection of property rights. First, private protection wastes resources because it is an unproductive activity. Second, the threat of expropriation distorts the economic environment and leads to suboptimal paths of capital accumulation and production. Third, extensive rent-seeking and improper public protection of property rights are associated with substantial income inequality”<sup>1148</sup>

Historically, the security of property rights has been “a critical determinant of the rate of saving and capital formation”.<sup>1149</sup> By compromising property rights on savings invested in the banking system, the Argentine Court’s jurisprudence on economic emergency, far from fostering economic growth, has hindered it.

In Argentina, long-term lending —essential for productive investments or for more personal, but equally important, projects like purchasing a house— is, unsurprisingly, very scarce. It depends crucially on savings and capital formation. But, consistent with the structure of incentives created by the economic emergency

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<sup>1146</sup> James Buchanan & Gordon Tullock, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 156 (Indianapolis, Liberty Fund, 2004) (arguing that, under simple majority voting, there will be a net transfer of income from the minority to the majority and where such direct transfers are forbidden, the majority will resort to financing special benefits through levying general taxes or through financing general benefits through special taxes).

<sup>1147</sup> See, e.g., Konstantin Sonin, Private Protection Of Property Rights, Inequality, and Economic Growth in Transition Economies”, *EERC Working Paper Series* 4 (2001) (available at [https://eerc.ru/default/download/creator/working\\_papers/file/ba271fad501a1f4f4a6c8a496c23f7470c275c89.pdf](https://eerc.ru/default/download/creator/working_papers/file/ba271fad501a1f4f4a6c8a496c23f7470c275c89.pdf); last visited 02/13/2013) (arguing that “[T]here is substantial empirical and theoretical evidence that rent-seeking is harmful for growth” and providing evidence from the Russian economy). See also Richard Posner, “The Constitution as an Economic Document”, 56 *Geo. Wash. L. Rev.* 4, 10 (1987-1988) (“A purely redistributive statute by definition does not increase the size of the social pie, but actually shrinks it because resources will be expended on obtaining and resisting the enactment of the statute”).

<sup>1148</sup> Konstantin Sonin, “Why the rich may favor poor protection of property rights”, 31 *J. Comp. Econ.* 715, 717 (2003).

<sup>1149</sup> See Douglass C. North, above n. 4, at 6.

jurisprudence, depositors do not trust the system or the government and prefer flexibility. Whatever their short-term benefits, the Bonex Plan and the *Peralta* decision took their toll by discouraging stable, long-term investments. By 1997, six years after the Supreme Court ruling, depositors were still extremely averse to risk and preferred to maintain “extremely flexible financial positions”.<sup>1150</sup> Something similar happened with the “pesification” of bank deposits and the *Bustos* decision, validating it. Over half of the total deposits in Argentina in 2008 were demand deposits.<sup>1151</sup> Being largely devoted to short-term operations, it’s virtually impossible for the Argentine financial system to fulfill its fundamental role of channeling savings into investments.<sup>1152</sup> Moreover, Argentines who have access to offshore banking put their savings abroad, thus detracting large amounts of money from the national productive circuit.<sup>1153</sup> Our history of economic emergency has undeniably played an important role in creating such undesirable state of affairs.<sup>1154</sup> In fact, recent studies show that poor enforcement of contracts and property

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<sup>1150</sup> See Guillermo Rosenwurcel & Leonardo Bleger, above n. 682, at 175 (arguing that, by 1997, depositors were still strongly averse to risk and, therefore, they preferred to maintain extremely flexible financial positions).

<sup>1151</sup> Agustina Leonardi, Fernando Staffieri & Adriano Mandolesi, “El Sistema Bancario en Argentina”, Instituto de Estudios Económicos, Fundación Libertad, March, 2009, at 7 (available at: <http://www.iee.org.ar/analisismarzo.pdf>; last visited 02/15/2012).

<sup>1152</sup> *Id.*, at 9.

<sup>1153</sup> It is estimated that, by 2004, Argentines held about one hundred thousand million dollars abroad. See “Becoming a serious country”, *The Economist*, June, 5, 2004, at 70 (available at <http://www.economist.com/node/2704457>; last visited 02/18/2013). Even some provincial governments preferred off shore banking for their revenue. Most notably, the province of Santa Cruz, under Governor Kirchner (who, remember, would go on to become president of the Nation and to pressure the Court to uphold “pesification”), deposited abroad some 500,000,000 dollars. See, e.g., “Confirmation there was a request on Kirchner's financial transactions” (available at <http://www.atfa.org/confirmation-there-was-a-request-on-kirchners-financial-transactions/>; last visited 04/01/2013).

<sup>1154</sup> Agustina Leonardi, Fernando Staffieri & Adriano Mandolesi, above n. 1151, at 9 (mentioning among the causes of the problem “the confiscation of deposits and the asymmetric pesification” and the “recurrent inflationary processes and expropriations in the Argentine history”).

rights, especially from the 1940's on, has been a determinant factor of Argentina's economic stagnation.<sup>1155</sup>

In light of the aforementioned evidence, a utilitarian-minded policymaker would do well to take seriously the long-term effects of emergency redistributions on the possibilities of economic and personal development. So would anyone interested in fostering sustainable economic growth.

But even if the arguments analyzed above are partly true and justify taking emergency measures such as the ones discussed throughout this dissertation, they leave out the crucial question of explicit compensation: if benefits are so general, as economic emergency regulations usually presuppose, why should a particular sector of the population bear the whole burden?<sup>1156</sup> Even more, why should we let the burden fall on those relatively disfavored to the particular benefit of the already rich and powerful? Economic emergency measures as the ones analyzed here usually take a “photographic”

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<sup>1155</sup> See Leandro Prados de la Escosura & Isabel Sanz-Vilarroya, “Contract enforcement, capital accumulation, and Argentina's long-run decline”, 3 *Cliometrica* 1, 2, 13 (2009) (using Clague et al's notion of “contract intensive money” [CIM], as a measure of compliance with contracts and of the security of property rights, and finding that “until the 1960s, poor contract enforcement played a major role in Argentina's unique historical experience of economic decline. Later, between the early 1970s and 1990s, hyperinflation reduced CIMs ability to capture the compliance of contracts” and that “[a]ll in all, the results of the estimated system of equations suggest that, in Argentina, contract enforcement and the security of property rights, as measured by CIM, would lead to higher rates of human and physical capital accumulation and, thus, [would result] in higher per capita GDP”).

<sup>1156</sup> This common sense intuition is reflected in the U.S. Supreme Court interpretation of the Fifth Amendment. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (arguing that “[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting) (arguing that “[w]hen one person is asked to assume more than a fair share of the public burden, the payment of just compensation operates to redistribute that economic cost from the individual to the public at large”); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935) (“[...] the Fifth Amendment commands that, however great the nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public”). Remarkably, this interpretation of the Fifth Amendment is shared by justices of all ideological stripes, including some who were not staunch defenders of private property. The *Radford* opinion was authored by Justice Brandeis and the *San Diego Gas & Elec. Co.* dissent cited before was written by Justice Brennan.

approach to the distribution of crises' costs. They freeze their focus on the moment a solution is badly needed and look no further. But it is not implausible to think that as soon as the worst is over, compensation (or more complete compensation) should be forthcoming.<sup>1157</sup> Let me borrow an example to state my case more clearly:<sup>1158</sup> if a ship is threatened by a storm, to the point of risking wreckage, and the technically correct solution is to lose weight in a certain sector of the vessel, it may be justifiable (indeed, it may be required) to throw away the baggage that is closest to that sector. All passengers of the boat, including the owners of the discarded baggages, benefit from the measure. Still, it would not be acceptable to hold that owners of discarded baggages have no legitimate claim to compensation as they would have been compensated implicitly by their taking advantage of the ship's safe arrival in port. Or, similarly, that they would have been worse in the alternative scenario where no action is taken and the ship sinks, so the measures were to their advantage and their regressive distributive effects are justified. One would think it is only fair that all those who benefitted from the measure contribute in equal proportions to the sacrifices incurred. Compensation, hence, is warranted.

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<sup>1157</sup> See, e.g., Bruce A. Ackerman, above n. 28, at 72-73 (modeling an ideal "restrained Kantian" approach to takings' claims which would find it easy to order compensation in cases where one group's property is taken for the benefit of the larger community and such benefits have accrued, because "[b]y placing the losers in as good a position as they were at Time one, it has been made clear that [they] are not conceived merely as means to the greater satisfaction of social utility"); Eldar Sarajlic, above n. 1123, at 477 (arguing that "once the economy is stabilized, the actors that have received resources under the pretext of their essential importance for stabilization have an obligation to redress the inequality of crisis distribution through priority measures aimed at the least advantaged members of society who would, had the crisis not occurred, have received more resources in absolute terms, or alternatively, aimed at bringing the crisis-deepened inequalities at the pre-crisis levels"). My argument is slightly different from Sarajlic's, as he assumes that redress should be directed at the least advantaged members of society. While I wholeheartedly endorse the idea that those at the bottom are entitled to priority measures that tend to improve their situation, my idea of compensation aims at the fair allocation of the burdens of controlling the crisis. The relatively vulnerable sectors that were forced to bear disproportionate burdens at the height of the crisis should be compensated. This sector may, or may not, coincide with the absolute worse-off.

<sup>1158</sup> I borrow this example from Lucas Grosman, Revised Opinion in *Peralta*, in José Sebastián Elías, Julio C. Rivera, Jr., & Damián Azrak (editors), *CÓMO PODRÍA HABER SIDO DECIDIDO EL CASO PERALTA: REPENSANDO LA JURISPRUDENCIA CONSTITUCIONAL DE LA CORTE SUPREMA* 124 (Buenos Aires, Del Puerto, 2013).



This is the only way to recognize that there is an individual (property) right that is (perhaps justifiedly) restricted for the general welfare's sake. As Joel Feinberg has famously argued in the context of a similar hypothetical, there would be no duty of compensation if no right had been infringed in the first place.<sup>1159</sup> But as there was a right, there must be compensation: “[o]ne owes compensation here for the same reason one must repay a debt or return what one has borrowed”.<sup>1160</sup> Jules Coleman has argued, similarly,<sup>1161</sup> that

“[...] some actions that are contrary to the demands rights impose on us are at fault or otherwise wrongful [...] Other actions, however, can be both contrary to the demands of rights and not at fault [...] In those cases of permissible invasions, that is, infringements, compensation derives from the invasion of the right, not from the wrongfulness or fault of the injurer's conduct<sup>1162</sup>

For Coleman, while necessity may justify appropriating (infringing) the property right, it is the property right that grounds the claim to compensation.<sup>1163</sup>

Someone might object that cases such as the ones posed by Feinberg and Coleman deal with *private* necessity, while my argument deals with *public* necessity. Destruction of property under public necessity does not, per se, generate a duty to

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<sup>1159</sup> Joel Feinberg, “Voluntary Euthanasia and the Inalienable Right to Life”, 7 *Phil. & Pub. Affairs* 93, 102 (1978) (posing the case of a backpacker on a high mountain trip who runs into an unanticipated blizzard that imperils his life and thus, breaks into a cabin, consumes the food stocked therein, and burns some of the furniture to keep himself warm; while Feinberg finds the backpacker's actions to be justified, he also understands there is a duty to compensate).

<sup>1160</sup> *Id.*

<sup>1161</sup> See Jules Coleman, *RISKS AND WRONGS* 281-302 (New York, Cambridge University Press, 1992) (discussing several variations on the case of a diabetic whose insulin's supply was lost in an accident and who, before lapsing into a coma, rushes into another diabetic's house and, without her consent, takes the insulin he needs).

<sup>1162</sup> *Id.*, at 283.

<sup>1163</sup> *Id.*, at 298.

compensate. While there are numerous exceptions, the majority view is that no compensation is owed in such cases.<sup>1164</sup>

Notice, however, that

“[...] in the case of public necessity the explanation for not requiring compensation appears to rest on the idea that the actor who performs an act of public necessity thereby averts a public calamity; *the actor as such gains no personal advantage from the situation*, but the public at large does, while in situations of private necessity the actor or some other individual has benefited, not the public at large. Thus, it would be unfair to impose a duty of compensation on one who acts to avert a public disaster.”<sup>1165</sup>

But once a few insights from public choice are grasped, it becomes clear that, in the sort of economic emergency cases I am dealing with, it is not true that the actor gains no personal advantage from the situation. Politicians deciding on the exception are subject to furious lobbying from powerful interest groups embarked on rent-seeking. Whatever the actual “currency” in which emergency legal changes are bought,<sup>1166</sup> the actors stand to gain from the decision (whether they end up with a net gain or a loss, all things considered, is a different matter). They are not public-spirited heroes who, with nothing to gain, run to destroy someone else’s property (or their value) to avert a public calamity. The decision-making process itself is heavily influenced by those who might benefit from the destruction of other people’s property rights. So the justification based

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<sup>1164</sup> See, e.g., John Alan Cohan, “Private and Public Necessity and the Violation of Property Rights”, 83 *N.D. L. Rev.* 653, 691-731 (2007) (arguing that the majority view requires no compensation, although there are numerous exceptions, and analyzing the cases where compensation was denied and those where it was granted). See also George C. Christie, “The Defense of Necessity Considered from the Legal and Moral Points of View”, 48 *Duke L. J.* 975, 995 (1999) (“One should finally note that the public authorities also have a privilege to destroy property in order to save life or to deal with public emergencies, and are under no common law duty to pay compensation to the owner of the property when they exercise the privilege”).

<sup>1165</sup> See John Alan Cohan, above n. 1164, at 733.

<sup>1166</sup> See Jonathan R. Macey, above n. 1110, at 156 (“The currency through which laws are bought and sold consists of political support, promises of future favors, outright bribes, and whatever else politicians value”).

upon the supposed impartiality, lack of self-interest and public-regardingness of the emergency decision-maker trembles, if not falls altogether.

Moreover, the distinction between cases where property is taken for “public use” and, thus, compensation is due, and cases where property is destroyed for “public necessity”, where there is no automatic duty to compensate, seems extremely artificial. It is even contradictory, as applied to the emergency rhetoric (at least in Argentina). If the justifications for economic emergency regulations are to be believed, it is hard to see what can be more constitutive of a “public use” than controlling the crisis. And if property is taken for such reasons, then the only way to make (textual) sense of a takings clause such as the U.S. Constitution’s Fifth Amendment, contrary U.S. Supreme Court caselaw notwithstanding, is to consider the clause applicable to such cases. The same happens with the Argentine Constitution’s expropriations clause.

An important detail that further reinforces the moral case for compensation is that sufferers from emergency decisions are usually small savers while beneficiaries are large companies and very wealthy individuals. The universe of bearers of the costs of controlling economic emergencies remains constant. It cannot be sound moral reasoning to hold that the relatively worst-off must repeatedly and exclusively bear the consequences of emergency regulation, to the benefit of powerful interest groups and, perhaps, of the community at large, and not be compensated.

Finally, one must bear in mind that in cases of the sort I am analyzing in this dissertation, the State (who decides to destroy property, or its value) is often the direct beneficiary of the measures and, alternatively or cumulatively, an active part in the production of the emergency situation. Take the *Peralta* case, for instance. Let’s recall the facts briefly. The State was indebted to the banks that, in turn, owed the deposits to their customers. The State had chosen to finance itself by forcibly borrowing the money of savers through banking regulations, thereby fuelling the mechanism that sent the so-

called “quasi-fiscal” deficit spiraling. The State bought itself time, and saved itself money, via the compulsory swap. Something similar occurred with the “pesification” case. The State forcibly imposed some debt upon certain creditors.<sup>1167</sup> The State promised bank depositors that their savings would be untouched, despite the ongoing crisis.<sup>1168</sup> The State benefitted from the debasement —via “pesification”— of its dollar-denominated debt with the financial system as well as with other creditors.

To sum up, there are no good reasons to retain a judicial jurisprudence that fails to vindicate the Constitution’s commitments to both property *and* equality. If measures must be taken, full compensation is due.

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<sup>1167</sup> See, e.g., Law 23,982 and 25,344 (“Debt Consolidation Laws”) The full text of the Law 25,344 is available at <http://www.infoleg.gov.ar/infolegInternet/anexos/65000-69999/65053/texact.htm> (last visited 02/15/2013).

<sup>1168</sup> Law 25,466 (“Intangibility of Deposits Act”).

## The Separation of Powers Game.

### a. The Deleterious Effects of the Economic Emergency Jurisprudence on Separation of Powers and Its Broader Implications.

The emergency powers doctrine is closely related to separation of powers concerns. Quite frequently, although not always, the doctrine relies on the exercise by the Executive Branch of powers reserved to the Legislative Branch by the Constitution.<sup>1169</sup> There is a general trend to expand Executive powers at the expense of Congressional powers. Although nothing particularly new, and in fact as old as constitutionalism itself,<sup>1170</sup> this trend has gained considerable steam during the Twentieth Century.<sup>1171</sup> Constitutionalism in an age of speed, as William Scheuerman has aptly called it, puts the traditional separation of powers in tension.<sup>1172</sup>

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<sup>1169</sup> See, e.g., John Ferejohn & Pasquale Pasquino, above n. 31, at 210 (“In cases of an urgent threat to the state or regime, constitutions sometimes permit the delegation of powers to a president, or to some other constitutional authority, to issue decrees, to censor information, and to suspend legal processes and rights”); Kanishka Jayasuriya, “The Exception Becomes The Norm: Law and Regimes of Exception in East Asia”, 2 *Asian-Pac. L. & Pol’y J.* 108, 109 (2001) (arguing that constitutional provisions in East Asia “give public authorities far-reaching power to suspend normal legal and political processes, in short, to exercise power through exceptional and executive prerogative power”).

<sup>1170</sup> See, e.g., John Locke, above n. 33, at 74 (§159 and §160) (arguing for the exceptional executive prerogative to override the laws); Clement Fatovic, “Constitutionalism and Presidential Prerogative: Jeffersonian and Hamiltonian Perspectives”, 48 *Am. J. Pol. Sci.* 429, 431-433 (2004) (analyzing the “theories of prerogative” before the enactment of the U.S. Constitution); John Ferejohn & Pasquale Pasquino, above n. 31, at 211 (2004) (“Emergency powers, exercised in this conservative way, have long been thought to be a vital and, perhaps, even an essential component of a liberal constitutional—that is, a rights-protecting—government”).

<sup>1171</sup> See William E. Scheuerman, above n. 640, at 1870 (“Politicians have probably always relied on the rhetoric of crisis to initiate legislative changes. In our century, however, they often have done so in order to abrogate, or even abandon, normal legislative procedures”). *Id.*, at 1890 (“[...] the growth of economic emergency powers is, fundamentally, a twentieth-century phenomenon”).

<sup>1172</sup> See William E. Scheuerman, “Liberal Democracy and the Empire of Speed”, 34 *Polity* 41, 57 (2001) (“[...] legislatures are expected to do nothing less than react effectively to a multiplicity of rapid-fire changes in social and economic life while *simultaneously* maintaining fidelity to the traditional notion of its legitimacy as resting on wide-ranging forms of unhurried debate”; emphasis in the original).

The economic field is no exception to the trend. In fact, it may be especially susceptible to this tension.<sup>1173</sup> It is a common feature of the past century that liberal democracies resorted to emergency institutions to control economic problems:<sup>1174</sup>

“Although virtually unknown during the nineteenth century, the practice became a ubiquitous facet of political life during the interwar years in stable democracies [...] Most recently, emergency authority has served as an instrument to implement controversial neoliberal economic policies [...] in many newly democratized countries”<sup>1175</sup>

Argentina has been no exception to this worldwide trend, and the Supreme Court has moved from admitting emergency *laws*, under certain conditions, to allowing for emergency *decrees*. Perhaps the most salient feature of the decisions handed down during the period that I have called “the times of permanent emergency” is the recognition of increasing presidential authority to control the successive economic crises<sup>1176</sup> and, consequently, to redistribute as she sees fit.

In *Peralta*, the justices decided that emergency decrees are valid insofar as Congress, exercising its own constitutional powers, does not adopt a contrary position

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<sup>1173</sup> *Id.* (“[...] time-space compression means that legislatures increasingly operate in the context of a social and economic environment characterized by incessant change and innovation. The ever faster pace of social and economic life potentially conflicts with the conventional emphasis on the legislature's reliance on careful, wide-ranging, and time-consuming deliberative exchange. A misfit between the time and space horizons of legislative activity and of social and economic life may result”).

<sup>1174</sup> See, e.g., Robert Higgs & Charlotte Twight, “National Emergency and The Erosion of Private Property Rights”, 6 *Cato J.* 747, 771 (1987) (arguing that “[t]he history of the United States in the 20th century provides strong evidence that derogations from private property rights in a liberal democracy occur chiefly during national emergencies and that, once curtailed, private rights seldom regain their previous scope”).

<sup>1175</sup> William E. Scheuerman, above n. 640, at 1870-1871.

<sup>1176</sup> See, e.g., Alejandro Pérez Hualde, “Smith’, o el final del sistema jurídico de la emergencia”, 2002-B *La Ley* 969 (arguing that the period beginning in 1985 is characterized by the presidential management of the crises and the Court's validation of a “system” of emergency norms). While Pérez Hualde characterizes the 1980s as the decade of judicial transition to a state of “permanent emergency”, for reasons offered above, I argue that the “times of permanent emergency” began at least two decades before.

on the economic policy issues at stake.<sup>1177</sup> It thus equated Congressional silence to Congressional assent, subverting the constitutional procedure for enacting laws and displacing to Congress the burden of reaching consent to oppose the already-in-force decree.<sup>1178</sup> Instead of the President being forced to gain consensus in the legislative branch in order to get his will enacted into law, Congress is forced to gain consensus to abrogate the President's will. As the 1994 Constitutional Convention explicitly rejected this aspect of *Peralta's* holding, the Court has thereafter adopted a very light test for legislative ratification of emergency decrees, admitting "implicit" ratifications<sup>1179</sup> and late ratifications through "omnibus bills".

This judicial turn, modifying the Constitution's separation of powers, has had profound negative implications in three areas of constitutional concern: redistribution of wealth, democratic and republican transparency, and sociological legitimacy of courts and of legal norms.

Arguably, the Supreme Court's current position has further reinforced already-present tendencies to "delegative democracy",<sup>1180</sup> with its leanings towards monist conceptions of democracy<sup>1181</sup> that are contrary to our constitutional text.<sup>1182</sup> But, how

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<sup>1177</sup> 313 *Fallos* 1513 (1990) (§24).

<sup>1178</sup> The Court's explicit admission of emergency decrees (decrees by reason of necessity and urgency) in *Peralta* sparked the 1994 Constitutional Convention to reject explicitly some of the rulings' doctrines (i.e., the doctrine that equated Congressional silence to Congressional assent). However, by admitting emergency decrees without any explicit constitutional permission —and, arguably, against an implicit prohibition—, the Court likely enticed the Convention to regulate such decrees —instead of forbidding them or just not regulating them—.

<sup>1179</sup> 327 *Fallos* 4495 (2004).

<sup>1180</sup> See Guillermo O'Donnell, "Delegative Democracy", 5 *J. Democr.* 59, 60-61 (1994) (characterizing delegative democracy as a system that rests on "the premise that whoever wins election to the presidency is thereby entitled to govern as he or she sees fit, constrained only by the hard facts of existing power relations and by a constitutionally limited term of office").

<sup>1181</sup> For the distinction between "monist" and "dualist" democracies, See Bruce A. Ackerman, *WE THE PEOPLE: FOUNDATIONS* 7-10 (Cambridge/London, Belknap/Harvard, 1991).

does this exactly affect redistributions? How come it distorts the republican and democratic value of transparency? By what mechanism can such jurisprudential stance affect the sociological legitimacy of courts? Shouldn't we be content with the fact that a democratically-accountable branch has the necessary authority to do whatever it takes to tame crises?

Economic emergency often implies a situation of especially intense scarcity<sup>1183</sup> that puts pressure on existing entitlements and pushes towards some form of redistribution. Hence, it makes the concept of constitutionally-protected property contested and opens up legal space for re-arrangement of economic entitlements.<sup>1184</sup> By unsettling the normal state of affairs as regards property, emergency opens a “bubble” in the constitutional fabric and allows for a political re-shuffling of the “economic cards”.<sup>1185</sup> These “bubbles” are nothing but rent-seeking opportunities waiting to be taken by those in a position to do it. Naturally, relatively small groups with high stakes will be in a position to influence, sometimes decisively, the norm-production

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<sup>1182</sup> Article 30 of the Constitution provides for a special amendment procedure, clearly different from the ordinary legislative process, Article 31 declares the Constitution to be the “supreme law of the land”, and Article 43 authorizes the judge deciding an *amparo* case to declare unconstitutional a law. Article 28, in turn, mandates that “The principles, guarantees and rights recognized in the preceding articles shall not be altered by the laws that regulate their enforcement”.

<sup>1183</sup> The Argentine Supreme Court defines the concept of emergency as an extraordinary situation that looms over the socio-economic order, disturbing it with an accumulated charge of scarcity, poverty, penury or indigence, and that creates a state of necessity that must be brought to an end. See, e.g., 313 *Fallos* 1513 (1990) (§43).

<sup>1184</sup> See, e.g., Stephen R. Munzer, above n. 181, at 275 (arguing that there is an implicit constraint that follows property rights into the future: “[w]hen plenty becomes scarcity, the rights can be diminished”).

<sup>1185</sup> This re-shuffling of “economic cards” should be limited, in principle, by the constitutional conception of property. Whether the results are consistent with such conception is irrelevant to the fact that there are opportunities for “rent-seeking”. As shown above with the example of the *Peralta* case, opportunities for redistribution may go well beyond what may be initially tolerable according to the popular conception of constitutional property.



process.<sup>1186</sup> Although it has been argued that the idea that special interest groups are *generally* decisive in the legislative process is “a caricature”,<sup>1187</sup> my argument here does not need to make such a strong assertion. My claim is weaker: I only hold that *in emergency situations* special interest groups are very influential. The evidence I have provided points clearly in that direction. As emergencies raise the stakes, small, organized, and resourceful groups have stronger incentives to flex their muscles and give their all in the attempt to capture the benefits potentially provided by a favorable legislation.<sup>1188</sup> In contrast, the politically-unorganized or unconnected, the relatively needy, the poor, are not in a good position to turn the legislative struggle in their favor. As a matter of fact, the rich and powerful may even have an interest in a jurisprudence that favors weak protection for property rights, as

“[...] in many countries, rich agents are the main beneficiaries of weak protection of property rights, which allows them to gain from nonproductive activities such as rent-seeking or other redistributive activities by maintaining expropriation capabilities. In the absence of adequate public protection of property rights by the state, these rent-oriented agents can take control of a substantial share of the national economy”<sup>1189</sup>

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<sup>1186</sup> See, e.g., Jerry L. Mashaw, above n. 79, at 19-20 (arguing that “while any group can play the pluralist game, not all groups can organize and operate effectively [...] The groups that form, prosper, and wield significant political power are largely the traditional ‘special interests’ that constantly seek legislative favor”).

<sup>1187</sup> See, e.g., Daniel A. Farber & Philip P. Frickey, above n. 1108, at 68.

<sup>1188</sup> See, e.g., John Tomasi, above n. 71, at 252 (arguing that small variations in the way some important economic questions are settled sometimes have very great consequences for powerful businesses and special interest groups and that the more significant the economic issues that a regime places on the legislative agenda, the more significant the exposure of its citizens to political domination by such groups). See also Douglass C. North, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 87 (New York, Cambridge University Press, 1990) (arguing that “To the degree that there are large payoffs to influencing the rules and their enforcement, it will pay to create intermediate associations (trade associations, lobbying groups, political action committees) between economic organizations and political bodies to realize the potential gains of political change. *The larger the percentage of society’s resources influenced by government’s decisions (directly or via regulation), the more resources will be devoted to such offensive and defensive (to prevent being adversely affected) organizations*”; emphasis added).

<sup>1189</sup> Konstantin Sonin, above n. 1148, at 716 (2003) (using the case of the Russian oligarchs of the 1990s to prove the assertions in the text).

James Buchanan's and Gordon Tullock's seminal work on what later came to be called "public choice" provides some important guidance to keep building my argument. They put an emphasis on the fact that there is an inverse relationship between the costs of making a decision and the costs that such a decision could be expected to impose on individual members of the community.<sup>1190</sup> The costlier to arrive at a decision, in accordance with the applicable decisionmaking rule, the lesser the costs an individual can expect from that decision. Such costs can be understood in terms of restrictions of rights through regulation. The basic idea is a very simple one: as the wills of more individuals are needed to take collective action, there are increasing chances that the interests of any given individual are represented, and her rights —or, more precisely, the interests protected by her rights— defended, by someone in the minimum effective coalition.<sup>1191</sup> Thus, more inclusive decisionmaking rules are better at protecting an individual's rights.<sup>1192</sup> But they come at the cost of being more burdensome from the standpoint of taking collective action.<sup>1193</sup> At the extreme, the rule that best protects an individual's rights is unanimity.<sup>1194</sup> It is also extremely impractical, if the group making the decision is

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<sup>1190</sup> See James M. Buchanan & Gordon Tullock, above n. 1146, at 60-67 (introducing the external costs function and the decision-making costs function, and arguing that while the former decreases as the number of individuals required to agree increases, the opposite occurs with the latter).

<sup>1191</sup> *Id.*, at 61 (“[...] as the number of individuals required to agree increases, the expected costs will decrease”).

<sup>1192</sup> As a matter of fact, rights and votes (decisionmaking rules) are frequently understood as two often alternative —and sometimes complementary— ways of protecting the interests of a minority. See, e.g., Daryl J. Levinson, “Rights and Votes”, 121 *Yale L. J.* 1286, 1292-1293 (2012) (“Rights and votes appear as functional alternatives in a broad range of settings in which collective decisionmaking processes threaten the interests of minorities or other vulnerable groups”).

<sup>1193</sup> James M. Buchanan & Gordon Tullock, above n. 1146, at 65 (“As a collective decision-making rule is changed to include a larger and larger proportion of the total group, these costs may increase at an increasing rate”).

<sup>1194</sup> *Id.*, at 83 (“[...] if we assume that the total costs of organizing decision-making are absent, the external costs from collective action expected by the individual were shown to be minimized only when the rule of unanimity prevails —when all members of the group are required to agree prior to action”). Other virtues

relatively sizeable, for any single person can veto any initiative.<sup>1195</sup> Hence, the costs of arriving at a decision are potentially very high. At the other end of the spectrum, one finds the rule that allows any given individual to decide collective measures. Such a rule, which is highly unusual indeed,<sup>1196</sup> can be expected to impose very high costs on individuals.<sup>1197</sup> A less extreme decisionmaking rule grants one single individual, selected by any chosen procedure, the power to make collective decisions. We can call this “the dictator” (or the “monarch”) rule.<sup>1198</sup> Expected costs for individuals are, under such a rule, still very high.

Someone might well object that public choice does not really prove that more inclusive rules better protect individual rights: all it proves is that they better protect the status quo.<sup>1199</sup> A well-meaning, unconstrained dictator, theoretically at least, could well

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are often attributed to unanimity as a voting rule. See Jules Coleman *MARKETS, MORALS AND THE LAW* 278 (New York, Cambridge University Press, 1988) (“Not without plausibility, advocates of unanimity have argued that the unanimity rule is both efficient and strongly democratic”); Robert A. Burt, above n. 64, at 45 (“Actual unanimity is, however, the only voting rule that consistently vindicates the democratic principles of equality and self-determination”).

<sup>1195</sup> This entails, of course, significant problems. See, e.g., Jules Coleman, above n. 1194 at 284 (arguing that “[s]trategic behavior plagues unanimity and promotes inefficiency”); James M. Buchanan & Gordon Tullock, above n. 1146, at 65 (“As unanimity is approached [...] Individual investment in strategic bargaining becomes highly rational”); Roberto A. Burt, above n. 64, at 45 (“We know of course that unanimity as a formal voting rule is a paradoxically crippling requirement for social decisionmaking”).

<sup>1196</sup> It is not easy to find examples of such a rule in the field of public law and, generally speaking, one should expect legislation to use it as means of discouraging undesirable situations. In the field of corporate law, Argentina has a regulation that resorts to such a rule: companies not regularly incorporated are subject to a regime where partners are bound by contracts entered into by *any* of them on behalf of the company (Articles 23 and 24, Law 19,550). As regards the specific field of public law, Buchanan and Tullock argue that a functional equivalent to such a rule operates when legislative bodies respond to popular demands for public services on the basis solely on “needs” criteria as well as when governments provide divisible (or “private”) goods and services to individuals without the use of pricing devices. See James M. Buchanan & Gordon Tullock, above n. 1146, at 63-64.

<sup>1197</sup> James M. Buchanan & Gordon Tullock, above n. 1146, at 62-63.

<sup>1198</sup> *Id.*, at 64.

<sup>1199</sup> See, e.g., Jules Coleman, above n. 1194, at 287 (arguing that unanimity rule, as a precondition of “constitutional contracts”, depends “on the justice or injustice of preconstitutional holdings” and thus “we might remain agnostic about whether the conservative features of unanimity are a good or a bad thing”).

improve upon a constrained legislature on the protection of individual rights. Depending on where the baseline for evaluating the level of protection of rights is drawn, more inclusive rules could be said to hinder improvements in the protection of rights. In fact, this is the core of a common argument left liberals frequently make against constitutional property rights. My rejoinder proceeds as follows.

First, one should distinguish the discussion about what rights should receive constitutional protection from the discussion about what rules better protect rights we have previously decided to entrench in the Constitution. Whatever we think about property rights' merits to receive constitutional protection, once we have granted them such status, the argument about what rules better protect individual rights should not be affected by considerations regarding the, some would say, logically-prior discussion on the list of rights that should be included in a constitution. It might still be objected that arguments about the constitutional entrenchment of rights should not be all-or-nothing. There could be different levels of protection for different rights, according to which various decisionmaking rules would be better or worse at providing the adequate level of protection. For instance, it could be argued that mere rationality review is the appropriate level of constitutional protection for economic liberties generally. Notice that my general argument in this dissertation makes the case for rejecting a thin protection of property rights in emergency situations, from a variety of perspectives that should have broad ideological appeal. Those who care deeply about the popular will should give considerable weight to the evidence I have offered throughout Part One of this dissertation about the "true counter-majoritarian difficulty". Those concerned with long-term economic growth per se should also be sympathetic to my claims. But even those

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See also Bruce Ackerman, "Constitutional Economics—Constitutional Politics", 10 *Const. Polit. Econ.* 415, 415 (1999) (arguing that "[i]f preexisting power-holders do not have a just claim to their 'entitlements', unanimity is no longer appropriate. To the contrary, it would be utterly wrong to allow the beneficiaries of injustice to veto any collective effort to stop them from enjoying the fruits of oppression").

concerned with the fate of the worst-off should be favorably disposed to my proposal of stronger judicial protection for constitutional property, for several reasons —some of which I have already discussed above. It is the relatively poor, needy, and politically disorganized or unconnected who have a lot at stake in the protection of property rights in emergency situations. Those at the very bottom (or the initial, lower steps) of the property ownership ladder are exposed to potentially large losses when emergency decisionmakers decide to distribute the costs of the crises. The rich and the wealthy can both influence the political process and diversify their risks so that whatever political outcomes are produced, they come out at least relatively unharmed, and frequently gainful.<sup>1200</sup> This much, I think, has been shown by the evidence from the 1989 and 2001-2002 crises. To borrow Charles Donahue, Jr.’s terminology, “property as power” plays the emergency game at the political level; it is “property as security” that needs judicial solicitude.<sup>1201</sup>

My second response is that the well-proved fact that people generally place a high value on the status quo, as discussed above in Chapter VI, provides firm grounds for preferring more inclusive rules when it comes to deciding how to protect individual rights. This is so, at least, in contexts where the status quo is not grossly unjust or

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<sup>1200</sup> For instance, companies and very wealthy individuals who made up almost half of the total stock of dollarized debt with the financial system in 2001 (see above n. 912) may have also been depositors in dollars in the Argentine banking system. While this is true, it is also true that they: 1) had access to international banking markets so they may have had substantial amounts of money in offshore banks (see above n. 1153); 2) had better access to information, so they could manage to take their deposits out of the system in time to avoid their “pesification” (see above n. 901-905, 919-929 and accompanying text); 3) may have invested their dollar debt in assets that kept their value in dollars (see above n. 914, 917 and accompanying text); 4) may have invested their dollar debt in productive assets linked to the export sector, thus ensuring for themselves dollarized income in a context of devaluation of national currency and strong revaluation of the US dollar (see above n. 913); 5) even assuming that their deposits were “pesified”, they still benefited from the differential between “pesification” of deposits (1,40 pesos, plus inflation adjustment, per dollar) and “pesification” of loans (1 peso per dollar, plus inflation adjustment) (see above n. 791 and accompanying text). Even if some part of their assets were caught by the emergency measures, whatever losses they may have suffered are very likely to have been cancelled off by benefits reaped elsewhere in the emergency scheme.

<sup>1201</sup> See Charles Donahue, Jr., “The Future of the Concept of Property Predicted from Its Past”, in J. Roland Pennock & John W. Chapman, above n. 6, at 56-57.

otherwise morally unbearable. Whatever the influences of interest groups in the process of arriving at the status quo,<sup>1202</sup> once we are there, it has a value of its own.<sup>1203</sup> People do not want to suffer losses. They want to make gains, but if given the choice between mathematically-equivalent alternative chances of losses and gains, they go for avoiding the potential losses at the expense of foregoing the prospective gains. In fact, constitutionalism is largely about “slowing down” politics, and even the staunchest supporters of radical democracy acknowledge that, “for the sake of politics, as well as for the sake of individual liberty, *some* things must be denied to politics”.<sup>1204</sup> What must be denied to politics, in this regard, is the substantial alteration of legitimate expectations formed around the rights of property. Hence, more inclusive rules, which will tend to protect the individual from potentially disturbing surprises derived from collective action in the sphere of economic rights, are justifiable from the standpoint of the individuals exposed to economic emergency regulations.<sup>1205</sup>

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<sup>1202</sup> See, e.g., Einer Elhague, “Does Interest Group Theory Justify More Intrusive Judicial Review?”, 101 *Yale L.J.* 31, 93 (1991) (arguing against the justification of more intrusive judicial review on the basis that “[u]nder interest group theory, the laws embodied in the status quo are just as likely to reflect the past influence of organized interest groups as current legal changes are likely to reflect their present influence”).

<sup>1203</sup> See Jeremy Waldron, above n. 20, at 174 (analyzing the moral value of the status quo as relates to property rights and claiming that property exhibits a particular “normative resiliency” that is reflected in a “a range of cases in which the condemnation of an open taking as dishonest does not depend on any judgment on the justification of the property right in question”).

<sup>1204</sup> Roberto Mangabeira Unger, above n. 12, at 168. Although not very specific as to what constitutes that *some* that must be denied to politics, Unger hints that “they [the protected entitlements] should protect people against radical insecurities [...] They should supply people with the economic and cultural equipment they need to define and execute their life projects”, *id.*, at 167.

<sup>1205</sup> See, e.g., James M. Buchanan & Gordon Tullock, above n. 1146, at 78 (“The individual will anticipate greater possible damage from collective action the more closely the action amounts to the creation and confiscation of human and property rights. He will, therefore, tend to choose somewhat more restrictive rules for social choice-making in such areas of political activity [...] Constitutional prohibitions against many forms of collective intervention in the market economy have been abolished within the last three decades. As a result, legislative action may now produce severe capital losses or lucrative gains to separate individuals and groups. For the rational individual, unable to predict his future position, the imposition of some additional and renewed restraints on the exercise of such legislative power may be desirable”). *Id.*, at 69-70 (“Property rights especially can never be defined once and for all, and there will always exist an area of quasi property rights, subject to change by action of the collective unit [...] the individual will foresee that collective action in this area may possibly impose very severe costs on him. In such cases, he will tend

This does not mean that individuals may not choose to accept a redistribution of entitlements that impose costs on them. They might well do it,<sup>1206</sup> and there is empirical evidence that individuals are frequently willing to enforce fairness at *some* personal cost.<sup>1207</sup> My only point is that their rights will be better protected if more inclusive rules are in place, as there will be better chances that unwanted redistributions will not be forced upon them. They can always choose to accept them, if they regard the measures as fair.<sup>1208</sup>

My last stepping-stone in the argument is that presidents have substantial incentives for encroaching upon individual rights during emergency situations. As Robert Higgs and Charlotte Twight have argued

“[c]risis clearly alters the expected benefits and costs of curtailment of private rights on both sides of the political equation. A fearful public, ideologically

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to place a high value on the attainment of his consent, and he may be quite willing to undergo substantial decision-making costs in order to insure that he will, in fact, be reasonably protected against confiscation”).

<sup>1206</sup> *Id.*, at 279 (“Many collective projects are undertaken in whole or in part primarily because they do provide benefits to one groups of the people at the expense of other groups. These objectives may be quite legitimate ones, and they may be accepted as such by all, or nearly all, members of the community”). See also Douglass C. North, above n. 4, at 85 (acknowledging that there are “occasions in which people are willing to engage in substantial sacrifices for their ideas and ideals” and that “the degree to which people feel strongly about their ideological views, may frequently lead them to engage in very substantial sacrifices, and such sacrifices have played a major role throughout history”).

<sup>1207</sup> See, e.g., Daniel Kahneman, Jack L. Knetsch and Richard H. Thaler, “Fairness and the Assumptions of Economics”, 59 *J. Bus.* S285, S299 (1986) (studies “demonstrate the willingness of people to enforce fairness at some cost to themselves”). Still, as the evidence I have provided in this dissertation shows, there seems to be a significant quantitative difference between the costs that individuals accept in Kahneman, Knetsch and Thaler’s studies and the costs that economic emergency measures frequently impose upon them. Furthermore, there seems to be a significant qualitative difference as well, as emergency measures often imply incredibly disruptive intrusions upon the lives of the regulated individuals (see above n. 811-891 and accompanying text). This is certainly not the case with the studies cited in this footnote.

<sup>1208</sup> Notice that the institutional form that the most inclusive rule I will deal with adopts, the one whose results approximate most the actual operation of the unanimity rule, is one that requires a majority of Congress to pass on legislation dealing with economic emergency and then subjects such legislative products to judicial review by independent courts not applying ultra deferential standards of review. As judicial review in Argentina, as in the U.S., is diffuse and with *inter partes* effects, any individual who believes that emergency measures, as enacted by Congress, are fair and should be applied, can opt not to litigate against the measures, thereby avoiding judicial review and settling, in her particular case, for a less inclusive decisionmaking rule.

predisposed to believe in the efficacy of governmental action, insists that the government ‘do something’ to diminish the threat, perceiving the benefits of such action to be immediate and direct and the costs to be remote and largely external. This public perception is nurtured by those who, for material or ideological reasons, would use the occasion to further their economic or political aims. From a cost-benefit perspective, governmental officials experience reduced political costs and increased political benefits from curtailing private rights in crisis as compared to non-crisis conditions.”<sup>1209</sup>

Summing up, we have a very basic theoretical framework that, first, finds that more inclusive decisionmaking rules will tend to protect rights better and, correspondingly, less inclusive rules will generally provide less protection; second, poses that emergencies create incentives for governments to regulate private property rights in especially intrusive ways; and, third, predicts that powerful special interest groups will be very active in lobbying the emergency decisionmaker, potentially producing regressive redistributions.

How does the Argentine Supreme Court case law come out after confronting these basic theoretical insights? Legislative procedures in Argentina, as per the Constitution, embody a bi-cameral majority rule. The Supreme Court’s dominant stance, which admits the validity of emergency decrees without a clear legislative ratification *and* adopts a rather deferential approach when it comes to assessing the substance of the emergency norms, implies the adoption of the “dictator” decisionmaking rule. *Quod pricipii placuit, legis habet vigorem*. What pleases the prince, it has the force of law. The theory predicts that such a position will impose substantial costs on the rights of individuals. It also predicts that a rule that demanded the intervention of Congress for any regulation of constitutional rights would provide a substantially higher level of protection to individual rights. Last, but not least, a rule that, in addition to Congress’ intervention, allowed for

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<sup>1209</sup> See Robert Higgs & Charlotte Twight, above n. 1174, at 771.



judicial review granting no special deference to legislative enactments would likely provide higher protection. The evidence confirms the theoretical predictions.

Let us take the last two great economic crises as the focus of our attention. During the implementation of the “Bonex Plan” there were ferocious struggles for more favorable portions of the pie that was being distributed (be it gains or losses). Large companies attempted to liquefy their debts by pressing the Executive to force the banks to take Bonex in payment of the companies’ debts. Banks managed to get the Executive to rid them of their obligation to pay interest to their depositors during the banking holiday, thus saving a not inconsiderable amount of money, approximately 200 million dollars.<sup>1210</sup> The average depositors had no one to lobby on their behalf. Still, it is interesting to notice that President Menem could not get Congress to ratify explicitly the compulsory conversion of bank deposits. Despite the fact that Congress had recently ratified two emergency decrees issued as part of the emergency legal scheme,<sup>1211</sup> it did not ratify the decree 36/90. It was the Court that, adopting a very deferential stance,<sup>1212</sup> upheld the measure and closed any further discussion on the topic.

The “dictator” rule, validated by the Court in *Peralta*, imposed substantial costs on bank depositors, costs that Congress refused to impose itself. Arguably, Congress implicitly accepted the President’s actions in regard to bank deposits, as it later passed a

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<sup>1210</sup> See above n. 686-687 and accompanying texts.

<sup>1211</sup> On September, 25, 1989, Congress passed the “Economic Emergency Law” under the number 23,697. Article 38 ratified two then-recent emergency decrees dealing with internal public debt (emergency decrees 377/1989 —which provided for an exchange of debt consolidation bonds for a new bond— and 570/1989 —partially amending the former—). Full text of the Law 23,697 is available at <http://infoleg.mecon.gov.ar/infolegInternet/anexos/0-4999/15/norma.htm> (last visited 02/21/2013).

<sup>1212</sup> 313 *Fallos* 1513 (1990) (majority opinion, §54) (rejecting a constitutional challenge to economic emergency measures and arguing that such rejection “[...] does not mean that [...] the rights of those who claim to have been affected [...] should not be taken into account, but it must be accepted that [their scope] has been determined by the Government in accordance to the role such rights played in the economy”).

law creating a tax exemption for holders of the bonds.<sup>1213</sup> But there is a substantial difference between an explicit ratification of the Presidential decree and an implicit acceptance of a *fait accompli*. Especially, when the implicit acceptance comes in the form of a measure that aimed at ameliorating the situation of those affected by the emergency decree. It is one thing to say that a majority of both Chambers decided that the involuntary bondholders created by presidential decree would enjoy a tax exemption; and it is a different thing altogether to hold that a majority of Congress decided that bank depositors (and other creditors of the State) would be transformed into involuntary bondholders. One measure may have well received a majoritarian support that the other has not. For whatever reasons, the opposition in Congress did not muster the necessary majority to abrogate the emergency decree. But that is something very different thing from Congress approving of the measure by the same majorities. Obviously, one cannot conclude on the latter, simply because Congress decided to exempt those affected by the decree from certain taxes. We don't really know what Congress would have done regarding a bill with the same content of the emergency decree 36/90, had it been given the opportunity by, say, a Supreme Court minimalist ruling that rejected the decree on separation of powers grounds. Perhaps all those deputies and senators who came out criticizing the Bonex Plan<sup>1214</sup> would have voted for it. But one thing is clear: depositors would have stood a better chance than they did at the hands of the sole decisionmaker, the president.

Some low-profile instances of judicial review provided additional protection for certain especially vulnerable depositors. After the worst of the crisis had passed, the

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<sup>1213</sup> See, e.g., Alejandro Pérez Hualde, above n. 1176. Article 16 of the Law 23,871 exempted from the all taxes the first sale of Bonex 89 made by those who received them as a consequence of the compulsory conversion mandated by the Executive Branch. The full text of the law is available at <http://infoleg.mecon.gov.ar/infolegInternet/anexos/0-4999/271/norma.htm> (last visited 02/20/2013).

<sup>1214</sup> See above n. 701-704 and accompanying text.

justices denied review in a series of cases that basically expanded the universe of cases excluded from the compulsory swap,<sup>1215</sup> protecting the property of the relatively weak and poor, even if the cases were —arguably— indistinguishable from *Peralta* and, clearly, were not included in the exemptions established by the emergency regime itself. In *García*<sup>1216</sup> and *Olivera*,<sup>1217</sup> a majority of seven justices denied review of decisions that had interpreted emergency decree 591/90 as establishing not strict and limited exemptions to the conversion but mere guiding principles that allowed for judicial creation of other causes of exclusion. Therefore, they affirmed decisions that exempted “savings of a whole life, the fruits of the work and efforts of many years, destined to support” the plaintiff and her family,<sup>1218</sup> and a severance payment received in July 1989 and destined to the purchase of a taxi vehicle that was to become the plaintiff’s livelihood.<sup>1219</sup> In *Tisera*<sup>1220</sup> the lower court had struck down emergency decree 591/90, on equality grounds, for

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<sup>1215</sup> Depositors who were 75 or older were exempted from the “Bonex plan” after a well-known tango composer, Enrique Cadícamo, sent a personal letter to president Menem, complaining about the injustice of applying the compulsory conversion to the elderly. Cadícamo was 91 years old at the time. Menem exempted Cadícamo from the plan, and later issued Emergency Decree 591/1990 (April, 4, 1990), generalizing the exemption. The same decree provided for other exemptions, such as severance payments received after December, 1, 1989. See, e.g., “No les devolvieron ayer a los ancianos los plazos fijos”, *Clarín*, April, 17, 1990, at 10 (explaining the contents of Emergency Decree 591/1990); “La bronca de Menem y González no alcanzó para cobrar la plata”, *Página/12*, April, 19, 1990, at 4 (same).

<sup>1216</sup> 316 *Fallos* 176 (1993).

<sup>1217</sup> 316 *Fallos* 184 (1993).

<sup>1218</sup> 316 *Fallos* 184 (1993) (Barra, Nazareno, JJ., dissenting from denial of review, §2) (explaining the facts of the case).

<sup>1219</sup> 316 *Fallos* 176 (1993) (Barra, Nazareno, JJ., dissenting from denial of review, §2) (explaining the facts of the case). Emergency Decree 591/90 had exempted from the compulsory conversion severance payments received after December, 1, 1989, on the alleged basis that the short time until the conversion allowed to presume that the depositor had only resorted to the fixed-term deposit to protect himself from inflation and not to engage in speculative deals. See 319 *Fallos* 925 (1996) (Fayt, J., dissenting, §4) (summarizing the arguments of the State in the brief urging reversal of the decision).

<sup>1220</sup> 319 *Fallos* 925 (1996).

limiting the exemption of the compulsory conversion only to amounts originated in severance payments that had been deposited on December, 1, 1989, or thereafter. The Court refused to review the decision. Finally, in *Zuccotti*,<sup>1221</sup> a late unpublished 6-to-1 decision, the Supreme Court let stand a decision that had excluded from conversion small deposits that exceeded 1,000,000 *australes*, by engaging —once again— in an expansive interpretation of the exemptions introduced by the emergency decree 591/90 and disregarding the explicit limit set by emergency decree 36/90.<sup>1222</sup> Although it is arguable that the effects of these decisions in the real world were marginal at best,<sup>1223</sup> it remains true that more inclusive decisionmaking rules<sup>1224</sup> provided (or would have provided) better protection.

During the 2001-2002 crisis, there was another bloody battle over the distribution of the costs of coming out of the “Convertibility” regime. This time the depositors were a more active and organized furious protests that, undoubtedly, must

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<sup>1221</sup> Corte Suprema de Justicia de la Nación, Z. 39. XXIII, 10/05/1995, *Zuccotti, Marta Cristina et al. v. PEN*, (available at [http://www.csjn.gov.ar/cfal/fallos/cfal3/cons\\_fallos.jsp](http://www.csjn.gov.ar/cfal/fallos/cfal3/cons_fallos.jsp); last visited 01/10/2012; direct link: <http://ar.vlex.com/vid/-39595392>; last visited 01/12/2012).

<sup>1222</sup> See *Zuccotti* (Fayt, J., dissenting, §7) (attacking the lower court decision for disregarding the explicit limit set by the Emergency Decree 36/90).

<sup>1223</sup> It is hard to say how significant these judicial interventions were in the real world. There is a certain degree of endogeneity in the whole set of actions: it is very likely that the Court was able to let lower court decisions stand because the number of similar cases actually litigated was not very high. Indeed, the Court itself had discouraged further litigation with its prompt and sweeping decision in *Peralta*. Otherwise, such an attitude on the Court’s part would have undermined its own prior decision upholding the “Bonex plan” and, depending on the timing of the decisions and other factors, could have compromised the viability of the emergency scheme. Unlikely as it may seem in the Argentine context, it is not impossible to think that the justices did that to defend some higher principles, such as equality in the share of public burdens. But at any rate such a move would have called for an explicit and well-argued decision, not just a series of mute (and mostly late) denials of review which, had it not been for the occasional dissent, would have likely been overlooked. Still, these decisions were significant for those who kept of litigating after *Peralta* and as a signal to lower courts that protecting small depositors would be tolerated.

<sup>1224</sup> A rule that provides for meaningful judicial review of either Congressional or Executive actions is, obviously, more inclusive than one which does not, as it requires gathering greater consensus in order for a legal norm to have actual effects in particular cases. The agreement of the judges sitting in the reviewing court must be secured before any measure under review has definitive effects on the parties.

have had some not insignificant political effect. Still, they had no direct channels to the authorities, who had their ears divided between the privatized utilities companies, the banks, the so-called “Productive Group” (mainly, large industrials and farmers linked to the export sector, who pushed for “pesification” of their dollar debts—which would liquefy the loans they had taken to modernize their productive structures— and a high exchange rate—which would multiply the domestic value of their prospective dollarized income—).<sup>1225</sup> As Roberto Lavagna, a former Minister of Economy under both Duhalde and Kirchner, has publicly acknowledged the Executive Branch (and, in particular, the Ministry of Economy) routinely received highly-elaborated, ready-for-application decree projects from regulated sectors, which only needed signing to enter into force.<sup>1226</sup> Such lobbies were pretty effective in getting the regular guy on the street that had small bank deposits to subsidize their enrichment in the after-crisis scenario.

Notice, however, that while the Executive decided to simply “pesify” bank deposits at an exchange rate that was very unlikely to keep the purchasing power of the funds,<sup>1227</sup> and that at some points it deprived depositors of more than 50% of their wealth, Congress did not “pesify” bank deposits and explicitly instructed the Executive to preserve the savers’ capital, including savings in foreign currency.<sup>1228</sup> In other words, the President went for a “haircut” to small and medium bank depositors to subsidize (mostly) large debtors; Congress chose to embrace a “deferment of maturities” scheme

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<sup>1225</sup> See above n. 911 and accompanying text.

<sup>1226</sup> María Angélica Gelli, *CONSTITUCIÓN DE LA NACIÓN ARGENTINA COMENTADA Y CONCORDADA* 84, fn. 41 (Buenos Aires, Editorial La Ley, 2004) (quoting former minister Roberto Lavagna).

<sup>1227</sup> Article 2, Executive Decree 214/02.

<sup>1228</sup> Article 6, Law 25,561.

and to subsidize only certain kinds of smaller debtors who, arguably, could not have possibly made payments in dollars.

Despite the fact that Kirchner supported “pesification” of bank deposits, and that he was a powerful president by 2004, Congress refused to ratify emergency decree 214/02, not once but twice,<sup>1229</sup> and only came to accept it as a *fait accompli* after a plurality of the Court had given “pesification” its constitutional blessing in late 2004.<sup>1230</sup> Interestingly, it had indeed ratified all emergency decrees that had offered depositors dollarized state bonds in exchange for their “pesified” deposits, but it had not come to terms with plain “pesification”.<sup>1231</sup>

When debating the Emergency Law 25,561, the rapporteur of the Committee in the Chamber of Deputies, Deputy Jorge R. Matzkin put forward Congress’ views:<sup>1232</sup>

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<sup>1229</sup> When the Executive sent to Congress the Budget Bills for 2003 and 2004, it included a provision by which Congress ratified the emergency decree that “pesified” the economy (214/02). Significantly, in both cases Congress excluded decree 214/02 from the ratifying provision finally enacted (which, incidentally, did ratify other emergency decrees). See Article 62, Law 25,725 (available at <http://www.infoleg.gov.ar/infolegInternet/anexos/80000-84999/81258/norma.htm>; last visited 02/20/2013) and Article 71, Law 25,827 (available at <http://www.infoleg.gov.ar/infolegInternet/anexos/90000-94999/91229/norma.htm>; last visited 02/21/2013).

<sup>1230</sup> See Article 64, Law 25,967 (available at <http://infoleg.mecon.gov.ar/infolegInternet/anexos/100000-104999/102049/norma.htm>; last visited 02/21/2013). See also Emilio Ibarluća, above n. 875, at 151-152.

<sup>1231</sup> See Article 71, Law 25,827 (available at <http://www.infoleg.gov.ar/infolegInternet/anexos/90000-94999/91229/norma.htm>; last visited 02/21/2013) (ratifying emergency decrees 905/02, 1836/02 and 739/03).

<sup>1232</sup> There are a number of well-known problems in the idea of constructing the intentions or views of collective organisms into a single, unified intention or view. See, e.g., Ronald Dworkin, above n. 68, at 315-316, 318-320. One way of avoiding such troubles is to assume that the considered views of one determined individual, as recorded on official transcripts, represents the view of Congress. The Argentine Supreme Court resorts to such an interpretive canon on occasion and gives the views of rapporteurs of Committees special weight. See, e.g., 333 *Fallos* 993 (2010) (“It must be assumed that the parliamentary committees study the issues that they deal with in a thorough and careful way, both as to their form and substance [...] their oral and written reports are more valuable than the general debates of Congress or the individual opinions of legislators [...] that is why in the face of differences of opinion [regarding a legislative or constitutional text] the will expressed by those who submitted the bill for consideration by the remaining members of Parliament must prevail”); 319 *Fallos* 3208 (1996) (Petracchi, J., dissenting, §6) (when a legal text is ambiguous the interpreter should “resort to the statements made by the reporting member when [she] explained [the text’s] meaning to the legislature [...] This principle of interpretation is based on the least two reasons. On one hand, on the assumption that the opinions of the rapporteurs [of the

“[t]he last paragraph of Article 6, dealing with the situation of those who are [trapped] in the 'corralito', intends to say that there will be restructurings that it will be necessary to make, primarily of the time terms and, eventually, of the interest rates. The central objective the paragraph is to ratify, by law, the will of Congress in the sense that these deposits will be returned in the currency in which were made”<sup>1233</sup>

Opposition Deputy Leopoldo G. Moreau, among several other representatives, also put emphasis in the restitution of savings in dollars:

“[s]urely these days we have all received the concerns and pleas from many savers who wonder what’s going to happen to their savings. The truth is that with this regime [we are enacting] we have the chance of salvaging them. I say this because if we didn’t take this path —that of partial ‘pesification’ and the establishment of export duties on fuel— the difference arising from the ‘pesification’ of dollar debts would have to be financed with other tools [...] we all know there aren’t many tools available in the real economy. One of them could be a ‘haircut’ on the amounts belonging to savers, in order to finance that difference. Thus, we would be benefitting debtors, but hurting savers. In addition, we would jeopardize the future return of deposits, because [such a measure] would make bank deposits disappear. But that’s not what we are to do, because that would be unfair. So this is a step that strengthens the possibility that, in time, those savings can be returned in the currency originally agreed upon, as we are not putting them at risk with this proposal”.<sup>1234</sup>

Interestingly, the Economic Emergency bill that the Executive sent to Congress did have a provision such as the one included as part of article 6 of the enacted law, prescribing the protection of the savers’ capital. However, when the bill was to be voted, that very important sentence had seemingly disappeared from the bill.<sup>1235</sup> Deputy

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committees] are the result of a thorough and careful study of the issues they deal with and, on the other, on the assumption that such members represent the will of the legislators who passed such laws”).

<sup>1233</sup> Deputy Matzkin was answering a question by Deputy (for Buenos Aires) Pascual Cappelleri, who asked him to clarify whether the projected text of article 6, which spoke of “restructuring the original obligations in a way that is compatible with the evolution of the financial system’s solvency”, meant that total amounts, maturities, or interest rates could be modified. See *Diario de Sesiones de la Cámara de Diputados de la Nación*, January, 5, 2002 (taquigraphic version available at <http://www.diputados.gov.ar/secparl/dtaqui/versiones/>; last visited 02/20/2013).

<sup>1234</sup> See *Diario de Sesiones de la Cámara de Diputados de la Nación*, January, 5, 2002 (taquigraphic version available at <http://www.diputados.gov.ar/secparl/dtaqui/versiones/>; last visited 02/20/2013).

<sup>1235</sup> *Id.*

Graciela Ocaña, along with other opposition deputies, demanded that the text in question was included in the bill to be voted:

“We notice with concern the difference between the draft that we got yesterday and the version that was introduced into Parliament today, which does not include article 6. [Such provision] recognized, although in general terms, the return of bank deposits and the preservation of their value, both in dollars and in pesos. This promise is not present in the project entered this afternoon in the Chamber of Deputies. The ARI [political party] is proposing [...] that this statement is included again in the articles [...] We also want that savers have, if not a strict timetable for the repayment of their deposits, at least the certainty that such deposits will be returned to them”<sup>1236</sup>

Not even when the Kirchner administration controlled Congress, in late 2003,<sup>1237</sup> did it manage to have “pesification” of bank deposits confirmed. Notice that Law 25,820, amending Emergency Law 25,561, stated that the protection of the saver’s capital provided for by Article 6 of said Law could be implemented through *voluntary* conversions of deposits into state bonds.<sup>1238</sup> Congress held fast to the idea of preserving the depositor’s dollars, while the Executive went for the simple “haircut” alternative, through “pesification”.

Right after the *San Luis* ruling, striking down “pesification” of bank deposits in 2003, the Executive issued emergency decree 739/03, which offered the holders of term deposits forcibly restructured and “pesified” the option of receiving a new, free short-

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<sup>1236</sup> *Id.* Later Deputy Rafael González replied Ocaña’s accusation and held that the project under debate did include the provision in question.

<sup>1237</sup> See Mark P. Jones & Juan Pablo Micozzi, “Control, concertación, crisis y cambio: cuatro C para dos K en el Congreso Nacional”, in Andrés Malamud & Miguel De Luca (eds.), *LA POLÍTICA EN TIEMPOS DE LOS KIRCHNER* 52-53, 59-61 (Buenos Aires, Eudeba, 2011) (arguing that once Kirchner took office, the Peronist party’s first minority in the Chamber of Deputies didn’t take long to align with the administration —it already controlled 60% of the Senate— and that after the 2003 elections the administration effectively enjoyed an absolute majority in both Chambers —50% in Deputies and 57% in the Senate—).

<sup>1238</sup> See Article 2, Law 25,820 (full text available at <http://infoleg.mecon.gov.ar/infolegInternet/anexos/90000-94999/90762/norma.htm>; last visited 02/21/2013).



term deposit in pesos equivalent to roughly the 67% of the then-current free market value of the original dollar deposit, plus a 10-year maturity State bond in dollars to cover for the additional 33%.<sup>1239</sup>

This evidence hints that the theory is accurate. More inclusive rules provided higher levels of protection for property rights. We can sketch three very simple alternative decisionmaking rules, in increasing order of inclusiveness: a “dictator”-like rule, which would give the President the final say on the bank deposits’ fate; a bi-cameral majority rule, which would put the final decision on Congress; and a non-deferential judicial review rule, which would require—in addition to the intervention of the elective branches—the constitutional validation of a Supreme Court not bent on adopting stances so deferential that amount to no review at all. Of course, the last rule admits of two variants: permissive legality review and stringent legality review. These alternatives differ on how seriously the reviewing court takes the task of enforcing separation of powers provisions.

The least inclusive rule, which allowed for relatively unconstrained Executive decisionmaking, imposed on depositors an immediate and definitive loss that at some points reached 50% of their asset’s value,<sup>1240</sup> plus the harms derived from the temporary freezing of funds.<sup>1241</sup> A noticeably more inclusive rule that demanded Congressional

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<sup>1239</sup> See above n. 932.

<sup>1240</sup> See above n. 995 and accompanying text.

<sup>1241</sup> After deciding the full “pesification” of bank deposits through Emergency Decree 214/02, the Executive amended and kept in place a restructuring scheme for “pesified” deposits, extending complete restitution of deposits over a maximum of 42 months, with different monthly repayment installments schemes depending on the amount of the original deposit. Larger deposits were subject to longer schemes, with repayments beginning later as well. See Executive Decree 141/02 (full text available at <http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/71742/norma.htm>; last visited 02/21/2013) and Ministry of Economy Resolution 46/2002 (full text available at <http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/72099/norma.htm>; last visited 02/21/2013).

approval would have imposed, at most, temporary losses derived from deferment of maturities, in one form or another.<sup>1242</sup> An even more inclusive rule, which required the validation of a neutral Supreme Court, allowed for the possibility of immediate release of funds, through injunctions, for truly needy depositors in dire personal circumstances,<sup>1243</sup> and preserved the savers' capital while allowing them to recover a substantial portion of their assets in relatively short terms.<sup>1244</sup> While the Court adopted the stringent legality review variant, and explicitly invited Congress to address the issues raised in the case through general legislation that respected the boundaries set forth by the ruling,<sup>1245</sup> Congress did not pick up the gauntlet and let the Executive keep on maneuvering.

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<sup>1242</sup> Recall that Article 6 of the Law 25,561 only provided for restructuring the depositors' credits against the banks, preserving their capital. Article 2 of the Law 25,820 insisted on the protection of the savers' capital through dollar-denominated state bonds. The initial restructuring scheme, done by the Executive pursuant to the delegation contained in Article 2 of the Law 25,561, extended restitution of bank deposits in dollars up to a maximum of 35 months (depending on the deposit's size), with 24 monthly repayment installments beginning in December 2003 for the least-favored deposits (those of over 30,000 dollars). Smaller deposits received a more favorable treatment, with deposits of up to 5,000 dollars (which, remember, made up 48% of all deposits subject to "pesification") being subject to a repayment scheme of 12 months, beginning in January 2003. See Delegated Decree 71/2002 (full text available at <http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/71543/norma.htm>; last visited 02/21/2013) and Ministry of Economy Resolution 23/2002 (full text at <http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/71820/norma.htm>; last visited 02/21/2013).

<sup>1243</sup> See, e.g., *U., P.M.*, 325 *Fallos* 8 (2002) (where the Court rejected a *per saltum* appeal filed by a bank against an injunction that ordered to give back the funds deposited by a couple of retirees where the wife suffered Alzheimer, had no medical coverage, and the husband had attempted suicide in the face of the emergency measures); *Amezaga*, 325 *Fallos* 46 (2002) (similar decision); *Montalto*, 325 *Fallos* 376 (2002) (same decision, in a case where the depositor suffered from a "serious hereditary disease" and would need "lung transplant"); *González de Giadone*, 325 *Fallos* 370 (2002) (rejecting a *per saltum* against an injunction that had ordered the release of the dollarized deposit of an 88-year old woman); *Zanini de Landi*, 2002-C *La Ley* 363 (same, with an 89-years-old woman); *S.M., M.I.*, 2002-C *La Ley* 366 (2002) (rejecting a *per saltum* appeal by the Central Bank against an injunction that had ordered the release of the dollar deposits of a woman whose son suffered from a serious cancer condition and needed expensive medical treatment); *Alonso*, 325 *Fallos* 822 (2002) (same in a case involving a depositor suffering from amyotrophic lateral sclerosis).

<sup>1244</sup> As noted above, Executive Decree 739/03, issued shortly after the *San Luis* decision gave depositors the option of receiving short-term deposits (the longest term was 120 days from the date of option) in *pesos* for approximately 67% of the free market value of the dollars originally deposited and the rest in dollarized State bonds with a ten year maturity term. This option implied the almost immediate availability of two-thirds of the funds as well as the full recovery of the remaining third, plus interests, in the long-term.

<sup>1245</sup> 326 *Fallos* 417 (2003) (Moliné O'Connor, López, JJ., plurality opinion, §54; Nazareno, J., concurring, §50-53).

As seen here, less inclusive rules as the ones embodied in many Supreme Court landmarks rulings of the most recent crises often involve substantial costs in terms of rights' curtailments. Additionally, such rules are prone to bring about regressive redistributions, as the heaviest burdens (at least those directly associated with concrete emergency measures) are largely put upon the shoulders of relatively poor (or otherwise needy) individuals.

The jurisprudential stance in question also has negative effects upon the democratic and republican value of transparency. By abdicating its role as custodian of the constitutionally-mandated separation of powers, the Supreme Court allows for the politics of obscurity, where public officers who are supposed to make the emergency decisions cannot realistically be held accountable, hence discouraging the ethics of responsibility.

Let us recapitulate a bit the situation during the 2001-2002 crisis. The electorate had not voted for the "pesification" of deposits; rather, it had opposed it.<sup>1246</sup> The president, though he had promised voters that he would create a framework of "negotiation" for the return of deposits,<sup>1247</sup> covertly pressed the Court to obtain its support for "pesification" and sent to Congress omnibus bills including the ratification of emergency decree 214/02. Congress had promised, not once but three times, that deposits would not be "pesified",<sup>1248</sup> and refused to ratify the decree,<sup>1249</sup> while winking to

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<sup>1246</sup> See above n. 846 and accompanying text.

<sup>1247</sup> See above n. 850 and accompanying text.

<sup>1248</sup> See Law 25,466 ("Intangibility of Deposits Act"); Law 25,561 (Article 6); Law 25,820 (Article 2).

<sup>1249</sup> See above n. 875 and accompanying text.

the Court and the Executive (Law 25,820),<sup>1250</sup> all in a sort of game of "throwing the stone and then hiding the hand", subtracting the issue from public debate as much as possible and trying to avoid any political responsibility.

When the Court accepts "tacit" ratifications (through congressional silence, as in *Peralta*) or "implicit" ratifications (through ratification of related, albeit different, measures, as in *Bustos*), it unconstitutionally releases Congress from its duties of deliberating and deciding, before the eyes of the public, what is to be done. Representatives are left off the hook just too easily. It is virtually impossible to know whom to hold responsible, except perhaps for the President. When ratification comes in the form of an omnibus bill —usually, a budget bill—, there is no substantial deliberation on the provisions that ratify the Executive measures. Media coverage focuses on the main provisions of the bill, like the budget. Legislative records scarcely show any discussions of the ratified decrees. Finding out who voted for what, and for what reasons, becomes a Herculean task. But even if a stubborn voter attempts to get himself out of his rational ignorance and, after investing time and money in his investigative efforts, succeeds in finding some information on the ratification issue, it will be the odd case, unlikely to bring any kind of political retribution. The regular person will not even know if Congress did anything on the substantive issue and, if it did, what it did. Much less will she be able to find out why Congress did what it did.

Just to exemplify, when the emergency decree 214/02 —the one that completely "pesified" the economy— was ratified by Congress three years later, through Law 25,967 (the 2005 Budget Act), only three deputies (out of 257) and four senators (out of 72)

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<sup>1250</sup> The "wink" consisting in amending Article 6 of the Law 25,561 (by Article 2 of the Law 25,820) in the sense of interpreting that the mandate to preserve the depositors' capital could be complied with through the offer of state bonds. Thus, Congress may be interpreted as suggesting the Court, which had just ruled straight "pesification" unconstitutional, a solution not unlike the one validated in *Peralta*.

talked and made any references whatsoever to the ratification issue.<sup>1251</sup> Interestingly enough, all references were negative.<sup>1252</sup> Deputies Zamora and Rodríguez Saá denounced Congress for embracing a politics of obscurity. Zamora said:

“[t]he Chamber of Deputies should have announced in the frontpage of the newspapers that it will ratify the decree, [it should have] told the people that it will validate an immoral, unconstitutional, illegal and unfair action, [it should have taken] responsibility with courage and bravery if it really believes that [the ratification] is positive”.<sup>1253</sup>

Rodríguez Saá, in a similar vein, argued that he

“[...] would like to see if Congress dares to discuss [the ratification of pesification] before the eyes of the savers, of the middle class that lost years of hard work so that a foreign or national bank gets to keep [the middle class] money”<sup>1254</sup>

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<sup>1251</sup> See Diario de Sesiones de la Cámara de Diputados de la Nación, November 3, 2004 (taquigraphic version available at <http://www.diputados.gov.ar/secparl/dtaqui/versiones/>; last visited 02/20/2013 (containing mentions to the “pesification” issue by Deputies Zamora, Rodríguez Saá, and L’Huillier) and Diario de Sesiones de la Cámara de Senadores de la Nación, November, 24, 2004 (taquigraphic version available at <http://www.senado.gov.ar/web/taqui/cuerpo1.php?anio=2004&pal1=&pal2=&operador=and>, last visited 03/16/2013) (containing mentions to the “pesification” issue by Senators Salvatori, Gómez Diez, López Arias, and Ibarra).

<sup>1252</sup> See Diario de Sesiones de la Cámara de Diputados de la Nación, November 3, 2004 (taquigraphic version available at <http://www.diputados.gov.ar/secparl/dtaqui/versiones/>; last visited 02/20/2013 (Deputy L’Huillier held that “[the bill] intends to legalize pesification in violation of the National Constitution”; Deputy Rodríguez Saá opposed the bill and argued that it intended to “validate the pesification” and accused the State of being an “accomplice” of the banks; Deputy Zamora opposed the bill arguing that the decree was “ignominious”, that he had filed criminal charges against former President Duhalde for issuing it, and that the ratification was a fraud against the savers and in violation of the Emergency Law 25,561 that guaranteed the respect of the saver’s capital); Diario de Sesiones de la Cámara de Senadores de la Nación, November, 24, 2004 (taquigraphic version available at <http://www.senado.gov.ar/web/taqui/cuerpo1.php?anio=2004&pal1=&pal2=&operador=and>, last visited 03/16/2013) (Senator Salvatori argued that Congress should not enact laws “of dubious constitutionality” and, thus, it should not ratify decree 214/02; Senator López Arias argued that emergency decree 214/02 was a serious mistake that exceeded Congress’ delegation and that he had systematically opposed its ratification, although he now voted for ratifying it in the face of the possibility of aggravating the crisis and “assuming the ethics of responsibility”; Senator Gómez Diez argued that the budget bill was not the proper occasion to debate the ratification of “pesification”; Senator Ibarra argued that she had proposed a bill to abrogate emergency decree 214/02 and that the budget bill was not the proper means to ratify such a decree).

<sup>1253</sup> *Id.*

<sup>1254</sup> *Id.*

Presidents, in turn, have fair chances of eluding political responsibility. If they are in their second term, the constitutional prohibition of a further immediate re-election makes them relatively immune to electoral responsibility.<sup>1255</sup> Also, if the measures are taken early enough in the first term, time helps the president. As time passes, public attention moves to other things, and the emergency issue loses its centrality. If other politically-sensitive issues go well, flagrant violations of rights go unpunished.

But even if, as it seems likely, political retribution comes mainly from bad policy choices, not illegal/unconstitutional ones,<sup>1256</sup> the lack of a clear-cut test of legality (in terms of separation of powers) in the Court's caselaw impedes citizens to determine with precision whom, among their elected representatives, should be blamed for bad emergency decisions, should the citizens so regard the measures in question. It also deprives citizens from the opportunity to reward those who opposed bad policy choices.

The Court creates, thus, a spurious veil of ignorance behind which citizens must make their political decisions. Instead of fostering transparency and deliberation, the justices encourage the politics of obscurity.

Last, but not least, this insufficient attention to separation of powers issues in economic emergency cases contributes to the sociological devaluation of the legitimacy of both courts and legal norms. As recent studies in legitimacy have shown, perceptions

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<sup>1255</sup> Article 90, Argentine Constitution, provides that “[t]he President and Vice-President shall hold their offices for the term of four years; and they may be re-elected or may succeed each other for only one consecutive term. If they have been re-elected or they have succeeded each other, they cannot be elected for either of these two positions but with the interval of one term”.

<sup>1256</sup> See Frederick Schauer, above n. 117, at 93 (arguing that “[w]hen illegal policies are successful on policy and political grounds, and when formal sanctions are unavailable, the fact of illegality will be relatively inconsequential”).

of procedural fairness play a central role in the creation of legitimacy.<sup>1257</sup> The economic arena, the evidence suggests, is no exception to this trend.<sup>1258</sup>

At the same time, it seems that a majority of the people in Argentina sees concentration of power in the Executive as an undesirable phenomenon. As noticed above, they disagree with frequent delegations of legislative powers and disapprove of the Executive practice of issuing emergency decrees instead of sending bills to Congress.<sup>1259</sup> In a context where there is a strong longing for constitutional compliance, as well as a perception of fairly generalized non-compliance,<sup>1260</sup> the disapproval may well come from the fact that the practice regarding both legislative delegation and emergency decrees has clearly overstepped their constitutional limits. They are both forbidden in principle and accepted only under exceptional circumstances. Both instruments have been abused in a departure from constitutional text. They are not the procedure the Constitution prescribes for steering collective life. Therefore, unconstrained decisionmaking by the Executive is likely to be perceived as unfair. Regardless of what the people think about any given emergency measure, the fact that it appears as the unilateral imposition of the president cannot contribute to the sociological legitimacy of the emergency norms. But if the norms themselves are, possibly, perceived as procedurally illegitimate, then judicial decisions upholding them are bound to be regarded

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<sup>1257</sup> See, e.g., Tom R. Tyler, above n. 108, at 382 (arguing that the “procedural justice effect on legitimacy is found to be widespread and robust”).

<sup>1258</sup> See, e.g., James R. Kluegel & David S. Mason, above n. 979, at 817 (“We propose that, independently of their evaluation of distributive justice, people find inequality of [economic] outcomes more fair if they believe that the rules governing its production are consistently observed”).

<sup>1259</sup> Some 57% of the people “disagree” or “disagree very much” with frequent delegations of legislative authority to the Executive and about 53% of the people disapprove of the Executive practice of issuing emergency decrees instead of sending bills to Congress. See Antonio M. Hernández, Daniel Zovatto & Manuel Mora y Araujo, above n. 941, at 148-149 (tables 135 and 136).

<sup>1260</sup> See above n. 948 and accompanying text.

as illegitimate as well. Hardly what the Argentine Supreme Court needs at this point in its history.

## **b. Against Deferential Judicial Stances.**

### **b.1. Putting Up a Defense: The Technocratic Objection Revisited.**

In Part One of this dissertation I attempted to deflect the paradigmatic objection to judicial review: its alleged “countermajoritarian” character. I left for a better time another central criticism of the practice, namely, the argument that courts are ill-equipped to deal with a good number of the questions that constitutional review puts upon their shoulders. I called this argument the *technocratic objection*. It is time to take up the challenge and put up a good defense against it.

The basic idea is that comparative institutional analysis gives the Legislature a clear edge over courts when it comes to dealing with certain topics, economic liberties prominently among them. The Legislature, so the argument goes, is just better at it. The structure of the adjudicative process would make it particularly unsuitable for deciding the complex policy issues often involved in the regulation of economic rights. Some conflicts are polycentric, meaning that there are multiple “centers” to the conflict, which are interrelated in a systemic way, and that any decision regarding one of these “centers” has implications for the proper decision concerning one or more of the remaining “centers”. Lon Fuller, who introduced the term in the legal scholarship, illustrates the concept in the following way:

“[w]e may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a ‘polycentric’ situation because it is ‘many centered’ —each crossing of strands is a distinct center for distributing



tensions”<sup>1261</sup>

Although legal cases are often imbued with polycentric elements,<sup>1262</sup> strongly polycentric conflicts are beyond the proper limits of adjudication, and more suitable for other methods of solution more typical of a legislature.<sup>1263</sup> Economic regulations are generally strongly polycentric,<sup>1264</sup> and even more so when they involve an emergency situation.<sup>1265</sup>

Furthermore, courts allegedly lack the information and expertise needed to decide upon such topics. The adversarial structure of the litigation process prevents them from getting all the pertinent information and giving due consideration to the multiple policy factors that are at play in conflicts of this sort. The views and interests from individuals not parties to the lawsuit, but with stakes in the decision, may well be ignored, or not be given a fair presentation. Einer Elhague’s position illustrates the point:

“[f]irst, courts generally only hear (or pay attention to) the arguments of the actual litigants. Other persons interested in the precedential implications of the case, but not in the judgment itself, generally lack standing and receive inadequate consideration. Nor, assuming there are more possible policy positions or legal rules than there are litigants, will the courts necessarily be presented with the full array of policy arguments and regulatory options. Each party may argue only for the policy or rule that is best for it; none may argue for the policy or rule that is

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<sup>1261</sup> Lon L. Fuller, “The Forms and Limits of Adjudication”, 92 *Harv. L. Rev.* 353, 395 (1978-1979).

<sup>1262</sup> *Id.*, at 397 (“[...] it is equally important to realize that the distinction involved is often a matter of degree. There are polycentric elements in almost all problems submitted to adjudication”).

<sup>1263</sup> *Id.*, at 398 (arguing that polycentric problems are suitable to be resolved by managerial direction or contract).

<sup>1264</sup> *Id.*, at 400 (“Generally speaking, it may be said that problems in the allocation of economic resources present too strong a polycentric aspect to be suitable for adjudication”).

<sup>1265</sup> A cursory review of the 2001-2002 crisis in Argentina provides a clear example of a strongly polycentric situation. Any decision taken in regard to how bank deposits were going to be repaid (“pesified”, and if so, at what rate, or in the original currency) had an impact on the issue of how bank debtors would repay their debts, and viceversa. Moreover, any such decision would also impact the chain of payments in the economy. Many more implications could be drawn, but these suffice as examples.

best for society [...] courts tend to underweigh, or be underinformed about, the systemic and prospective consequences of their decisions because they focus on the particular parties and adjudicated historical facts before them. A trial record usually reveals less about the social and economic consequences of the court's possible decision than does the information presented to legislatures or administrative agencies”<sup>1266</sup>

Constitutional rights protect individual interests that are deemed too important to be generally overridden by collective goals,<sup>1267</sup> but the mere fact that something very important is at stake should not be a sufficient condition for treating it as a right (or, at least, as a judicially enforceable right—or, better, as a right protected by anything more intrusive than minimal rationality review—). This is Neil Komesar's position:

“[...] the importance of a goal does not tell us whether the achievement of that goal should fall to the political process or the courts [...] A goal must be important and better handled by the (always imperfect) adjudicative process than by the political process before we have a good case for translating that goal into a right”<sup>1268</sup>

But, for reasons as those stated above, judges wouldn't be in a good position to handle review of economic regulations. Even Justice Scalia—someone who could hardly be said to object to economic liberties on ideological grounds—fears the courts would not do a good job if they were to afford significant constitutional protection to economic

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<sup>1266</sup> Einer Elhague, above n. 1202, at 77-78.

<sup>1267</sup> See, e.g., Ronald Dworkin, above n. 302, at 92 (“It follows from the definition of a right that it cannot be outweighed by all social goals”); Ronald Dworkin, above n. 68, at 223 (“Most working political theories also recognize [...] distinct individual rights as trumps over [...] decisions of policy”); George L. Priest, “Economic Rights...”, above n. 26, at 3 (defining rights as “largely immutable areas of citizen activity which the majority is prohibited from affecting in any way”).

<sup>1268</sup> Neil Komesar, “Constitutionalism and the Reality of Rights”, *Wisconsin Law School Legal Studies Research Paper Series Paper No. 1176* 11 (2011) (available at <http://ssrn.com/abstract=1940649>; last visited 02/24/2013).

liberties.<sup>1269</sup> I will quote Neil Komesar at some length, for his stance summarizes quite a few crucial points of the *technocratic objection*:

“[...] if the conventional wisdom is correct and this sort of legislation is correctly presumed constitutionally valid, it is not because of an absence of serious systemic political malfunction or an absence of reason to believe that this political malfunction has serious impacts on vulnerable parts of the population. The problem lies not in the absence of serious malfunctions in the political process but *in the presence of serious malfunctions in the adjudicative process*. In other words, *the problem lies on the supply side of rights*. Judicial review of ‘economic classifications’ in the US is extraordinarily limited not because the possibility of harm to traditionally disfavored groups is limited and unimportant, but because, if anything, the evil is so pervasive. There is simply too much to review and that amount will likely only grow in the future. More importantly, *it is increasingly difficult to separate out the valid from the invalid use of these economic classifications*. As I have shown elsewhere, the presence of serious political malfunction does not mean that all the resulting legislation is bad. It only means that there is a tendency or bias in a given direction. *Some of the legislation passed by a biased political process would have been passed by an unbiased process*. The presence of the good among the bad makes the task of the reviewer both difficult and sensitive. Even courts thoroughly distrustful of the economic classifications employed by a political process subject to minoritarian bias would and should fear throwing out babies with the bath water, especially given the decreasing ability to discern babies from bath water. The issue is not the absence of serious and systemic political malfunction. The issue is the inability of the adjudicative process to do better”<sup>1270</sup>

While there is some undeniable merit to all of the abovementioned criticisms, perhaps the objections go too fast. Perhaps courts can do an acceptable job in reviewing economic emergency legislation. Perhaps they can improve upon the political process in context such as the ones I have described in this work.

I want to suggest that the comparative institutional analysis that underlies the *technocratic objection* has missed an important point. The key question needs to be further defined. It is not enough to say that legislatures —or the executive— are better than courts. We need to give precision to the question and state it clearly: better at what?

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<sup>1269</sup> See Antonin Scalia, above n. 1110, at 35 (grounding his skepticism in “the absence of any reason to believe that the courts would limit their constitutionalizing of economic rights to those rights that are sensible”).

<sup>1270</sup> *Id.*, at 12-13. Emphasis added.

Our first reply should encompass the determination of what the Constitution requires or tolerates on the issue at stake. Are the elected branches better than courts at applying the Constitution? If the Constitution clearly forbids any given economic emergency measure, many of the points the critics wield against judicial review lose much of their force. If the Constitution rules out the possibility of adopting policy measure “x”, it doesn’t really matter if courts are not good at, say, weighing alternative policies. Or at listening to interested non-parties. Or at predicting the consequences of their rulings beyond the parties to the lawsuit. The measures will be unconstitutional, *simpliciter*, and courts should rule so.<sup>1271</sup> But, of course, constitutional texts are seldom so explicit and determinate regarding policy measures. Some of them are clearly off-bounds, such as the prohibition to establish the death penalty in Argentina,<sup>1272</sup> but many will be in the “argument zone”. And the constitutional mandate that “property is inviolable” (article 17) doesn’t help much. For the question will be, in any given case, whether a contested measure actually violates property or not. So we should reformulate the question and ask ourselves whether courts or legislatures (or the executive) are better at ascertaining the correct meaning of the Constitution and applying it to cases. For reasons I explained above, I think the correct meaning of the constitution is the current, public, textual, non-esoteric meaning, that which a lay person would ascribe to the constitutional text in question today. As regards the property clause, I have called it the popular conception of constitutional property. While, generally speaking, it is debatable what branch handles the task better, the evidence I have provided here shows a clear superiority of the courts when it comes to reflecting —doctrinally, if not always practically— popular conceptions

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<sup>1271</sup> It is a different question altogether whether public authorities are morally obliged to take the allegedly unconstitutional measures to avert disaster. “Extra-legal Measures” theorists of various kinds would reply yes, but that spawns a whole lot of special problems. See, e.g., Oren Gross & Fionnuala Ní Aoláin, above n. 31.

<sup>1272</sup> Article 4 of the San Jose de Costa Rica Pact (Inter-American Human Rights Convention), which enjoys constitutional standing in Argentina (Article 75.22, Argentine Constitution) terminantly forbids the reestablishment of the death penalty in states parties to the treaty that had previously abolished it.

of constitutional property. Congress has largely retreated from making substantial emergency decisions, and the Executive branch has gone for ever-deeper encroachments on property, understood in popular terms. So if “better” means better at applying the Constitution as per its popular understandings, courts in Argentina are arguably better than the elected branches.

Moreover, it is far from clear that elected representatives actually engage in good-faith constitutional interpretation or that they even want to. In the U.S., for instance, some studies suggest that some 62% of representatives think that Congress should form its own independent constitutional judgement on issues before it, but at the same time the evidence signals that high levels of constitutional deliberation in Congress are rare.<sup>1273</sup>

Let us put aside, for a moment, the possibility that the courts are better at ascertaining popular conceptions of constitutional property. Let us assume that it does not matter at all. Suppose that a different constitutional theory—one that, for instance, accepts interpretations that frontally contradict popular understandings of the text, or one that commends underenforcement of economic constitutional rights—is more convincing. In such a context, a possible answer to the “better at what” question is a general assertion that elected branches are better at dealing with economic rights issues. But there are many dimensions that may enter an analysis of which institution does a better job in that regard. Moreover, the objection overlooks the possibility that courts and legislatures (or presidents) can work together, complementing—rather than completely displacing—each other. I want to explore briefly these two potential lines of defense against the objection.

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<sup>1273</sup> See Brett Max Kaufman, “Weak Courts On Steroids: Improving Weak-Form Judicial Review”, 87 *Tex. L. Rev.* 639, 646-647 (2009) (analyzing evidence cited by Mark Tushnet and citing J. Mitchell Pickerrill’s studies).

An analysis of whether courts, legislatures, or presidents perform better in the realm of economic rights should not overlook that the very definition of better, as applied to the case, must include at least three interrelated dimensions: responsiveness to popular will, probability of “getting it right”, and public regardingness. When these factors are taken into account, it is far from clear that courts are at a disadvantage vis-a-vis the elected branches, at least in the Argentine contexts I am dealing with.

While the “countermajoritarian difficulty” and the “technocratic objection” are, of course, conceptually distinct, it is not clear that they should be totally divorced when it comes to arguing for or against judicial review of emergency measures. Even if, say, a team of bureaucrats in the Executive branch “knows better” how to overcome any given economic crisis, we do not want to give them *carte blanche*. It is not just accountability that we want, for it always comes late, if it comes at all, and it is often a very imperfect redress for the harms inflicted. We also want responsiveness. They may know better how to get over the emergency, but what price we are willing to pay for a solution is a different thing.

Doctors know better than patients what treatments are available, but we still want patients to make the decisions. We request their informed consent. We do not trick them into treatments just because there is always liability if the doctors do wrong. Specially, we do not force them to undergo treatments they refuse. Certainly, the analogy I am making has its limits, for it is not possible to completely equate decisions over one’s own health and life, whose reach do not transcend from oneself, with collective decisions which, bar the case of unanimous consent, always affect someone who opposes them. Still, I think it is useful to emphasize the value of responsiveness to the judgements, and even preferences, of those who will bear the consequences of a decision. Bear in mind that once we realize the failure of the model of general legislation as protection from

legislative harm,<sup>1274</sup> legislators are like doctors who act upon the patient's body but do not suffer themselves the consequences of bad policy decisions. Legislators are largely beyond the reach of their own normative products or they are sufficiently compensated by other means if they in fact suffer the consequences of the legislation they enact. They have privileged information and frequently belong to the classes that, I have shown, are rarely adversely affected by emergency regimes. Add to the equation that accountability is feeble at best, and then it is easy to see why responsiveness is an important factor.

As I have shown throughout the first part of this dissertation, in emergency contexts at least, electoral branches have often contradicted not only the popular conception of constitutional property, but also the majority's concrete will on the topic, as expressed through various means. Courts have vindicated popular sentiments only rarely. But they have tried to embrace conceptions of property more amenable to the people's will. On occasion, they have even defended the popular conception of constitutional property against violations from the political branches. They have shown, at least at the argumentative level and arguably also in the actual world, better fidelity to the Constitution, as understood by the people, and more responsiveness to their judgements and preferences.<sup>1275</sup> There is a trade-off to be made between the probability of reaching the best possible solution and the responsiveness to the people's will. It isn't

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<sup>1274</sup> See, e.g., James M. Buchanan & Gordon Tullock, above n. 1146, at 277 (explaining that "If all collective action should be of such a nature that the benefits and costs could be spread equally over the whole population of the community, no problem of interest group, and indeed few of the problems of government, would arise. If each individual, in his capacity as choice-maker for the whole group could, in his calculus, balance off a pro-rata share of the total benefits against a pro-rata share of the total costs, we could expect almost any collective decision-making rule to produce reasonably acceptable results. Under these relatively 'ideal' circumstances, individuals and groups would have relatively little incentive (because there would not exist much genuine possibility) to utilize the political process to secure advantage over their fellows").

<sup>1275</sup> Fidelity to the popular conception of constitutional property and responsiveness to the concrete wishes of a majority of the people need not lead to identical outcomes, of course. An undisputed interpretation of a constitutional clause, as per popular understandings, may be deemed as undesirable by a majority of the people in any number of circumstances. Still, in many instances in the narrative I have presented, historical-sociological evidence hints that both have tended to coincide.

enough, then, to assert that legislatures (or presidents) are better than courts at dealing with economic rights to close down the discussion on judicial review.

Regarding the probability of making sounder decisions, there is, indeed, an extensive literature exploring the possibilities of dialogic engagements between courts and elected branches in constitutional interpretation.<sup>1276</sup> I am not going to enter such debate here. Still, I want to point out that the occasional instances in which Argentine courts adopted a moderately non-deferential stance, they prodded the elected branches to come up with solutions that were much more acceptable from the social standpoint and, arguably, more respectful of the rights at stake than those originally challenged.<sup>1277</sup> Social acceptability is surely an important part of emergency decision-making, as economic emergencies often put strain on the administration's ability to retain control of the circumstances.<sup>1278</sup> Respecting individual constitutional rights is a constitutional mandate, so it should also be a component of sound decision-making. Importantly, these judicial

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<sup>1276</sup> See, e.g., Mark Tushnet, "Dialogic Judicial Review", 61 *Ark. L. Rev.* 205, 209 (2009) ("The basic idea of dialogic judicial review is to encourage interactions — dialogues — among the branches about which of the competing reasonable interpretations of constitutional provisions is correct"); *Id.*, at 212-213 (arguing that the evidence of dialogic judicial review is discouraging from a democratic perspective); Barry Friedman, above n. 118, at 653 (2009) ("I call the process of judicial review that actually occurs in the workaday world *dialogue*. The term emphasizes that judicial review is significantly more interdependent and interactive than generally described. The Constitution is not interpreted by aloof judges imposing their will on the people. Rather, constitutional interpretation is an elaborate discussion between judges and the body politic"); Christine Bateup, "The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue", 71 *Brook. L. Rev.* 1109, 1180 (2006) (assessing different theories of dialogue and claiming that dialogue should incorporate both society-wide and institutional aspects).

<sup>1277</sup> See Barry Friedman, above n. 118, at 670 (mentioning "prodding" other branches as part of the role of courts in the dialogic model).

<sup>1278</sup> See, e.g., Tom R. Tyler, above n. 108, at 377 (arguing that legitimacy is particularly important in times of crisis because "disruptions in the control of resources brought on by periods of scarcity or conflict quickly lead to the collapse of effective social order. When the public views government as legitimate, it has an alternative basis for support during difficult times. Further, when government can call upon the values of the population to encourage desired behavior, society has more flexibility about how it deploys its resources. In particular, the government is better able to use collective resources to benefit the long-term interests of the group because the resources are not required for the immediate need to ensure public order"). *Id.*, at 381 ("Such a reservoir is of particular value during times of crisis or decline, when it is difficult to influence people by appealing to their immediate self-interest, and when there are risks concerning whether they will receive the long-term gains usually associated with continued loyalty to the group").



decisions did not impede or frustrate the solution to the crisis. Once again, it seems that judicial intervention in the regulation of the emergency brought about a solution that reflected a superior trade-off of values than a wholly hands-off approach would have caused. Let us examine the evidence, once more, very briefly.

When the Supreme Court struck down, in an admittedly hurried fashion, the first wave of emergency norms during the 2001-2002 crisis, in the *Smith* decision, lower courts followed the ruling and began granting (frequently partial) injunctive relief to the enraged savers. While both Congress and the Executive seemed to disagree with judicial mandamus based upon *Smith*, and issued norms forbidding the granting of injunctions ordering the return of dollars to depositors, save cases where special circumstances were present,<sup>1279</sup> the truth of the matter remains that courts played a central role in keeping social peace and channeling the savers' rage through institutional means. They helped defuse an explosive situation,<sup>1280</sup> in a way that neither Congress nor the Executive was able to do. Sound(er) decisionmaking came from the interplay of elected and non-elected branches.

The next following decision in the “pesification” saga, *San Luis* further reinforces the point. Right after the Court declared “pesification” of bank deposits unconstitutional,

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<sup>1279</sup> See Articles 1 and 4, Law 25,587 (available at <http://infoleg.mecon.gov.ar/infolegInternet/anexos/70000-74999/73816/norma.htm>; last visited 03/20/2013), and Articles 1, 2 and 3, Emergency Decree 1316/02 (available at <http://infoleg.gov.ar/infolegInternet/anexos/75000-79999/76187/norma.htm>; last visited 03/20/2013).

<sup>1280</sup> See above n. 75. See also Agustín Gordillo, “Corralito”, Justicia Federal de Primera Instancia y contención social en estado de emergencia”, 2002-C *La Ley* 1217 (explaining the chaotic situation in the federal courts during the first few weeks after the entry into force of the “corralito” and describing the judiciary’s actions as “heroic”, channeling through pacific means the popular outrage unleashed by the “evolutive irrationality of the corralito”); Dafne Soledad Ahe, “El desamparo del amparo”, 2002-C *La Ley* 1227 (describing the dramatic situation of thousands of plaintiffs who showed up in the court’s buildings in absolute despair, exhibiting prothesis, the last few doses of their own cancer medications, and other similarly eloquent signs of their own individual emergency, aggravated by the impossibility of using their money due to the emergency regime).

President Duhalde issued Emergency Decree 739/03, which —as explained above— presented the depositors with an option to recover their funds that, arguably, respected their core constitutional property rights. It set up a scheme whereby smaller depositors (deposits of up to 30,000 dollars) could withdraw the full amount of their “pesified” deposits right away, which amounted to two-thirds of the value of the original dollar deposit at the free market exchange rate of the time, and receive a 10-year maturity dollarized bond for the remaining third. Larger amounts were subject to a mandatory waiting period of 90 and 120 days before “pesified” funds could be freely disposed. During such period, the funds would be put in a term deposit. All depositors would get the bond to cover the difference to the free market value of the original dollar deposits. The decree also authorized banks to offer depositors better restitution conditions and seven banks did so. Four banks allowed their depositors to withdraw “pesified” deposits right away, regardless of their amount. Three other banks improved upon the conditions of the administration’s scheme, offering immediate release for all deposits up to 100,000 *pesos* (some 70,000 dollars, “pesified” at the official conversion rate of 1.40 *pesos* per dollar).<sup>1281</sup>

Those who opted for accepting the scheme tended to leave their money in the banks, in new, freely usable term deposits. About 60% of the money that depositors could have withdrawn under Emergency Decree 739/03 seems to have remained in the banks’ vaults.<sup>1282</sup> While many factors may have influenced depositors to forego actual withdrawal of the funds —i.e. high interest rates, insecurity, etc.—, one cannot discount

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<sup>1281</sup> See, e.g., “Abren hoy el corralón a más de 145.000 ahorristas”, *Clarín*, April, 8, 2003 (available at <http://www.clarin.com/diario/2003/04/08/e-02401.htm>; last visited 03/15/2013).

<sup>1282</sup> See, e.g., “Los ahorristas no sacaron sus depósitos del corralón”, *Clarín*, April, 18, 2003 (available at <http://www.clarin.com/diario/2003/04/18/e-01215.htm>; last visited 03/15/2013). At the time of the information, depositors still had three more days to opt for the conversion scheme.

that the Court’s vindication of property rights in *Smith* and, especially, *San Luis* also played a role.

We don’t know for sure if the Court’s ruling in *San Luis* prompted the Executive to issue the decree or if President Duhalde was going to take a similar measure anyway. But it is hard to imagine a president taking pains to guarantee full restitution in a scenario where the Court validated “pesification” with a “haircut” and two very big players, the banks and the so-called “Grupo Productivo”, were very much interested in full “pesification” of deposits. History supports the hypothesis that the Court did influence the Executive. Before the justices invalidated “pesification”, no offer likely to produce full restitution for everyone had been put forward; after the *Bustos* plurality upheld “pesification” no more exchange offers were made. It was only during the time when *San Luis* was good law that more reasonable alternatives were advanced.

Before *San Luis*, all attempts offering depositors a voluntary conversion of their frozen and “pesified” deposits into long-term State bonds were very limited and did not provide at for immediate availability of any portion of the funds, beyond the possibility of selling the bonds in the secondary market at a heavy discount.<sup>1283</sup> The initial scheme contained in Emergency Decree 214/02 only provided for the optional conversion of deposits of up to 30,000 dollars into long-term dollarized bonds issued by the State. Later, Emergency Decrees 905/02 and 1836/02 extended the option to all depositors, regardless of their amounts.<sup>1284</sup> Every alternative offered to the depositors prior to the *San Luis* ruling was modeled after *Peralta*. Thus, as I have already explained, they were likely to have significantly regressive effects, given the profile of the median saver and the

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<sup>1283</sup> Remember that Argentina had just defaulted on its sovereign debt.

<sup>1284</sup> Notice that all conversion schemes are posterior to the ruling of the Court in the *Smith* case. Even if *Smith* did not deal with “pesification” (which had not been enacted yet), it did hint at the Court’s later rejection of it. Therefore, options of dollarized bonds are likely to have been included with an eye on the Court’s case law.

ensuing likelihood that many depositors could not help selling their bonds early and well below par. Heavy losses on depositors were to be expected. It was only after the Court struck down “pesification” as an unwarranted intrusion of property rights that the Executive made an offer that was substantially less likely to deprive depositors of their property. The immediate availability of a significant portion of the funds made it more likely that depositors could actually wait to recover the remaining portion. But even if some depositors had to sell their bonds, any losses derived from early sales would only affect one third of their deposits. A depositor who could not afford to wait and had to sell her bonds right away would have received a total amount of almost 86% of her original dollar deposit,<sup>1285</sup> as opposed to the roughly 50% she was to receive under the “pesification” regime.<sup>1286</sup> By way of comparison, remember that a similarly situated depositor in times of the Bonex Plan, forced to sell early, would have received about 30% of the original value of her deposit.<sup>1287</sup>

Notice that the Court’s ruling did not bring about the failure of any banks, much less of the whole financial system, nor did it compromise the latter’s viability. To the contrary, the interplay with the Executive seems to have instilled a much-needed sense of legal certainty into the financial system, prompting depositors to leave their money in the banks and fueling the system’s recovery. Moreover, the Court’s stance, insofar as it actually motivated the issuance of Emergency Decree 739/03, effectively protected

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<sup>1285</sup> See, e.g., “Abren hoy el corralón a más de 145.000 ahorristas”, *Clarín*, April, 8, 2003 (available at <http://www.clarin.com/diario/2003/04/08/e-02401.htm>; last visited 03/15/2013) (explaining that the bonds were selling for about 52% of their face value at the time of the Emergency Decree 739/02, that a depositor who accepted the administration’s plan would receive enough pesos to purchase dollars amounting to near 70% of the original total deposit in dollars and that the remaining 30% —bonds— could be sold for about half of its value, thereby immediately recovering approximately 86% of the total original amount).

<sup>1286</sup> See above n. 995 and accompanying text.

<sup>1287</sup> See above n. 727 and accompanying text.

property rights and prevented further regressive redistributions. All in all, a case can be made that the intervention of the Judiciary induced more reasonable, sounder, emergency decisionmaking than what the lone action of the elective branches had done.

Last, but not least, courts may actually have an edge over legislatures (and executives) when it comes to assessing the public-regardingness of the decisionmaking process. Neil Komesar has made the point that a skewed decisionmaking process does not automatically mean unsound decisions. It only means there is a bias. But some decisions made through a biased process would also have been made by an unbiased one.<sup>1288</sup> True enough. Some decisions would have been equally endorsed by a public-regarding process. But citizens have a constitutional right to demand that public law be public-regarding.<sup>1289</sup> If courts can improve upon the elected branches in the public-regardingness department, then the *technocratic* objection is further undermined.

Some commentators are very skeptical of the claim that courts can manage to weed out special interest legislation. Komesar emphasizes that it is increasingly difficult to separate out the valid from the invalid use of economic classifications and that courts would run the risk of making serious mistakes if they attempted to police legislation for rent-seeking efforts.<sup>1290</sup> Daniel Farber and Philip Frickey make a related point: courts trying to stamp out rent-seeking would be forced to review virtually all governmental

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<sup>1288</sup> See above n. 1123 and accompanying text.

<sup>1289</sup> See Jerry L. Mashaw, above n. 79, at 80 (“The Constitution presumes that private activity will be constrained only to promote public purposes [...] Citizens have a constitutional right to demand that public law be public-regarding. Otherwise, their private harms are constitutionally inexplicable”). See also Jonathan R. Macey, “Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model”, 86 *Colum. L. Rev.* 223, 225, fn 14 (1986) (arguing that for a judicial interpretation to be consistent with the U.S. constitutional scheme it must, inter alia, “result in making legislation more public-regarding by serving as a check on legislative excess” and that such requisite is an “implied condition inherent in the structure of the Constitution”).

<sup>1290</sup> Neil Komesar, above n. 1268, at 13.

activity, with costs to exceed any purported benefits.<sup>1291</sup> In short, the task would be both very difficult and very vast, perhaps to the point of being unmanageable.

I think both objections can be answered. Patrick Luff has forcefully argued that

“[...] in contrast to the elected branches, structural, as well as attitudinal factors, suggest that courts are comparatively less likely to be captured by private interests, and therefore more likely to act in the public interest”<sup>1292</sup>

In his view, there are two dimensions to the differences between courts and elected branches, when it comes to private interest influence: informational influence and purchase influence.<sup>1293</sup> A number of statutory and professional prohibitions limit the types of extraneous information to which judges are exposed and the way they process it,<sup>1294</sup> enhancing their relative ability to detach themselves from the influence of actors pursuing special class legislation.<sup>1295</sup> Also, relatively independent courts are better positioned than elected branches when it comes to purchase influence. Be it that judges have a “legalist” inclination —that is, they decide cases based on rules, which constrain and channel their decisions, and regardless of their own policy preferences— or be it that they embrace “non-legal” role orientations —that is, they decide based on what they

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<sup>1291</sup> Daniel A. Farber & Philip P. Frickey, above n. 1108, at 68-71 (arguing that public choice does not provide an adequate basis for a broadscale judicial attack on special interest legislation and analyzing what they perceive as the flaws of such an approach).

<sup>1292</sup> Patrick Luff, above n. 116, at 14-15.

<sup>1293</sup> *Id.*, at 11.

<sup>1294</sup> *Id.*, at 19 (mentioning as relevant factors that judges are prohibited from discussing pending lawsuits with those not party to the suit, and prohibited from engaging in *ex parte* contacts with those party to the suit, as well as the duty to recuse themselves that bears upon judges with personal interest in any given lawsuit).

<sup>1295</sup> *Id.*, at 10 (“Elected-branch officials are busy, and the more information they get from a particular organized interest, the more likely they are to enact policies in favor of that interest, purely because of the disparity between the amount of information that a small, organized interest group is able to convey to policymakers, compared to large, unorganized groups”).

think best for the public— ,<sup>1296</sup> there is little room for private-interest influence.<sup>1297</sup> Legalist judges make their decisions divorced from their policy implications; thus, they cannot have private-interest motivations. As the judicial process lacks the “purchase” influences prevalent in the elected branches,<sup>1298</sup> judges with non-legal role orientations are unlikely to exercise their independence to favor private interests, unless it is an inevitable consequence of pursuing some wider policy goal.<sup>1299</sup>

If Luff is right, and both structural and attitudinal factors make courts less likely to be captured by private interests, then there is no need for courts to do any special search for invalid uses of economic classifications: the mere fact of their intervention ensures a better prospect of public-regardingness in official actions. Komesar’s fears may be unwarranted. Granted, we still face the question of what courts should do, if they are not to conduct specific searches for special interest legislation. Mashaw proposes a cost-benefit test as a manageable proxy for public-regardingness.<sup>1300</sup> Macey proposes that judges should take a consistently neutral approach to all sort of statutes and apply traditional interpretive techniques, such as using legislative history, traditional canons of interpretation such as the “plain meaning rule”, all of which is likely to result in raising the costs of enacting “hidden-implicit” legislation.<sup>1301</sup> I will also follow the indirect

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<sup>1296</sup> *Id.*, at 26.

<sup>1297</sup> *Id.*, at 28.

<sup>1298</sup> *Id.*, at 10 (“In exchange for favorable policies [...] politicians receive campaign contributions and other organizational benefits, the promise of future jobs and, occasionally, outright bribes. The ability to provide votes and resources also gives organized groups another advantage”)

<sup>1299</sup> *Id.*

<sup>1300</sup> See Jerry L. Mashaw, above n. 79, at 66-68, 79-80.

<sup>1301</sup> See Jonathan R. Macey, above n. 1289, at 261-266.

strategy. I will provide a brief sketch on the test later. Suffice it to say that any test which does not embrace an ultra deferential stance will play a role in improving public-regardingness.

Farber and Frickey’s critique can also be dodged by my argument, as it is focused on certain particular circumstances, namely, economic emergency, which amplify opportunities for rent-seeking behavior while providing rhetorical cover up. These two features of economic emergency justify restricting my proposal of stronger judicial scrutiny to this particular area, regardless of any arguments that might be put forward in support of a broader judicial supervision. I need not endorse such a strong position to defend my argument here.

It is generally admitted that emergency circumstances justify stronger restrictions on individual rights, restrictions that under normalcy conditions would be deemed beyond constitutional limits.<sup>1302</sup> Thus, Chief Justice Hughes held in *Blaisdell* that

“[i]t cannot be maintained that the constitutional prohibition [of impairing the obligations of contracts] should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts *if made necessary by a great public calamity* such as fire, flood, or earthquake [...] The reservation of state power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts as is the reservation of state power to protect the public interest in the other situations to which we have referred. And if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, *that power cannot be said to be nonexistent when the urgent public need demanding such relief is produced by other and economic causes*”<sup>1303</sup>

In a similar —albeit more explicit— way, the Argentine Supreme Court has held that

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<sup>1302</sup> Only “business as usual” models of emergency powers deny that emergencies justify exceptional measures. Such models are admittedly rare, though. See Oren Gross & Fionnuala Ní Aoláin, above n. 31.

<sup>1303</sup> 290 U.S. 398, 440 (1934). Emphasis added.



“[e]mergency legislation can be valid even though it effects restrictions on individual rights which, under normal circumstances, would not have been valid under the Constitution”<sup>1304</sup>

This increased leeway means that the redistribution possibilities are also larger. Hence, the stakes for the players are substantially higher in a context of economic emergency. Such increase in the potential gains enlarges the amount of resources that small, organized groups devote to rent-seeking activities,<sup>1305</sup> thereby increasing their “purchase influence”. At the same time, the rhetoric of emergency, accurate or not, lowers the political costs of curtailing individual rights, for the people may tolerate particularly intense restrictions if they believe them to be inevitable. Thus, Higgs and Twight seem to be right when they assert that governments face a favorable cost-benefit calculus when assessing whether, and to what extent, to restrict individual rights for emergency reasons.<sup>1306</sup> In economic emergency contexts, then, we can expect both increasing encroachments on individual rights and related larger private gains. This phenomenon justifies the need for more searching judicial scrutiny in this particular area of governmental activity, effectively defusing Farber and Frickey’s argument that public choice necessarily leads to placing most, if not all, regulation under close judicial supervision.

Finally, Luff has also argued that the alleged informational problems that would hinder the Judiciary’s ability to deal with complex policy issues might well be overstated. He argues that when the policy issue is framed narrowly and in such a way that it presents a binary choice, the binary adversarial system provides an ideal forum in which

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<sup>1304</sup> 243 *Fallos* 449 (1959).

<sup>1305</sup> See above n. 1188 and accompanying text.

<sup>1306</sup> See Robert Higgs & Charlotte Twight, above n. 1174, at 771.

to assess the policy.<sup>1307</sup> Amicus curiae can be filed, and courts can always require information from state agencies, if relevant to the decision. He further contends that the seriatim nature of legal decisions create a system likely to be more deliberative than legislative policymaking<sup>1308</sup> and, one supposes, there is scarcely any need to argue that such a system is more deliberative than pure executive policymaking. If the argument holds true,<sup>1309</sup> then the *technocratic* objection loses much of its power.<sup>1310</sup>

## **b.2. Counterattacking: the Selective Risk, Equal Sharing of Public Burdens, and Right-to-a-Hearing Arguments.**

It is time to suggest some additional reasons why judicial review of economic emergency measures, beyond mere rationality review, may actually be a good idea. I will be brief, for the bulk of the arguments I will present here have already been hinted at throughout the dissertation. The evidence I will use has also, for the most part, been already presented and discussed in different sections and chapters.

The first argument relies on the idea of equality and impartiality in the distribution of risks created by economic emergency regulation, as well as on the

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<sup>1307</sup> See Patrick Luff, above n. 116, at 33.

<sup>1308</sup> *Id.*, at 33.

<sup>1309</sup> While proving the accuracy of Luff's arguments is way beyond the scope of this dissertation, the evidence gathered here suggests that they might hold true, despite what is said in the following footnote. The Supreme Court struggled with the issue of "pesification" of bank deposits during a period of about 5 years, during which it interacted with lower courts, as well as with the elected branches, reacting to their respective decisions on the topic. As circumstances evolved, decisions were adjusted and modified, generally improving upon the sole work of the elected branches, as it has been argued throughout this second part of this text.

<sup>1310</sup> While Argentina's Judiciary does not seem to be quite up to the standards that Luff's arguments presupposes, in terms of independence and immunity to purchase and informational influences, the truth of the matter remains that the elected branches are comparatively worse. Moreover, if his argument is correct, then it makes sense to work towards improving the Judiciary, rather than to deprive it of revision powers.

constitutional mandate to respect equality in the sharing of public burdens. If no individual can be singled out to carry the burden of overcoming crises, then it would seem that over time, people might be compensated implicitly or in kind for the burdens imposed on them by any given emergency regulation. They might actually turn out to be, as Michelman suggests, “net gainers”. Such an argument faces significant obstacles from the perspective of those subject to the regulations. Economic emergencies, no matter how repetitive or pervasive, are not everyday events that readily lend themselves to the kind of trade offs and compensations that the argument presupposes. It is one thing to understand and accept that the limitation imposed on my property rights by a regulation that forbids building beyond, say, twenty meters of height, in order to prevent buildings from blocking light to other buildings is compensated in kind by the like limitation that my neighbor suffers. It is a completely different thing to accept that the limitation imposed today on my property rights over my savings (say, a 50% “haircut”) is compensated by the hope that in a future emergency someone else (other sector of the population) will bear the burden of controlling the eventual crisis. Arguably, the argument is almost naïve when transplanted from the takings context in which Michelman originally advanced it, to the emergency regulatory takings in question. As complex facts underlie economic emergencies, it may well be that solutions to the crises are frequently confined to regulating more or less the same sectors, in particularly intrusive (although significantly varying) ways, with the consequence that, potentially, the same classes of people (and even the same individuals) are brought to bear the costs of overcoming the emergency. There are “net gainers” and “net losers”, indeed. But the chance of being on one or the other side is far from being equal. Public-burdens sharing is not equal, as the Constitution mandates. Not even over time.

Analyzing the U.S. Supreme Court *Kelo* decision,<sup>1311</sup> and in an admittedly somewhat different context, Laura Underkuffler has argued that a very potent issue is whether the risk of destruction of property, with the ensuing undermining of the individuals' political, social, and economic lives, is a risk extended equally to all, or is, a structural matter, extended only to a particular class of persons.<sup>1312</sup> She says that

“Whatever the theoretically equal risk that all community member face from economic revitalization projects, the ‘goals’ that these projects seek —and the politics of wealth— mean the certain privileging of some over others”<sup>1313</sup>

Notice how well a paraphrase would work here: “whatever the theoretically equal risk that all community members face from economic emergency regulations, the ‘goals’ that these regulations seek —and the politics of wealth— mean the certain privileging of some over others”.

The truth of the matter is that risks created by economic emergency regulations fall selectively on the same class of persons, for both kind of reasons identified by Underkuffler. Lobby power, the evidence shows, has played a central role in determining outcomes in the last two economic crises in Argentina. Wealth, for a variety of reasons —which include but also go beyond— political influence, is directly correlated with avoidance of harms and reaping of gains in emergency contexts. But the “goals” of the regulations also often create a bias towards favoring the rich, regardless of their political influence. If the regulations aim at, e.g., promoting the general welfare or the recovery of

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<sup>1311</sup> 545 U.S. 469 (2005).

<sup>1312</sup> See Laura Underkuffler, “Kelo’s Moral Failure”, 15 *Wm. & Mary Bill Rts. J.* 377, 386 (2006-2007).

<sup>1313</sup> *Id.*

the economy, then the aggregative calculus implicit in determining the content of such goals is likely to favor protection of the assets of the wealthy.<sup>1314</sup>

Notice, however, that my argument is broader in scope than an argument based solely on the idea of special interests influencing decisively the political process (which affects the impartiality of the decisions and the equal distribution of risks) or on the bias that utilitarian approaches to the management of the crisis might create (which affects equality of burden-sharing). The argument I offer here encompasses both impartiality and equality concerns, procedure and substance.

Deferential judicial review, to the point of abdication, has the effect of validating such morally unwarranted political outcomes. A Judiciary whose review powers have some bite may ameliorate these defective qualities of economic emergency decisionmaking.

Additionally, judicial review grants the individual a chance of actual, and not merely theoretical, participation in the rule-making process that affects her rights. Judicial review increases, rather than undermines, participation. In doing so, it bolsters political legitimacy, insofar as legitimacy is based upon participation of the governed in the lawmaking process.

Alon Harel, in a series of co-authored papers, has forcefully argued that any rights-respecting society owes its citizens a right to judicial review.<sup>1315</sup> Such right derives from a basic right to a hearing that is due to any right-bearer whenever her rights are at stake.<sup>1316</sup>

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<sup>1314</sup> See above n. 1132-1141 and accompanying text.

<sup>1315</sup> See, e.g., Alon Harel & Tsvi Kahana, “The Easy Core Case for Judicial Review”, 2 *J. Legal Analysis* 227 (2010); Yuval Eylon & Alon Harel, “The Right to Judicial Review”, 92 *Va. L. Rev.* 991 (2006); Alon Harel & Adam Shinar, “Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review”, 10 *Int’l J. Con. L.* 950 (2012).

<sup>1316</sup> See Yuval Eylon & Alon Harel, above n. 1315, at at 1017 (“[...] individuals have a right to JR [judicial

“[t]he right to a hearing is grounded in the fact that people occupy a special position with respect to their rights. Rights demarcate a boundary that has to be respected, a region in which the rightholder is a master. One’s special relation to the right, i.e., one’s dominion, does not vanish even when the right is justifiably overridden. When the infringement of the right is at stake, the question of whether it might be justifiable to infringe that right is not tantamount to the question of whether one should have dominion over the matter. A determination that the right has been justifiably infringed does not nullify the privileged position of the rightholder. Instead, his privileged position is made concrete by granting the rightholder a right to a hearing. Thus, infringing the right unilaterally is wrong even when the infringement itself is justified because the rightholder is not treated as someone who has a say in the matter”<sup>1317</sup>

The right to a hearing is comprised of three parts.<sup>1318</sup> First, right-holders have a right to voice their (actual or imaginary) grievances. Second, individual justification must be given to them when their interests may be adversely affected by collective decisions. Finally, a true, open-minded, reconsideration of the decision affecting the individual rights must be granted. Courts are especially suited for satisfying this very basic right to a hearing,<sup>1319</sup> are arguably superior to legislatures and other non-adjudicative bodies in that

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review]—a right which is derivative of the right to a hearing”); Alon Harel & Tsvi Kahana, above n. 1315, at 238 (“[...] judicial review is designed to facilitate the voicing of grievances by protecting the right to a hearing”); Alon Harel & Adam Shinar, above n. 1315, at 965 (“[...] judicial review is designed to protect the right to a hearing (or the right to raise a grievance)”).

<sup>1317</sup> Alon Harel & Tsvi Kahana, above n. 1315, at 241. See also Yuval Eylon & Alon Harel, above n. 1315, at 1002 (“The right to a hearing recognizes and accommodates a person’s dominion over her rights even when infringement of those rights is justified. The failure to recognize this right to a hearing represents a failure to respect persons as right-holders. Since respecting rights requires recognition of this demarcated realm as such, respecting rights must also require recognizing the significance of the position right-bearers hold with respect to their rights. In particular, individuals should be able to claim their rights and be heard before those who have the capacity to infringe”).

<sup>1318</sup> Yuval Eylon & Alon Harel, above n. 1315, at 1002-1006.

<sup>1319</sup> Alon Harel & Tsvi Kahana, above n. 1315 at 249 (“It seems uncontroversial (to the extent that anything can be uncontroversial) that courts are designed to investigate individual grievances [...] The judicial way of assessing individual grievances comprises three components. First, the judicial process provides an opportunity for an individual to form a grievance and challenge a decision. Second, it imposes a duty on the part of the state (or other entities) to provide a reasoned justification for the decision giving rise to the challenge. Last, the judicial process involves, ideally at least, a genuine reconsideration of the decision giving rise to a challenge, which may ultimately lead to an overriding of the initial decision giving rise to the grievance. If the judicial review of legislation can be shown to be normatively grounded in these procedural features, it follows that courts are particularly appropriate in performing such a review. To establish this claim, consider the nature of a failure on the part of courts to protect the right to a hearing. Such a failure is different from a failure on the part of the court to render a right or a just decision. The

regard, and to the extent that such bodies may satisfy the right to a hearing, they perform typical adjudicative functions.<sup>1320</sup>

Ultra-deferential judicial review, as epitomized by *Ferguson v. Skrupa* and other like decisions,<sup>1321</sup> has very little to offer to the citizen in this regard, for it fails at least the third condition of the right to a hearing. All it can say to the aggrieved citizen is “whenever your property rights are at stake, you have the right to vote for a representative who will represent you freely and who, without being obliged to consider—nor able to actually know— your true opinions, preferences, and circumstances, will vote on a final decision over your rights”. It seems just too feeble a right to ground political legitimacy when important matters are in question.

If political representation is nothing but a necessary evil of modern political conditions,<sup>1322</sup> and not the realization of the democratic ideal—which would require, among other things, the direct participation of each citizen in the lawmaking process—

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latter failure indicates that courts are fallible, but it does not challenge their status as courts. In contrast, the former failure, namely a failure to protect the right to hearing, is a failure on the part of courts to do what courts are specially designed to do; it is a failure to act judicially; in short it is a failure to function like a court. It seems evident therefore that courts are specially suited to protect the right to a hearing”).

<sup>1320</sup> *Id.*, at 250 (“[...] whatever institution performs this task, such an institution would inevitably use processes that are indistinguishable from those used by courts [...] The more effective institutions are in facilitating a hearing, the more these institutions resemble courts”).

<sup>1321</sup> See, e.g., 431 U.S. 1, 46 (1977) (Brennan, White, Marshall, JJ., dissenting) (“The central principle developed by these decisions, beginning at least a century ago, has been that Contract Clause challenges [...] are to be resolved by according *unusual deference* to the lawmaking authority of state and local governments”; emphasis added). The case involved a Contract Clause challenge against a legislative retroactive repeal of a previous legislative decision of a contractual character.

<sup>1322</sup> In a more extreme form, the argument could affirm the impossibility of actual democracy. Rousseau famously argued in *The Social Contract* that “[i]f we take the term in the strict sense, there never has been a real democracy, and there never will be. It is against the natural order for the many to govern and the few to be governed. It is unimaginable that the people should remain continually assembled to devote their time to public affairs, and it is clear that they cannot set up commissions for that purpose without the form of administration being changed [...] Were there a people of gods, their government would be democratic. So perfect a government is not for men”. See Jean Jacques Rousseau, *POLITICAL WRITINGS* 71-73 (Madison-Wisconsin, The University of Wisconsin Press, 1986).

,<sup>1323</sup> then ultradeferral judicial review loses most of its purportedly democratic justification.

By bringing judicial review to bear on the issue of economic emergency regulation, my argument improves legitimacy through actual participation. The democratic legitimacy based upon procedural grounds extends from the rule-creation process to that of its application, and the deliberation through representatives in the creation stage finds its counterpoint in the effective possibility of contradiction during the application phase, the phase where —ultimately— the rights of an individual are given concrete and determinate content.

Moreover, participation is broadened not only through the direct intervention of the (potential) right-bearer on the decisionmaking process, but also by means of the significant expansion of the universe of claimants who can take an active part in the process.<sup>1324</sup> Access to justice is significantly easier in the judicial process than in the legislative process.

There are several dimensions along which judicial review presents meaningful advantages over legislative processes when it comes to citizens' access. First, judicial review has a lower threshold of detection for claims to be recognized and processed. Its radar, so to speak, is more sensitive than the Legislature's, and thus even relatively invisible, socially-insignificant claims can receive a fair treatment. Second, and relatedly, it

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<sup>1323</sup> *Id.*, at 103-104 (“Sovereignty, for the same reason as makes it inalienable, cannot be represented; it lies essentially in the general will, and will does not admit of representation: it is either the same, or other; there is no intermediate possibility. The deputies of the people, therefore, are not and cannot be its representatives: they are merely its stewards, and can carry through no definitive acts. Every law the people has not ratified in person is null and void —is, in fact, not a law. The people of England regards itself as free; but it is grossly mistaken; it is free only during the election of members of parliament. As soon as they are elected, slavery overtakes it, and it is nothing [...] Law being purely the declaration of the general will, it is clear that, in the exercise of the legislative power, the people cannot be represented”).

<sup>1324</sup> Thomas W. Merrill, “Does Public Choice Justify Judicial Activism After All?”, 21 *Harv. J.L. & Pub. Pol’y* 219, 225-226 (1997) (“Judicial activism dramatically expands the universe of groups that can make an effective pitch for law change, and hence presumably increases the total amount of change that takes place”).



is cheaper to use. A credible judicial challenge on allegedly unconstitutional legislation costs less than a lobbying campaign to block the enactment of such norms or bring about their repeal. Third, the ceiling beyond which having more money and resources available stops increasing the likelihood of success is significantly lower in the judicial arena than in the legislative process. In other words, the marginal utility of money decreases more rapidly in the courts than in legislatures. Notice that these last two features of the judicial process exhibit an inherent potential for equalizing political influence. And then there is, of course, the fact that noncitizens can be affected in their interests by collective decisionmaking and they are not generally represented in the process, so unless there is judicial review they have no voice whatsoever in creating the laws that affect them. Judicially-enforceable rights appear as a unique channel to protect noncitizens.<sup>1325</sup>

Regarding the first threshold, which we could call the “visibility threshold”, it is easy to notice that courts and legislatures differ significantly when it comes to the entity of the claims that are actually heard in each forum. Rights claims that are not socially salient certainly have a hard time getting into the legislative agenda.<sup>1326</sup> Representatives are not obliged to receive petitions from individuals, much less to include them in their

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<sup>1325</sup> See Daryl J. Levinson, above n. 1192, at 1338-1339 (“In theory, a strong case might be made for enfranchising everyone whose interests might be affected by a democratic decisionmaking process [...] In practice, however, virtually no one thinks it would be a good idea to open the U.S. political process to everyone in the world. Extending rights protections to nonresident aliens whose fundamental interests are significantly threatened by U.S. policies may be thus the only practical alternative to leaving these people unprotected”).

<sup>1326</sup> See Thomas W. Merrill, above n. 1324, at 223-224 (“Every once in a blue moon someone writes an editorial advocating a new law, key members of the legislature read the letter and are persuaded by it, and a statute more or less spontaneously results. But 99.9 percent of the time it does not happen this way. If a group wants to have a law change seriously considered by the legislature, it will have to mount a sustained and well-conceived campaign in pursuit of this end. The group will have to motivate key legislators to embrace its proposal, perhaps by showing them that the group has the ability to influence how a significant number of votes will be cast in the next election, or that the group can direct a large amount of campaign contributions to the legislators, or that the group has significant influence over the attitude that the media will adopt toward the legislators in the near future. In other words, in order to be taken seriously by legislators, the group has to command significant resources or organizational backing, and has to make a credible threat to deploy those assets in support of its request”).

own agenda. Incentives point in the opposite direction: low visibility claims, no matter how important or well-founded as a matter of justice, are not likely to receive serious consideration by legislators. Courts, on the other hand, are usually obliged to give fair consideration to any sort of minimally founded claims that are brought before them. Judges do not face the same sort of incentives legislators do. They do not usually stand for re-election and, therefore, are not pressed to devote their valuable time and scarce resources to issues the public care about. Often, all that is needed to get a claim heard in court is to secure a lawyer, which in many cases can even be gotten for free, as is the case with Public Defense Offices in Argentina,<sup>1327</sup> or on the basis of a contingency fee. All in all, it seems fair to conclude that in order to get the judicial system to detect and process an instance of rights violation significantly fewer resources are needed than to obtain a similar effect in the legislative forum.<sup>1328</sup> As Thomas Merrill points out, the “threshold costs” of engaging the Judiciary to seriously consider a claim are lower than those of pursuing a cause in the Legislature.<sup>1329</sup> This means that more individuals and groups will have a chance to be heard in courts than in the political process. It also means that their profile will be different from the profile of the regular legislative players,<sup>1330</sup> at least for low visibility right claims.

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<sup>1327</sup> Public Defense Offices in Argentina deal with all sorts of cases, not only criminal law cases.

<sup>1328</sup> For a similar argument, see Alec Walen, “Judicial Review in Review: A Four-Part Defense of Legal Constitutionalism. A Review Essay on *Political Constitutionalism*”, 7 *Int’l J. Con. L.* 329, 341-342 (2009).

<sup>1329</sup> Thomas W. Merrill, above n. 1324, at 224 (“[...] my guess would be that, on average, the magnitude of the minimum bid, at least in the U.S. Congress, is much higher than in court [...] The concept of threshold costs, together with the reasonable hypothesis that threshold costs are higher for legislative action than for judicial action, has important implications for determining the supply of law changes from legislatures and courts”).

<sup>1330</sup> *Id.*, at 226 (“Eliminating judicial activism would skew the market for legal change in favor of well-endowed and well-organized groups. If, as seems plausible to assume, the well-endowed and well-organized groups are more likely to be economic groups (for instance, labor unions, producer groups, and professional groups), then eliminating judicial activism might tilt social policy away from ideological causes in favor of purely bread-and-butter issues”).

Finally, the influence of wealth in outcomes is also likely to be lower in courts than in legislatures (or in the Executive, for that matter). Again, Merrill's suggestions about what he calls the "maximum bid limitation", the ceiling for the effectiveness of money as a factor in reaching a desired outcome, points in the direction of a Judiciary less likely to be influenced by the wealth of the parties. Allow me to quote him at some length:

"What is the shape of the judicial supply curve as groups seeking law change make higher and higher expenditures? There is no doubt that, at least initially, the supply curve slopes upward to the right: the higher the expenditures, the greater is the supply of law change [...] With even greater levels of expenditure, the group can fund multiple test cases, hire a top-flight private law firm, procure the filing of amicus briefs by other supporting groups, and so forth. It is reasonable to assume that as the level of investment in litigation effort rises, the supply elicited from the courts, in terms of the probability of securing favorable rulings, rises too. After the litigation bills have piled up for a while, though, the law of diminishing returns starts to set in. Once one has hired Cravath, Swaine & Moore to file multiple lawsuits, and several boutique Washington firms to file amicus briefs, what else remains to be done? Hiring more and more lawyers will quickly generate coordination problems and may interfere with the work product. In effect, there is a ceiling on how much one can spend effectively in seeking legal change through litigation [...] after a point, the supply curve for courts is perfectly inelastic -no further increase in the level of expenditure by groups will yield a higher expected payout. Exactly where the supply curve becomes inelastic will depend on the nature of the issue [...] In the legislative arena, it is much less clear that the supply curve becomes inelastic, at least in the range of expenditures that we are talking about. If the sugar farmers want to secure legislation tightening quotas- or want to block efforts to liberalize quotas- then the more they spend, the greater the expected value of the legislative output. The more PAC contributions, the more television ads about the need to protect the family farm, and so on, the greater the likelihood of favorable legislation. At some point, it is reasonable to assume that limits will be reached, given restrictions on campaign contributions, public revulsion against bribery, and the danger of advertising overkill. But this will probably occur at a far higher level of expenditure than will be the case with respect to a campaign for judicial activism"<sup>1331</sup>

Are all these conjectures plausible? The evidence gathered here, and elsewhere,<sup>1332</sup> suggests they are, indeed. As reflected in the 2001-2002 economic crises, the bulk of the

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<sup>1331</sup> *Id.*, at 226-228.

<sup>1332</sup> See, e.g., Reginald Sheehan, William Mishler & Donald R. Songer, "Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court", 86 *Am. J. Polit. Sci.* 464, 470 (1992)

people who litigated against the measures seem to have been comprised of relatively poor (or otherwise needy) individuals.<sup>1333</sup> They had much better access to courts than to the political branches, as explained above. Even if the issue regarding the intrusion on property rights was perhaps the most salient topic of the times, Congress was incapable of actively protecting this relatively vulnerable group as well as courts did. Rights claims fared much better in the Supreme Court than they did in the Executive branch and in Congress, even if there were important differences between the elected branches, with Congress lending better protection to the rights of savers than the President. Especially, neither Congress nor the Executive channeled the voice of the millions<sup>1334</sup> of outraged small savers who saw their savings destroyed by the distributively-regressive emergency scheme resulting from the pressures of the “Grupo Productivo” and other large and influential debtors.

Although there was much political action in the part of savers, it is still true that many of them were able to recover their money and cover expenses directly related to serious health problems or other dire circumstances thanks to the actions of the courts. While the political branches did enact legislation that provided for the (limited) immediate availability of funds to those depositors who needed them desperately, they

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(“Theory suggests —and our data support— the argument that litigant success before the Supreme Court depends substantially on the ideological composition of the Court but little, if at all, on the resources and prior judicial experience of the litigants”).

<sup>1333</sup> See above n. 902, 1113-1115 and accompanying text.

<sup>1334</sup> In December, 2001, when the freeze on bank deposits was imposed, there were 1,586,198 time-deposit holders and 8,691,935 savings accounts holders. Roughly 6 million holders of money in savings accounts had less than 300 *pesos* (or dollars —at the time one *peso* was equivalent to one dollar—) and some 2.3 million account holders had between 300 and 10,000 *pesos* (or dollars). Regarding time-deposits, some 1,223,331 individuals had deposits of less than 25,000 *pesos* (or dollars). See “Información sobre tramos de depósitos”, Estadísticas e Indicadores Monetarios y Financieros, Central Bank of the Argentine Republic, information as of December, 1, 2001 (available at: <http://www.bcra.gov.ar/estadis/es020200.asp>; selecting “Otras Informaciones sobre la actividad financiera”/“Tramos de Depósitos (serie trimestral)”); last visited 02/10/2012).

imposed the substantial “haircut” of “pesification” on such savers.<sup>1335</sup> Administrative procedures, established by the emergency legislation, provided for immediate release of “pesified” funds, hence depriving small and needy savers from almost 50% of the purchasing power of their savings. Courts, instead, ruled “pesification” unconstitutional and granted injunctions that allowed prompt disposal of all (or part) of the savers’ dollarized savings. Regardless of whether any particular needy saver actually required the immediate availability of the full amount of their original deposit in dollars in order to avoid irreparable harms, or whether any lesser amount would have fulfilled the same function adequately, the truth of the matter is that the political branches’ approach imposed on them not only a diminished economic capacity but also the undeniable stress of losing what the people deemed as their legitimate property.

Notice that the majoritarianly small savers who litigated against the measures faced the determinate opposition of both the Federal Government and the banks in the lawsuits, two very powerful and resourceful opposing parties who could hire thousands of lawyers, even the most prestigious law firms in Argentina, and had direct access to the courts.<sup>1336</sup> Still, the savers —usually assisted by solo practitioners or public defense attorneys— managed to get an outcome in courts that, while less than ideal, was acceptable for most of them. Their fate was certainly different in the political process.

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<sup>1335</sup> See, e.g., Central Bank Communication A3467 (points 1.2.5, 1.2.6, 1.2.7, 1.2.8) (allowing cash withdrawals from accounts held by individuals older than 75 years, or accounts where severage payments or other kind of redresses had been deposited, or when the account holder or a close relative needed the funds to pay for medical expenses; in all cases, money could be withdrawn in *pesos* at the official conversion rate, thereby depriving the depositors of a substantial part of their property) (available at <http://www.bcra.gov.ar/pdfs/comytexord/A3467.pdf>; last visited 11/20/2013).

<sup>1336</sup> See, e.g., 326 *Fallos* 417 (2003) (§7) (the Supreme Court invited the *Asociación Argentina de Bancos* — Argentine Banks Association— and the *Asociación de Bancos Públicos y Privados de la República Argentina* — Association of Public and Private Banks of the Argentine Republic— to express their views on the issue of bank deposits before deciding the case); “Los bancos acuden a la Corte”, *Clarín*, March, 13, 2002 (available at <http://www.clarin.com/diario/2002/03/13/p-358015.htm>; last visited 04/02/2013) (both bank associations filed a brief requesting the Supreme Court to intervene via *per saltum* —a figure not unlike the *certiorari before judgement* in the U.S.— to stop the injunctions against “pesification” that were being granted by lower courts).

Powerful lobbies got the Executive branch to liquefy their debt through “pesification” at the expense of “haircuts” and deferments of maturities imposed, largely, upon millions of small (or otherwise needy) savers. Congress couldn’t muster enough strength to oppose the President. The political process produced a very biased outcome that, arguably, was not inevitably required nor justified by reference to the public good.<sup>1337</sup>

Courts provided, instead, a forum where individuals could be heard and their claims treated on a more equal footing with the claims of such powerful players as the State, the banks and, *indirectly*, those interested in currency devaluation and debt liquefaction. If anything, their intervention bolstered political legitimacy at a time when it was most needed.<sup>1338</sup>

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<sup>1337</sup> See above n. 911-933 and accompanying text.

<sup>1338</sup> Remember that during 2001-2002 crowds were protesting regularly and claiming that the entire political class should be kicked off.

## D. Epilogue: the Post-New Deal U.S. Supreme Court Caselaw as a “Negative Model”

Courts in the U.S. have, for a long time now, largely abandoned the business of policing the political process when it regulates property rights. Judges seem to be fearful of the potential for social and political conflict that a more intrusive judicial role allegedly carries,<sup>1339</sup> distrustful of their own abilities to deal with complex economic issues<sup>1340</sup> or of the effects of their review on the development of governmental tasks,<sup>1341</sup> and/or confident that the political process, for whatever reasons, does not usually obliterate the property owners’ rights,<sup>1342</sup> as Madison feared. Whatever the reasons for this now consolidated position, and despite continuing debate over it,<sup>1343</sup> property rights have

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<sup>1339</sup> See, e.g., 431 U.S. 1, 62 (1977) (Brennan, J, dissenting, joined by White and Marshall, JJ.) (“[...] this Court should have learned long ago that the Constitution —be it through the Contract or Due Process Clause— can actively intrude into such economic and policy matters only if my Brethren are prepared to bear enormous institutional and social costs. Because I consider the potential dangers of such judicial interference to be intolerable, I dissent”).

<sup>1340</sup> See, e.g., Antonin Scalia, above n. 1110, at 32-35. See also Richard Posner, above n. 1147, at 24 (arguing that “A final objection to libertarian proposals for reinterpreting the Constitution to make it a charter of laissez-faire is the cost of judicial decisionmaking. Courts have limited competence to make economic (as other) decisions; and once it is recognized that constitutional doctrines are not self-defining or self-enforcing, the risk of heavy error costs and heavy litigation costs in any ambitious expansion of constitutional regulation becomes apparent”).

<sup>1341</sup> See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 488 (2005) (“The disadvantages of a heightened form of review are especially pronounced in this type of case. Orderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced. A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans”).

<sup>1342</sup> See, e.g., 431 U.S. 1, 61-62 (1977) (Brennan, J, dissenting, joined by White and Marshall, JJ.) (“I would not want to be read as suggesting that the States should blithely proceed down the path of repudiating their obligations, financial or otherwise. Their credibility in the credit market obviously is highly dependent on exercising their vast lawmaking powers with self-restraint and discipline, and I, for one, have little doubt that few, if any, jurisdictions would choose to use their authority ‘so foolish[ly] as to kill a goose that lays golden eggs for them’ [...] But in the final analysis, there is no reason to doubt that appellant’s financial welfare is being adequately policed by the political processes and the bond marketplace itself”).

<sup>1343</sup> See, e.g., Richard Funston, “The Double Standard of Constitutional Protection in the Era of the Welfare State”, 90 *Polit. Sci. Quart.* 261, 284 (1975) (asserting that “[t]he Court’s broad and indiscriminate

taken a comfortable second seat in the array of constitutional rights. Deference to political branches is the dominant theme in the U.S. Supreme Court jurisprudence.

Argentina's Supreme Court has always had an eye on the caselaw of its U.S. counterpart. Early cases treated the U.S. constitutional practice as a source of authority,<sup>1344</sup> and justices often felt obliged to show that the U.S. Supreme Court caselaw supported their position in any given decision or that the constitutional texts in question were different. The examples are numerous, but just to mention a couple of cases already discussed in this dissertation, let us recall *Caffarena* and *Elortondo*. In *Caffarena*, a decision that upheld retroactive alteration of contractual terms, the Court felt the need to distinguish our Constitution from the U.S. constitutional text.<sup>1345</sup> In *Elortondo*, striking down an expropriation as running afoul of the "public utility" clause of the Constitution, the Court cited *Story and Cooley*, as well as the U.S. Supreme Court.<sup>1346</sup>

Although reliance on U.S. Supreme Court decisions gradually declined after 1930,<sup>1347</sup> economic emergency is a topic where the Argentine Court never quite shook off

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rejection of any constitutional duty to protect property-related interests rests upon the failure to perceive that 'the primary evil of the discredited doctrine was the dogmatic judicial intervention regarding ends, not means' and arguing for a "strict" rationality test for property interests); Leonard W. Levy, "Property as a Human Right", 5 *Const. Comment.* 169, 183 (1988) (arguing that "the Court made a mistake fifty years ago: it should not have employed the rational basis test in cases of economic regulation involving property as a human right. The Court should learn to distinguish the rights of people from the rights of business enterprises. Strict judicial scrutiny is called for when personal rights of property are at issue"); Walter Dellinger, "The Indivisibility of Economic Rights and Personal Liberty", 2003-2004 *Cato Sup. Ct. Rev.* 9, 16 ("The New Deal Court's elimination of any effective protection of economic rights seriously weakened the bases for protecting personal liberty as well").

<sup>1344</sup> See Jonathan M. Miller, "The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap Of Faith", 46 *Am. U. L. Rev.* 1483, 1546 (1997) ("The most powerful examples of U.S. influence appear in decisions of the Argentine Supreme Court, however, because in the case of the Supreme Court's decisions one can demonstrate not only that U.S. practice was an important source of authority, but that it was binding").

<sup>1345</sup> See above n. 189 and accompanying text.

<sup>1346</sup> 33 *Fallos* 162 (1888) (§20, 21, 25).

<sup>1347</sup> See Jonathan M. Miller, above n. 1344, at 1561-1568.



the U.S. influence. Citations to *Blaisdell* are still common,<sup>1348</sup> and discussion of the *Gold Clause Cases* took place in the cases dealing with “pesification” of bank deposits.<sup>1349</sup> One could legitimately wonder, as the Argentine Founding Fathers did, if following the example of one of the most (if not the most) successful capitalist economies in the world would not be a good idea. The idea of imitating successful models is, after all, a very reasonable one, despite any problems one may find in the process. As Horacio Spector has argued

“[p]ersuasion might proceed along these lines: If the U.S. Supreme Court accepts compulsory modification of contracts when the country is under macroeconomic distress, why could the Argentine Supreme Court not accept expropriation of financial assets under similar conditions? Or, if the U.S. (an advanced capitalist country) accepts limitations on these institutions, why should Argentina not do the same? By applying U.S. precedents to vindicate expropriations, the Court seems to say: ‘We cannot be more Catholic than the Pope’”<sup>1350</sup>

Curiously, the Argentine Court never went beyond the 1930s U.S. cases, nor took the path followed by the U.S. Supreme Court, extending extremely deferential review to legislation not dealing with emergencies and eschewing the distinction between temporary and permanent restrictions.<sup>1351</sup> Should it have done so?<sup>1352</sup>

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<sup>1348</sup> See, e.g., 313 *Fallos* 1513 (1990) (majority opinion, §40-41); 326 *Fallos* 417 (2003) (Fayt, J., concurring, §29); 329 *Fallos* 5913 (2006) (Argibay, J., concurring in the judgment, §5), 330 *Fallos* 5341 (2007) (Argibay, J., dissenting, §9) (criticizing the loose use of *Blaisdell* by the Argentine Court and analyzing other U.S. Contract Clause cases such as *Worthen v. Thomas*, *City of El Paso v. Simmons*, and *Allied Structural Co. v. Spannaus* to support the interpretation that a clear line dividing permissible and impermissible alterations of contracts can be drawn).

<sup>1349</sup> 326 *Fallos* 417 (2003) (Moliné O'Connor, López, JJ., concurring, §36) (discussing and distinguishing *Perry v. United States*) (Vázquez, J., concurring, §17) (distinguishing the “pesification” of banks deposits from the situation dealt with in *Perry v. United States* and *Norman v. Baltimore*); 327 *Fallos* 4495 (2004) (Belluscio, Maqueda, JJ., plurality opinion, §10) (citing *Perry* in support of “pesification”) (Highton de Nolasco, J., concurring, §28) (citing *U.S. Bankers Trust* in support of “pesification”); 329 *Fallos* 5913 (2006) (Argibay, J., concurring in the judgment, §9) (criticizing the use of *Perry* and *US Bankers Trust* by the *Bustos* plurality and arguing that they did not support “pesification”).

<sup>1350</sup> Horacio Spector, “Constitutional Transplants and the Mutation Effect”, 83 *Chi.-Kent. L. Rev.* 129, 144 (2008).

<sup>1351</sup> See, e.g., *Veix v. Sixth Ward Building & Loan Ass'n of Newark*, 310 U.S. 32 (1940) (“While the act [...] under review was not emergency legislation, the dangers of unrestricted withdrawals then became apparent

Deference is about enlarging the portion of reality that is subject to regulation by political majorities. Deference is, in a nutshell, about deepening democratic decisionmaking. In the particular case of economic emergency jurisprudence, deference is about enlarging democratic decisions at the expense of, arguably, debilitating the rule of law and the enforcement of property rights. If economic growth is a desirable goal for a political community, then an ultradeferential judicial stance might not be such a good idea after all. Some evidence suggests that protection of property rights is a determinant factor of economic growth, while democratic decisionmaking is not necessarily so.

“[D]emocracy is neither necessary nor sufficient on its own to ensure economic performance [...] Indeed, [the more nuanced view] sees that any growth-enhancing effects of democracy are conditional on a policy that includes a combination of market-orientated growth strategies —perhaps embodied in pro-growth institutions— and trade openness [...] as far as enhancing economic performance is concerned, developing countries may be far better served by concentrating on improving the quality of political-economic institutions that exert a more direct, first-order influence on the functioning of market processes —such as the rule of law and the enforcement of property rights— rather than expanding their energies on building participatory political institutions”<sup>1353</sup>

Moreover, it may well be the case that the reasons why the model has proved largely successful are not to be found in the U.S. Supreme Court’s deferential stance in constitutional property matters. George Priest has argued that

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[...] The cases cited [...] make repeated reference to the emergency existing at the time of the enactment of the questioned statutes. Many of the enactments were temporary in character. We are here considering a piece of permanent legislation. So far as the Contract Clause is concerned, is this significant? We think not.”)

<sup>1352</sup> Although some instances of very deferential review in non-emergency cases can certainly be found, they are not definitive of the physiognomy of the Court’s stance. For a case involving an obligation to enter a contract, with some similarities to the recent debate of the so-called “individual mandate” provision in the Affordable Care Act in the U.S, see CSJN, *Cine Callao*, 247 *Fallos* 121 (1960) (upholding a legal provision that forced cinema theater owners to hire variety artists and offer a live spectacle between movies’ exhibitions).

<sup>1353</sup> See Jessica Henson Decker & Jamus Jerome Lim, “What Fundamentally Drives Growth? Revisiting the Institutions and Economic Performance Debate”, 20 *J. Int. Dev.* 698, 721-722 (2008).

“[...] the relative success of the United States, at least with respect to economic affairs, cannot be attributed in any important way to the provisions or the structure of the U.S. Constitution. The failure of countries to emulate the economic experience of the U.S. though they have adopted the U.S. Constitution may derive from the fact that these countries failed to adopt 200 years of English common law and the societal instincts that the common law had inculcated [...] The basic rights created by the common law —the right to private property, to contract, to compensation for accidental harm— do not generate external harms; quite the opposite, they enhance societal value to the benefit of all the citizenry. As described above, even in the U.S., the legislative majority is not constrained from altering them in marked ways; they are not yet rights. If they were established as rights against the majority, the economic welfare of the society would be enhanced.”<sup>1354</sup>

Other scholars have made similar points.<sup>1355</sup> Regardless of any debate about the merits of such claims, democratic participation is an extremely worthy political value in itself, and should be extended regardless of the potential costs in terms of economic growth. It is, undoubtedly, a central basis of modern political legitimacy. But, as I have shown throughout this work, the Argentine Supreme Court’s economic emergency caselaw falters, too, when it comes to fostering democratic participation. Its flaws are two-fold: it allows for almost unrestrained, unilateral Executive decisionmaking not unlike a dictator’s, and it validates, by and large, decisions that are profoundly undemocratic, at least if democracy is understood as requiring a correlation between the people’s views and their representatives’ actions. Arguably, the elected branches have

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<sup>1354</sup> See George L. Priest, “Economic rights...”, above n. 26, at 11, 19.

<sup>1355</sup> See, e.g., Richard Posner, above n. 1147, at 28-30 (arguing that “[i]t is highly plausible [...] that economic growth will be helped if the government protects property and contract rights through a system of impartial courts enforcing property, contract, tort, and basic criminal law against not only private but also public misconduct (e.g., expropriation). Such protections for economic freedom would seem to encourage hard work and investment for the future [...] a government strong enough to maintain law and order, but too weak to launch and implement ambitious schemes of economic regulation or to engage in extensive redistribution, is probably the optimal government for economic growth. The Constitution as originally drafted would have kept the United States Government on approximately this even keel, but judicial interpretations have, by authorizing a “Fourth Branch” of administrative agencies, by expansively construing congressional power over interstate and foreign commerce and congressional power to enact statutes that purportedly promote the general welfare, greatly strengthened the power of the federal government to regulate markets”, with uncertain results from the economic standpoint). *Id.*, at 24 (“Courts seem to do well in developing common law principles that allocate resources efficiently”).

often gone beyond the popular understanding of constitutional property *and* beyond the public's preferences—which have tended to, but need not, coincide—in the concrete situations analyzed in this work. The “true countermajoritarian difficulty” lurks in the shadows of judicial rubber-stamping of formally majoritarian collective decisions.

Furthermore, the evidence I have supplied shows that economic emergencies quite frequently create the opportunities for very effective rent-seeking behavior in the part of the most powerful political and economic actors. Thus, emergencies of this sort have often instantiated regressive redistributions, under the rhetorical cloak of the common good. Hardly a desirable feature of any political system, such transferences from relatively poor, politically weak or unconnected sectors of the population to the largest, most powerful and richest players pose a formidable normative difficulty for the traditional deferential approach. The Court should take notice of the most likely effects of its current stance and adopt heightened scrutiny when economic emergency regulations are at stake, for they are likely to consummate distributive injustices that are not sanctioned, in any meaningful way, by democratic procedures, regardless of what one thinks about the propriety of leaving property interests to be completely re-arranged by democratic decisionmaking.

The deleterious effects of the “true countermajoritarian difficulty” and the “regressive redistribution difficulty” have reached the Judiciary itself, undermining its quest to rebuild its sociological legitimacy. The people perceive that constitutional rights are not meaningful constraints on what the politically powerful can do (or cannot omit to do), and judges are seen as frequent violators of the Constitution.<sup>1356</sup> Self-deprived of a textual source of legitimacy—pointing towards the constitutional text as the basis for its decisions—and lacking a sound moral basis for the redistributions they have validated,

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<sup>1356</sup> See above n. 940 and accompanying text.

courts have failed to achieve a political status that guarantees their independent role in the political process. While further empirical work is needed to isolate completely economic emergency decisions from other likely contributing factors and, most certainly, the Supreme Court's caselaw on the topic cannot be blamed as a unique causal determinant of the Judiciary's image in the eyes of the public, the evidence I have presented in this work hints that it has, indeed, played a significant role in bringing about such states of affairs.

In this context, the U.S. post-New Deal caselaw should be rejected as a model to follow. It should be used as a "negative model", instead, signaling what not to do as a general matter. It may well be the case that U.S. judges, as well as legal scholars and philosophers working in the American political-economic environment, "can excoriate the concept of property because we believe, with great certainty, that the property we wish to shelter is safe".<sup>1357</sup> Political processes, however imperfectly, may have been effective in providing acceptable levels of protection for individual property, thus avoiding the need for more zealous judicial oversight.<sup>1358</sup> However low the levels of protection formally afforded to individual property by courts, the cultural and political background have restrained majorities from frequent large-scale expropriations. It may well be the case that

"[...] in countries with long established formal and informal institutions of property rights protection [...] the social costs entailed by the process of constitutional judicial review may not be worth the social benefits. In those cases,

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<sup>1357</sup> Laura S. Underkuffler, "The Perfidy of Property", 70 *Tex. L. Rev.* 293, 316 (1991). While some evidence has somewhat undermined Underkuffler's claim, as she admits in regard to the *Kelo* decision (see Laura S. Underkuffler, above n. 1312), it is still true that, by and large, property receives a much stronger protection in the U.S. than in Argentina.

<sup>1358</sup> See Daniel H. Cole, "Political Institutions, Judicial Review, and Private Property: A Comparative Institutional Analysis", 15 *Sup. Ct. Econ. Rev.* 141 (2007) (analyzing evidence from the U.K. and the U.S. and concluding that the political process in both countries provide substantial protection to property rights).

the least inefficient solution could be to limit or even abandon the use of constitutional judicial review”<sup>1359</sup>

Argentina’s background is very dissimilar, at least when economic emergency strikes (and it does so quite frequently).<sup>1360</sup> So judicial abdication is not *prima facie* justified from an efficiency perspective, nor is it justified on the grounds that the political process works well enough to provide acceptable protection. To the contrary, it is one of those cases where

“[...] it seems plausible that constitutional judicial review would be the most efficient or (what amounts to the same thing) the least inefficient solution to the problem of protecting private property rights”<sup>1361</sup>

But, am I not faced with somewhat of a paradox here? As Grossman and Cole argue

“[j]udicial review should have its greatest net benefit where there is a potentially predatory government and ill-defined property rights, but this predatory government has to be one that does not interfere either with an independent judiciary or the enforcement arms of the law. It would work best, therefore, in an environment where predators are restrained to a considerable degree whether there is constitutional judicial review or not”<sup>1362</sup>

In sum, judicial review is most desirable where it has fewer chances of being effective, and it has more chances of being effective where it is less necessary (and, at least from the social welfare perspective, less desirable as well). What is missing from Grossman and Cole’s perspective is that an important part of what allows a Judiciary to

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<sup>1359</sup> Peter Z. Grossman & Daniel H. Cole, “Protecting Private Property with Constitutional Judicial Review: A Social Welfare Approach”, 5 *Rev. L. & Econ.* 233, 234 (2009).

<sup>1360</sup> See Horacio Spector, above n. 1350, at 145 (questioning the wisdom of citing U.S. precedents in the Argentine context because “there is a striking difference between applying a rule of expropriation once every hundred years and once every ten years”).

<sup>1361</sup> Peter Z. Grossman & Daniel H. Cole, above n. 1359, at 234.

<sup>1362</sup> *Id.*, at 240.

be independent is its political capital, which in turn may depend on whether it is perceived by the public at large as warding off encroachments of constitutional rights by the political branches. In Argentina, as the evidence I have presented above suggests, it is very likely that to break out of the circle identified by Grossman and Cole, courts need to dare and seriously scrutinize at least the most severe and blatant violations of constitutional property. Admittedly, it is a tricky business, for if courts cannot command compliance with their rulings, which is always a concrete possibility in grave emergency contexts,<sup>1363</sup> the task of positioning themselves as independent players in constitutional matters will be impaired.

What should Argentine courts do, were they to take up a more active role in protecting property rights in economic emergency contexts? I cannot do more than scratch the surface of the issue here, and suggest a mere sketch of how a new jurisprudential stance might look like. For starters, emergency executive decrees should be subject to careful examination, as they compromise the separation of powers in ways that encourage rent-seeking activities and are likely to jeopardize property interests of relatively vulnerable groups. Lobbying powers seem to be particularly effective in the Executive Branch,<sup>1364</sup> even if this is a disputable empirical claim. Thus, I propose that courts only admit emergency decrees to the extent necessary to guarantee that

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<sup>1363</sup> See, e.g., Gerard N. Magliocca, “The Gold Clause Cases and Constitutional Necessity”, 64 *Fla. L. Rev.* 1243, 1277 (2012) (transcribing Roosevelt’s Gold Clause Speech, which he intended to read to the U.S. public if the Supreme Court decided the *Gold Clause Cases* against the Government’s interest, and where he was prepared to defy the Court’s adverse decisions: “It is the duty of the Congress and the President to protect the people of the United States to the best of their ability. It is necessary to protect them from the unintended construction of voluntary acts, as well as from intolerable burdens involuntarily imposed. To stand idly by and to permit the decision of the Supreme Court to be carried through to its logical, inescapable conclusion would so imperil the economic and political security of this nation that the legislative and executive officers of the Government must look beyond the narrow letter of contractual obligations, so that they may sustain the substance of the promise originally made in accord with the actual intention of the parties [...] In order to attain this reasonable end, I shall immediately take such steps as may be necessary, by proclamation and by message to the Congress of the United States”).

<sup>1364</sup> See above n. 1226 and accompanying text.

deliberation in Congress will not defeat the basic purpose of the proposed measure. Emergency decrees might be accepted insofar as they work as the functional equivalent of a judicial injunction decreed to preserve the possibility that a decision on the merits is effective. They should be temporary and provisional. For instance, if the Executive thinks that bank deposits need to be re-structured, it may not decide it by itself. As a bill proposing such a measure would be bound to start (or accelerate) a bank run, the Executive may impose a temporary, limited freeze, until Congress has had a reasonable time to decide on the substantive policy. Depositors won't be able to defeat the purpose of the emergency scheme, should it be enacted by Congress, but they will get their shot in the legislative arena.<sup>1365</sup>

What about emergency legislation enacted by Congress? If, as I have argued above, the mere fact of emergency creates opportunities for special class legislation, as well as incentives for the Government to regulate individual property in particularly intrusive ways, surely decrees and laws should be treated on par. Not quite so. Legislation should be entitled to greater deference than decrees, but by no means to the "unusual deference" suggested by the U.S. Supreme Court caselaw. On the one hand, Congress is, all other things being equal, more likely to provide superior protection to individuals' property than the Executive, and it enjoys greater democratic credentials. On the other hand, it is still the case that legislators are susceptible to private interest influence to a not inconsiderable extent and that governing parties often control the political levers that

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<sup>1365</sup> Admittedly, even temporary and provisional measures can alter the political scenario and constrain the options actually available to Congress. Legislators may prefer not to impose, say, a bank freeze of any sort, but once such a proposal has made its way into Congress and the Executive has issued a temporary restriction on the withdrawal of funds, Congress might not be able to avoid imposing some sort of restructuring. That is because even the temporary and provisional emergency decree that my framework allows alters the status quo and, hence, conditions the range of feasible options available to the branch that is charged with making a final decision on what to do about any given problem. In the example, once a temporary restriction is imposed, it is very likely that a sudden removal ignites a bank run. In such circumstances, Congress may need to provide for an orderly lifting of restrictions that might involve short-term restructuring.



open or close careers for legislators. Agent-principal problems are very much present in the relation between Congress and the people.

Moreover, the political support that property enjoys is linked to the possibility that owners mount a credible threat to exit from the jurisdiction.<sup>1366</sup> Quite frequently, the universe of property owners affected by the emergency measures is largely comprised of individuals who cannot “exit the jurisdiction” and, hence, are more likely to be exposed to substantial encroachments of their rights. Take for instance the case of “pesification” in 2002. As I have shown above, a large percentage of bank deposits caught by the emergency scheme were very small. Larger depositors had taken their money out of the financial system long before the legislation was enacted. It is a structural situation: small and medium savers do not have access to foreign financial markets, because the amounts they own do not justify the costs of engaging in the process and, quite often, because offshore banking is open only to people operating with amounts above a certain minimum. They also suffer informational disadvantages vis-à-vis larger savers. Small savers cannot stay completely away from the financial system under any realistic assumptions, as the risks of having money at home are considerable. The same general picture was true, to a large extent, of creditors in lending contracts unrelated to the financial system. They cannot afford to take their assets out of the jurisdiction. These are the kind of owners who received the heaviest blow from the emergency regime.

It is hard to delineate the basic contour of a test for emergency laws, as opposed to decrees. The test cannot be such that merely labeling a law as an “emergency” measure triggers heightened scrutiny, for it would have counterintuitive effects and would be, after a short time, ineffectual. It would be counterintuitive, as Congress would enjoy less maneuvering margin in circumstances when it is often the case that more discretion is

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<sup>1366</sup> See, e.g., Thomas W. Merrill & Henry E. Smith, above n. 1129, at 230.

needed. And it would become ineffectual, eventually, as Congress would try to shelter its emergency laws from more searching judicial scrutiny simply by not calling them so. How can we tackle the task, then?

A declaration of emergency, in principle, opens the legal space for more energetic regulation of individual rights. Contracts can be altered in significant ways, and this, in itself, is a major departure from normal times. But it cannot be the case that Congress enjoys unlimited power over property rights. The traditional distinction between “haircuts” and “deferral of maturities”, suitably adapted, may be of help here. Congress is entitled to certain deference when its measures do not impose a definitive reduction of the creditor’s (or property holder’s) capital nor do they force upon the right-holders deferrals that are excessively long, enough as to stop working as deferrals and become effective “haircuts”. More generally, temporary, as opposed to definitive, alterations in the rights’ regime are entitled to certain deference. When the measures cannot be easily squared with a deferral, or they are likely to work as a “haircut” in the plaintiff’s circumstances, then heightened scrutiny should be applied. While even short deferrals can, undoubtedly, be the product of rent-seeking on the part of sectors who stand to benefit from them, it is also true that they are more likely to be justifiable on non-biased grounds. Moreover, the longer the deferral, the more likely it works a definitive (and potentially significant) transfer of wealth from one sector to another, which —if nothing else— provides a motive for any suspected rent-seeking behind the enactment. The more significant the potential transfer, the higher the stakes and, thus, the more reasons for powerful players to devote substantial resources to lobbying. Express compensation, if provided for in the scheme, should be taken into account when assessing the impact of the measures on the individual’s property rights.

Another good candidate for triggering careful and searching judicial scrutiny of emergency laws are previous public assertions by the relevant high-level public officials

have guaranteed the people that the measure in question will not be taken. The reasons for heightened judicially scrutiny are present regardless of whether such public reassurances have taken the form of valid laws, but they are more pressing—and less troublesome from the standpoint of judicial manageability—when we face formal legal enactments. Such public promises are more likely to instill trust in less educated, less sophisticated groups of people. Such groups are more likely to rely on them when making decisions about what to do (or not do) with their property.<sup>1367</sup> When the promises are not kept, they work as a “bait and switch” strategy that leaves these groups exposed to be the main targets of the emergency regulation. At the same time, they allow groups with better information to prepare for impending State interventions on contracts and take both preventive measures—i.e., abandoning their positions on the sectors potentially exposed to emergency regulation—and measures aiming at profiting from likely emergency schemes—i.e., move towards positions likely to receive significant advantages in the foreseeable regulatory alternatives—.

How should the more intense test work? While I cannot flesh out a proposal in any significant degree of detail here, one possibility would be to apply traditional means-ends analysis, in strict scrutiny form. The concrete ends pursued by the State need to be very pressing and compelling, the means must be narrowly tailored to such ends, be the least restrictive alternative available and not be disproportionate to the importance of the ends and to the extent that the measures further such ends.<sup>1368</sup> Justice Argibay has suggested a similar path by arguing that when the emergency measure imposes a definitive loss on the creditor and, hence, alters the “substance” of a contractual right, it

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<sup>1367</sup> See above n. 906-910 and accompanying text.

<sup>1368</sup> For a detailed analysis of the strict scrutiny test in the U.S. context, see Richard H. Fallon, Jr., “Strict Judicial Scrutiny”, 54 *UCLA L. Rev.* 1267 (2007).

loses its presumption of constitutional adequacy.<sup>1369</sup> In such cases, “[...] courts must demand a full, convincing demonstration that the measure is both just and indispensable to meet a necessity whose satisfaction cannot be postponed”.<sup>1370</sup> While Justice Argibay’s proposal is troubled by the relative indeterminacy of justice as a measure of constitutional validity,<sup>1371</sup> hers seems to be a step in the right direction.

A final caveat is in order. My criticism of an ultradeferralist judicial stance, and my alternative proposal of more active judicial revision of emergency legislation, presupposes that the judiciary is impartial, well educated, and committed to the public interest. This, of course, may not always be the case. Indeed, Argentina’s history shows that independent, impartial, knowledgeable, and public-regarding courts have been largely lacking during the best part of the last century. Therefore, my proposal is strongly dependent on a substantial improvement of the current situation, and both selection and removal procedures for the federal bench deserve close attention if the Judiciary is to have any beneficial role in the Argentine political system.

An analysis of the current procedures and of the possibilities for improvement far exceeds the scope of this work, but a rough sketch of the arrangements suffices to show some of the complexities involved in any such analysis. All federal judges are appointed by the President with approval of the Senate. Lower court judges are chosen from a short-list of three candidates elaborated by the Judicial Council, while Supreme Court justices are nominated by the President freely. The latter require the votes of two-thirds of all present senators. Senate sessions for appointment of judges are public, and in the

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<sup>1369</sup> 329 *Fallos* 5913 (2006) (Argibay, J., concurring in the judgement, §5).

<sup>1370</sup> *Id.*, §7.a.

<sup>1371</sup> Still, one could defend her proposal by stating that while what constitutes a “just” solution to the discrete part of the crisis that any given regulation aims at solving may be indeed quite debatable, it is significantly easier to arrive at a relative consensus regarding what it is not just. See above n. 85.

case of Supreme Court justices, a special session must be held. While Supreme Court justices are subject to removal by impeachment procedures similar to those of the U.S. Constitution, lower court judges are subject to disciplinary procedures held by the Judicial Council. It is clear that both the composition of Congress and of the Judicial Council, as well as the power dynamics within them and in relation to the Executive are crucial to the possibility of building up a serious Judiciary. An in-depth understanding of their current functioning would necessarily imply digging into the national electoral systems. In any case, the latest political events in this regard are hardly encouraging.

In early 2013, President Cristina Fernández de Kirchner sent to Congress a pack of bills pompously called “Democratization of the Judiciary Laws”, which were quickly enacted by the officialist majority. One of the laws regulates injunctions against the State, limiting them severely.<sup>1372</sup> Another law created a series of intermediate courts, *courts of cassation*, between the appellate courts and the Supreme Court, in the hope of staffing them with judges that could be trusted to have a friendly outlook in cases of interest to the administration and, at the same time, of hindering the arrival of cases to the Supreme Court, given that the justices had given a few signals of independence.<sup>1373</sup> The third law modified the structure of the Judicial Council, giving decisive weight in the appointment, suspension, and removal procedures of lower court judges to members of the council representing the Executive and Congress, and diluting the influence of the lawyers’ and judges’ representatives, by making them eligible directly by the general electorate —as opposed to being eligible solely by lawyers and judges as article 114 of the Constitution

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<sup>1372</sup> Law 26,854 (available at <http://www.infoleg.gob.ar/infolegInternet/verNorma.do?id=212680>; last visited 01/06/2014). It remains to be seen whether courts will uphold, generally, such a curtailment of their jurisdictional power.

<sup>1373</sup> Law 26,853 (available at <http://www.infoleg.gob.ar/infolegInternet/anexos/210000-214999/214383/norma.htm>; last visited 01/06/2014). This reform is not, per se, unconstitutional, although it might generate State liability under the Inter-American Convention on Human Rights for violations of the right to a reasonable duration of the judicial procedures.

seems to mandate— and tying their participation in the elections to a political party.<sup>1374</sup> This reform was quickly struck down by the Supreme Court —via a *per saltum* appeal— in the *Rizcço* case, preventing any future political majority from basically controlling the federal lower courts at will.<sup>1375</sup> The Court was generally praised<sup>1376</sup> for taking such a stand in the face of immense pressure from the Executive and its supporters.<sup>1377</sup>

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<sup>1374</sup> Law 26,855 (available at <http://www.infoleg.gob.ar/infolegInternet/anexos/215000-219999/215215/norma.htm>; last visited 01/06/2014).

<sup>1375</sup> CSJN, 06/18/2013, *Rizcço, Jorge G. v. Poder Ejecutivo Nacional*. This decision is not paginated in the *Fallos* collection yet.

<sup>1376</sup> *La Nación*, for instance, praised the ruling in the following terms: “In declaring unconstitutional the law that reformed the [Judicial] Council, the Court gave a lesson in the defense of republicanism. There are [some] steps that are so large, that initially it is hard to get a thorough understanding of their magnitude. That’s the case of the admirable decision through which yesterday the Supreme Court not only aborted the rampant attempt of the Government to subordinate the Judiciary in the most complete way, but it also gave a brave lesson of constitutionality, public-spiritedness, and republicanism [...] The Court has thus set a timely limit to the totalitarian advance that, under the guise of a supposed ‘democratization’ of the Judiciary, has only tried to subject it to the absolute discretion of the Executive branch, to turn the Judicial Council into an appendix of the ruling party. The ruling prevented that the body responsible for selecting and removing judges depended entirely on the political will of the person holding the Presidency of the Nation. The health of a democratic and republican regime is evidenced when the head of the Judiciary, is able to rule as it did yesterday, despite the open attacks of the Executive branch”. See “Límite al totalitarismo”, *La Nación*, 06/19/2013, available at <http://www.lanacion.com.ar/1593362-limite-al-totalitarismo> (last visited 01/08/2014). *Clarín*, in turn, assessed the decision in the following terms: “Not because it was expected, the decision of the Supreme Court is less transcendent. By a six-to-one vote, the Court sanctioned two crucial things for this historic moment. It ratified that the members of the Judicial Council must be elected in accordance to the Constitution and not by the popular vote as provided by the reform approved by the Government. And, thus, it foreclosed the possibility of removing or disciplining judges that may annoy the Kirchners. The ruling sets a limit to the Government’s attempt to dominate the Judiciary and run over the separation of powers. Hence, it transcends itself to become a message to the society: the Government cannot do everything it wants, even if it has gotten 54% of the votes”. See Ricardo Roa, “Un fallo que se trasciende a sí mismo”, *Clarín*, 06/19/2013, available at [http://www.clarin.com/opinion/fallo-trasciende-mismo\\_0\\_940705926.html](http://www.clarin.com/opinion/fallo-trasciende-mismo_0_940705926.html) (last visited 01/08/2013). Roa was one of *Clarín*’s editors, and the section where he published his note is called “from the editor to the public”. See also “Consejo de la Magistratura: siguen las repercusiones por el fallo”, *Todo Noticias*, 06/19/2013, available at [http://tn.com.ar/politica/siguen-las-repercusiones-por-el-fallo-de-la-corte\\_395995](http://tn.com.ar/politica/siguen-las-repercusiones-por-el-fallo-de-la-corte_395995) (last visited 01/08/2014) (reporting the favorable opinions of a number of constitutional lawyers). The day of the ruling, but before it became known, Jorge Enríquez called the citizenship to support an eventual ruling declaring the unconstitutionality of the reform, praising the lower court that had ruled the reform unconstitutional, and declaring that the Court was “at the gates of history”. See Jorge Enríquez, “La Corte, a las puertas de la historia”, *Economía para Todos*, 06/18/2013, available at <http://economiaparatodos.net/la-corte-a-las-puertas-de-la-historia/> (last visited 01/08/2014).

<sup>1377</sup> The day before the ruling Justice Maqueda had received threats from members of *La Campora*, a juvenile branch of the Peronist Party founded to support the Kirchners’ political project. See, e.g., “Piden que se investiguen las amenazas de La Campora a Maqueda”, *Diario Perfil*, 06/18/2013, available at <http://www.perfil.com/politica/Piden-que-se-investiguen-las-amenazas-de-La-Campora-a-Maqueda-20130618-0033.html> (last visited 01/08/2014). Right after the ruling, the Federal Administration of Public Revenues (AFIP, in the Spanish acronym) began a tax investigation on the President of the Court, Justice

This recent incident may prove that path dependence is likely to make any attempt at reform of the institutional practices regarding the Supreme Court very difficult. Dominant leaders have an almost constant tendency to the politization of courts. Diana Kapiszewski has forcefully argued that

“[...] at a critical point in the past, leaders in Argentina [...] adopted a particular politics of Court crafting that eventually became locked in as expectations formed about high court appointment practices and as leaders needed—or desired—to recreate their Courts. In other words, it became increasingly difficult (or decreasingly desirable) for leaders to deviate from established Court-crafting practices”<sup>1378</sup>

Two factors that may cast things in a more optimistic light must be born in mind, however. The first is that the current Supreme Court has given some signals of independence and, while still undoubtedly struggling, it seems to be on its way to building some level of respect among the citizenship. Sociological legitimacy might be on the rise. It is *this* Court that might change the direction of things, provided it can become a respected, independent actor. Striking down the reform of the Judicial Council was a move in the right direction. The second is that even if entrenched political practices push in the direction of politicizing the Court—and the Judiciary more generally—and this detracts from the institutional conditions that need to obtain for my proposal to be feasible, it is still the case that interpreting the property clause of the Constitution in accordance to popular understandings of its text is very likely to boost the Court’s legitimacy, thus increasing the possibilities of breaking out of the dynamics identified by Kapiszewski. A more legitimate Court has more chances of being independent, because of its political capital. Public-regardingness, as well as legal skills, is likely to be an

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Lorenzetti. Such move was widely perceived as a political retaliation for the ruling. See, e.g., “Alerta en la Corte Suprema: la AFIP investiga a Lorenzetti y sus tres hijos”, *Diario Perfil*, 06/25/2013, available at <http://www.perfil.com/politica/Alerta-en-la-Corte-Suprema--AFIP-investiga-a-Lorenzetti-y-sus-tres-hijos-20130625-0034.html> (last visited 01/08/2014).

<sup>1378</sup> Diana Kapiszewski, above n. 579, at 200.

important component of its legitimacy. Nonparadoxically, thus, adopting a less deferential judicial stance in economic emergency matters, such as the one I have defended here, might well be a first step in the direction of creating the institutional conditions in which such a stance may thrive with useful societal effects. Taking the property clause seriously may boost an incipiently independent Court.

Adrian Vermeule and Cass Sunstein have argued that disputes over how to interpret legal texts are of little value if they are not especially attentive to institutional considerations:

“[...] first-best theories are incomplete without an acknowledgement of the importance of [institutional questions] [...] it is not possible to deduce, from large claims about legitimacy or authority, an answer to the reasonably disputed questions of interpretive choice”<sup>1379</sup>

In Part One of this work, I have offered an approach to the interpretation of a constitutional text, Argentina’s Constitution Property Clause. In Part Two, I have explained and defended some of the distinguishing features of the Argentine Supreme Court’s interpretation of the property clause. The interaction between Part One and Part Two is meant to defend, albeit in a qualified fashion, a more robust judicial review of economic emergency measures. But in arguing for a particular interpretive stance, one that reduces judicial deference to the elected branches, I have offered a series of arguments that embrace institutional considerations. I have, for instance, advanced a comparative argument as to what institution —the courts or the elected branches— are better at interpreting the Constitution in accordance with popular conceptions and I have explained why it is important to pay attention to such conceptions. I have offered a comparison of the likely distributive effects of measures taken by Executive alone, of measures taken by Congress, and of measures taken by both political branches and

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<sup>1379</sup> Adrian Vermeule & Cass R. Sunstein, “Interpretation and Institutions”, 101 *Mich. L. Rev.* 885, 919 (2002-2003).



subject to non-cursory judicial review. This text has also explored the possibility that courts have an advantage vis-à-vis Congress and the Executive when it comes to producing public-regarding decisions and has provided some evidence that they also provide individuals with better access to the political decisionmaking process that affects their rights. In sum, I have developed the central features of an interpretive proposal that does not neglect important institutional effects of various sorts. Much work remains to be done in order to flesh out the details of this proposal, but the basics I offer here are, I believe, a significant contribution to current debates over constitutional property, in Argentina and elsewhere.

Whatever the proper path for Argentina (and other similarly situated countries) might be, it seems clear that the economic emergency doctrine, as developed by the Argentine Supreme Court, is fraught with significant dangers (hindering economic growth, deepening distributive inequalities, undermining the legitimacy of both the Constitution and the Judiciary, among others). Enlarging judicial deference to elected branches, by adopting a U.S.-style bi-furcated review that further relegates property rights would be a large step in the wrong direction. Keeping the current situation is also unacceptable, as the rhetoric of democratic decisionmaking and the furtherance of the “common good” provides an excellent cover up for morally unwarranted redistributions that have both short and long-term pernicious effects. Conventional wisdom had led us to believe that “unusual judicial deference” enhances the people’s control over their collective destiny, improves the prospects of the relatively poor and vulnerable, and better achieves the “common good”.<sup>1380</sup> It is high time we revise these misconceptions.

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<sup>1380</sup> See, e.g., Steven Semeraro, “Sweet Land of Property? The History, Symbols, Rhetoric, and Theory Behind the Order of the Rights to Liberty and Property in the Constitutional Lexicon”, 60 *S.C. L. Rev.* 1, 61 (2008-2009) (arguing that “[a] regime of strict judicial scrutiny of property regulation has never been part of American society’s understanding of property [...] Those who seek to unify property and liberty must demonstrate empirically why we would be better off in a world where governmental actors were prevented from affirmatively seeking to better our society. To date, the case remains unmade”).

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