

BUILDING AN INDEPENDENT JUDICIARY:  
ESTABLISHING INSTITUTIONAL LEGITIMACY IN DEVELOPING DEMOCRACIES

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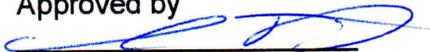
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### Abstract

This paper investigates the factors that contribute to the establishment of an independent judiciary that acts as an appropriate check on other branches of government in emerging democracies. First, the U.S. Supreme Court is studied as a successful case of establishing an independent judiciary to derive lessons that can be applied to present-day emerging courts. Based on a literature review, the prerequisites for an independent judiciary are competitive and clean elections, the existence of multiple political parties, peaceful regime changes, public access to and knowledge of information related to the courts, and judges that serve lifetime appointments both by law and in practice. A successful court system will also need public and regime support. These lessons are then applied to the failed court system in Argentina, which has a constitution modeled after the U.S. Constitution. The failure of the Argentine Supreme Court to establish independence from the influence of other government actors is due primarily to fact that Argentine justices are removed via informal pressures with each regime change, despite Constitutional protections. Finally, this paper concludes that the fate of the emerging judiciaries around the world is mostly dependent on the actions of outside influences, especially the lay public.

## Introduction

The U.S. Constitution set up the framework for the separation of powers between three branches of government: the legislative, the executive, and the judicial branches. The legislative and executive branches were explicitly granted certain powers in the Constitution that laid out the framework for how these branches were to operate and which areas they would be most able to influence. The judicial branch was not granted such specific powers, and the level of influence the U.S. Supreme Court has over the other branches and the country as a whole today is the product of an institution that evolved dramatically over time. Although not perfect, the existence of a relatively independent judiciary that has acted as an appropriate check on other institutions has strengthened and protected the American democracy, and it has helped to demonstrate that an independent judiciary is a necessary component to every democracy.

An independent judiciary is a prerequisite to a successful democracy for several reasons. First, and perhaps most importantly, it acts as a check on other branches of government to prevent abuses of power. A court can only do this, of course, if it has the institutional legitimacy to prevent the abuse of power from being aimed at the court itself. A functioning judiciary is also essential in protecting minority rights and the rights of people with unpopular views, such as protecting unpopular speech. Similarly, the judiciary has the power to expand and protect civil liberties, such as when the U.S. Supreme Court forced schools to integrate.

For the purposes of this paper, an independent judiciary is defined as one that can issue rulings against the governing regime and have their rulings be faithfully executed by other government officials without fear of reprisal. Thus, the justices who operate in an independent judiciary can base their decisions on legal precedent and arguments rather than appeasing the ruling regime. Of course even the most established court systems aren't completely insulated

from making rulings that are unpopular with the regime; even the Supreme Court of the United States takes into account factors such as public opinion and court-curbing legislation in Congress before issuing a decision (Clark, 2011). Yet throughout its history, the U.S. Supreme Court has issued decisions against elected officials at the state and federal level that have had a significant impact on important legislation. Therefore, although no court system can be completely independent and justices must consider a variety of factors when issuing a decision, a successful court that has the power to act as a meaningful check on the other branches of government is one that has enough institutional legitimacy to have both its popular and unpopular decisions implemented.

Creating an independent judiciary is far more complex than simply granting it the constitutional authority of judicial review. In Federalist 78, Alexander Hamilton famously wrote that the judicial branch is the least dangerous branch because the courts lack the purse and the sword. Thus, because they cannot enforce decisions through military might or financial means, they have to rely on the other branches of government to implement a ruling that may be unpopular with the ruling party in those branches. There may be little incentive for the executive or legislative branches to implement a court ruling, even if ignoring or contradicting the decision means violating the constitution. In fact, there could be an incentive not to implement a ruling if it would be unpopular among constituents. Institutional legitimacy, as mentioned, could be the incentive that forces the ruling party to implement an unpopular court decision, but institutional legitimacy can't merely be granted in the constitution; it must be built with time and public support. Yet public support also has to be built with time and is especially difficult with an uninformed public where the concept of an independent judiciary may be foreign. Thus, the early

years of a new court system in a new democracy can be especially treacherous and need to be navigated carefully.

This paper investigates the U.S. Supreme Court and the federal court system as an example of the successful establishment of an independent judiciary in an attempt to understand how an independent judiciary can be built in emerging democracies today. Specifically, it will focus on the factors that contributed to the Supreme Court gaining influence and legitimacy over time. It will look both at strategic posturing from the justices of the Supreme Court and outside influences on the Court's power. Then, this paper will examine the failed court system in Argentina, which has a constitution modeled after that of the U.S. The paper will look at why the courts in Argentina have so far failed, and what steps must be taken to begin to build the institutional legitimacy the Argentine Supreme Court needs to attain its place as an independent branch of a functioning democracy.

### **Case Study: United States**

Studying the Supreme Court will provide insights into how the U.S. court system became the powerful and relatively independent institution it is today that will be used to explore how these lessons can be applied in emerging court systems around the world today. Although some things have certainly changed in the more than 200 years since the inception of the Supreme Court, this paper will argue that the following lessons learned from the U.S. example are universal truths about what makes a court system operate independently from coercion from other branches of government, and can thus be applied to court systems that are currently struggling to emerge.

#### Early Struggles

A court system's early days aren't necessarily indicative of how successful the courts will become. The Supreme Court of the United States began with very little power to influence public policy and its independence faced a number of early challenges. In one example, the Judiciary Act of 1801, which eliminated circuit riding by increasing the number of federal judges, was repealed early in Thomas Jefferson's administration because they wanted to limit the number of Federalist appointed justices in the court system (Crowe, 2012). In another, more direct challenge to the Supreme Court, the Republicans impeached Associate Justice Samuel Chase in an attempt to limit the federal judiciary while the Federalists, who had appointed sympathetic judges during a lame duck session, fought to defend Chase (Whittington, 1999). These challenges were made possible partially because Article III of the U.S. Constitution, which establishes the Supreme Court, was vague about the powers and responsibilities of the judicial branch. The future of the judiciary was thus left in the hands of Congress, which made small, incremental changes over time (Crowe, 2012). The Supreme Court wasn't an early priority to Congressional leaders, so early reforms to the court involved more administrative details than significant changes to the power or reach of the judicial system (Crowe, 2012).

Both of the early challenges described here were legal under the Constitution, which demonstrates that an independent court system needs more than just legislative or even Constitutionally granted powers to succeed. In some cases, the justices can work to solidify their legitimacy, while in other cases they need outside help. In the case of the Chase impeachment, Chase was acquitted by only four votes as Federalists argued that the standard to remove justices should be high, which ultimately led to the depoliticization of the judiciary (Whittington, 1999). The Federalists were able to save Chase and actually helped to make the Supreme Court become

a more independent actor, but the extremely close vote helps to illustrate just how precarious the position of a new court system can be in an emerging democracy.

### **Expansion of Judicial Power and Independence**

#### The Court as a Political Ally

The Federalist Party attempted to use the Federal Judiciary as a political ally after losing a landslide election to Thomas Jefferson and the Republicans. Crowe (2012) argued that judges, assuming they have lifetime appointments, can far outlast other politicians, so the Federalists expanded and packed the federal courts with sympathetic judges in a series of lame duck appointments under the pretense of eliminating certain inefficiencies, like circuit riding. Understanding the potential power of the federal courts as a political ally to advance an agenda, the newly elected Republicans also attempted to pack courts with friendly justices. For example, the Republican dominated Congress, in an umbrella effort to ultimately eliminate slavery, reformed the courts and granted certain powers to protect freedmen and unionists. Under the U.S. Constitution, Congress has the power to define the jurisdiction of federal courts, so the Republicans worked to increase the number of cases heard in anti-slavery Northern federal courts instead of pro-slavery Southern state courts to advance their political ambitions. This dramatically increased the caseload and jurisdiction of the federal court system. Therefore, the Supreme Court, which is the final court of appeals, also saw its reach expanded. After the American Civil War, Republicans continued to use the federal courts as political allies, granting the court system powers to push their economic agenda. Later on, Crowe (2012) argues the courts used their powers granted during this time period in ways Congress hadn't intended, further expanding their own power. In this example, the Federal Judiciary was given outside support to help advance an agenda, but the justices also worked to expand their own reach.

In the case of slavery, the Republicans used the federal court system to push an agenda the legislature couldn't enact on its own. In some cases, though, the courts can be used to implement policies that are necessary but may be unpopular with constituents. For example, early supporters of the federal judiciary wanted to develop a centralized and more uniform commercial economy, a task they passed off to the judiciary because it could be done more easily by the courts and it provided the individual legislators with political cover (Crowe, 2012). In another scenario, legislators may welcome a judicial veto if the results of a bill weren't what they had intended so they can avoid the political embarrassment of having to repeal it themselves (Vanberg, 2005).

The federal courts can also be used as a political ally to push a political agenda in a federalist system where states and municipalities may institute policies that run counter to the national regime's policies. Thus, a national legislature may prefer that a friendly federal judiciary become more active in striking down laws to spread the regime's agenda in areas led by political minorities (Whittington, 2007). As a result, the courts may be granted even more power and the ruling party is likely to faithfully execute the judiciary's rulings. In this situation, the national regime is using the courts to accomplish political goals that they cannot accomplish themselves because of how power is shared in a federalist system.

These and other examples demonstrate that elected officials, both as a form of regime maintenance and to make policy advancements, may be willing to give up some of their own power for something in return and to prioritize passing legislation that focuses on more salient legislative goals (Whittington, 2007). However, it's important to distinguish here that this doesn't necessarily make the court system a political pawn of the ruling regime. Because justices serve lifetime appointments and successfully removing federal judges is very rare, many justices

from previous regimes may still work to block the political agenda of the ruling party. This cycle continues because the expansion of the courts under one regime hinders the next regime.

Furthermore, if the regime supports many of the court's actions and faithfully enforces them, it becomes more difficult for them to ignore rulings they find less desirable later because it would make the party an easy target for the opposition who will argue they're corrupt and hypocritical.

Therefore, opposition parties and the public, who can vote a party out of power, can act as a check to ensure judicial independence.

### Gaining Public Support

Public support for the institution of the Court and for justice administered by the courts are pivotal if the Court is to gain power and remain independent. In the United States, the Federal Judiciary was expanded because Congress was pressured by their constituents to expand the court system as the country grew and justice wasn't being administered effectively (Crowe, 2012). The public had a need for an efficient judicial system and Congress, to please their constituents, had to surrender more power and influence to the courts. After the Civil War, for example, the courts were vital to administering quick justice, and the public generally supported the Republicans' efforts to expand the federal courts which in turn expanded the reach of the Supreme Court (Crowe, 2012). The previous section demonstrated that Congress can be a political ally of the Court, which they're more likely to do if their voting constituents support it. Therefore, the public can also be an ally of the Judiciary.

The federal court system and by extension the U.S. Supreme Court is strongest when both the public and the ruling regime support it. However, when one ruling party is replaced by another, it signals a shift in public opinion to the Court and increases the likelihood of conflict between the Judicial branch and Congress and/or the president (Whittington, 2007). Thus, public

support for the institution of the court is something that needs to be built over time so individual decisions that may conflict with public opinion don't threaten the independence of the Judicial branch. In fact, the American public will generally support the Supreme Court once it's established as a legitimate institution, even if they disagree with an individual decision, because the public views the Supreme Court as working on higher Constitutional grounds (Clark, 2011). For example, when Franklin Roosevelt attempted to "pack" the Supreme Court with justices who were more sympathetic to his economic agenda, the public was overwhelmingly opposed even though Roosevelt was extremely popular and the Court's rulings on the New Deal legislation were unpopular (Clark, 2011). Additionally, if the federal courts and Supreme Court are generally popular, then the ruling party is more likely to enforce a court decision because their constituents may get angry and vote them out of power if they directly challenge the Court's authority.

### Judicial Lobbying

The U.S. Supreme Court also saw an increase in its own power and reach through the direct lobbying efforts of Chief Justice William Taft. In the 1920's, Taft used the political capital he had built up from his time as president to lobby for causes that would increase the efficiency of the court system and by extension, its reach (Crowe, 2012). The Justices wanted the administration of the judicial department to be independent to make the entire branch seem more independent, and the work of Taft and lobbying efforts by the American Bar Association greatly increased the Supreme Court and the Federal Judiciary as a powerful institution (Crowe, 2012). This political maneuvering likely worked because the Supreme Court was already largely established as an institution, and such efforts earlier in the court's history likely would have failed and even could have harmed the court because for the Supreme Court to succeed, it's

important that the public views it as an apolitical decision-maker. However, it also shows that the justices themselves were able to bolster their power and independence with direct lobbying at an appropriate time.

### **Operating under Constraints: Maintaining Power**

#### Responding to Public Support

Despite more than 200 years in operation, the Supreme Court still cannot operate completely unrestrained because it is always reliant on the other branches of government to enforce its decisions. The previous sections discussed why other branches of government may be incentivized to follow the rulings of the Supreme Court, but those incentives can run out if the Court does not monitor the public attitude. Although support for the institution of the court is more important than gaining public or Congressional support on every individual decision, it would be naive to think that the Supreme Court could make countless decisions that are unpopular with the ruling party and the public without facing consequences. In fact, diffuse support for the institution of the Court tends to be a product of support for specific decisions over time (Vanberg, 2005). Thus, if too many decisions are unpopular, the Court's public support will wane, which forces the justices to consider factors that aren't necessarily related to their beliefs about the case when issuing a decision.

Clark's (2011) research shows that U.S. Supreme Court justices are indeed aware of legislation designed to limit the courts being introduced in Congress, and they use this as an indicator of public support (or lack thereof) because representatives will introduce court-curbing legislation if they believe it will be popular with their constituents, even if the legislation has no real chance of passing. The justices can use this information strategically to protect the institution from succumbing to court-curbing legislation as a result of negative public attitudes

towards the Supreme Court by ruling a certain way or limiting the scope of their rulings.

However, it's important for the Court to do this secretly because the Supreme Court is at its weakest when it is viewed as being too political (Whittington, 2007). In order to be perceived as an apolitical institution among the public, the Supreme Court has to engage in tremendously political behavior (Clark, 2011). Engaging in this political behavior is a strong example of how the U.S. Supreme Court is still constrained, even today. Although it's impossible to tell how many decisions, if any, were changed because of a fear of losing too much public support, the very fact that the justices recognize this threat at all demonstrates that they know their power is still limited.

Although the vast majority of court-curbing legislation has no serious chance of ever passing, the court monitors such legislation because overtime, it's conceivable that Congress and/or the president could disrupt the Court's operations if the public is angry enough. To prevent this, the Supreme Court strikes down fewer laws when the number of court-curbing proposals is high (Clark, 2011). Furthermore, as public support for the Court declines, the Court invalidates fewer laws, likely because the laws were written and enacted by the more popular ruling party (Clark, 2011). Although there's variation between the justices as to how much they feel constrained, the effects of court-curbing legislation affects all justices to some degree (Clark, 2011).

Presidents who have directly challenged the Supreme Court had high political ambitions and felt empowered by a public mandate to enact their agenda because they replaced an unpopular regime (Whittington, 2007). In other words, the regime had public support when the courts did not, which put the Supreme Court in a particularly vulnerable position. Furthermore, a popular president who voices dissent with the Supreme Court may be able to influence public

opinion (Clark, 2011). In these cases, the justices cannot look to the public or the government for support, so they may have to rule in a way that doesn't directly challenge the regime.

Beyond the possibility of legal court-curbing, the Supreme Court also needs to consider that if an individual decision is very unpopular, public officials will be reluctant to execute the decision, which means the justices must take into consideration another factor that doesn't relate to their beliefs about the Constitutionality of the law or action (Clark, 2011). Therefore, even though federal judges are not publicly elected, the public still has a great deal of influence over them.

#### When the Court is Weakest

Any discussion of public opinion or attitudes towards the Court assumes that the public is aware of the cases being heard and the decisions being made. However, most cases will never break into the news cycle, which greatly weakens the Court's influence in those cases. In order for the ruling regime to feel obligated to enforce a decision, the public must have access to information about the decision and there must be public interest (Vanberg, 2005). In a related sense, the public is less likely to be well informed about complicated cases, so the Court is weaker in its ability to rule in an unrestrained manner in these instances (Vanberg, 2005).

Without public knowledge, the Supreme Court is very weak, and may refrain from ruling against the regime just to avoid a direct conflict with the other branches of government that it is likely to lose. Clark (2011) found that Supreme Court justices are concerned with maintaining the institutional legitimacy of the Court and they want to be evaluated positively by both the public and their peers, neither of which will occur if the Court is having its decisions ignored or contradicted. Therefore, the Supreme Court can only make a completely unrestrained decision if

they have public support and public interest (Clark, 2011). Without both, they may be resigned to appeasing the ruling party.

This isn't meant to suggest that the U.S. Supreme Court is unsuccessful as a check on other branches, as in a separation of powers system, the other branches of government should indeed have some ability to check the courts. In fact, the Court has a long history of having a profound impact on public policy, and as a whole, can be viewed as a court system that has the ability to act independently from the other branches of government. The preceding section demonstrates not that the Court is weak, but rather that any high court in a democratic nation should be expected to operate within some reasonable constraints. Therefore, in the case study of Argentina, it will be important to remember that any challenge to the Judiciary should not be interpreted to mean that the Court is powerless and destined to fail. Instead, we will have to consider if the Court is able to appropriately respond to and bounce back from such challenges.

### **Implications for Emerging Court Systems**

#### **Prerequisites for an Emerging Court System in a New Democracy**

The case study of the United States demonstrated that the Supreme Court's success was largely dependent on public support for the institution of the Court. Public support helps to ensure that other branches of government will respond to the Court's decisions because officials fear that their constituents will vote them out of power if they directly challenge a popular institution. However, this simple equation only works if several conditions are met.

#### **Competitive Elections**

Any country that hopes to establish a working democratic system needs competitive elections to prevent an abuse of power in many arenas. One such arena is the court system. Public support for the court system only matters if the public can in some way influence the

legislators and the executive, which can most directly be done at the polls. However, if the legislature and/or executive feel as though the public cannot or will not vote them out of power, then they're unlikely to enforce a court ruling that they view unfavorably because there aren't any direct political consequences for ignoring the Court. Therefore, in order for a court system to succeed, the basic functions of a democracy need to be in place first.

#### Clean Elections

First, clean elections without corruption are necessary both for the overall health of the democracy and the institutional power of the court system. The ruling party must in some way fear political consequences if they directly challenge the courts, so it's important that the public has a real ability to influence vote members of the legislature in and out of office.

#### Multiple Political Parties

Second, competitive elections require that there is more than one political party (or at least a coalition of parties) that has a real chance of gaining the majority of the seats in the legislature and/or the executive. The political parties need to have some sort of establishment to continue to check the majority party even when they're not in power to keep the pressure on the ruling party or coalition to enforce court decisions. If this occurs, the ruling regime should be under constant pressure from the minority party or coalition and they'll know the threat of an election defeat as a result of defying the courts is very real. In the U.S. case study, the Federalist Party, who was in the minority, successfully fought to keep Associate Justice Samuel Chase on the Supreme Court, demonstrating the role the minority party or coalition must serve in protecting the courts. Therefore, it's useful not just for the minority party or coalition to keep election pressure on the ruling regime, but also to have legitimate governing powers that can obstruct or at least slow actions by the majority that would undermine the Court's authority.

### Peaceful Regime Changes

The importance of peaceful regime changes follows similar logic to the need for multiple political parties that are legitimate contenders. The ruling regime will only be concerned about losing power if there are processes and precedents in place for the will of the people to actually be implemented. In the U.S. case study, the party that was voted out of power frequently propped up the Judiciary in their lame duck session as a way of preserving their power even when they no longer controlled the legislature and/or executive. Although this is a way of politicizing the court, it's necessary for a new court system to have some support from the other branches of government; but such support, at least early on, is only likely if the other branches aren't capable of doing something on their own, such as pursuing their agenda when they're out of power. During a peaceful regime change, the court system can act as an ally to the departing regime and can see its power and influence increase. This may open the door to challenges from the incoming regime, but if the court is already popular and the minority party still has some ability to protect it, these challenges are likely to be unsuccessful. Thus, the Judiciary has gained power without any negative consequences during these lame duck sessions.

### Access to and Knowledge of Information

The above points hinge on there being access to information about the actions both of the Judiciary and the other branches of government. If the public is unaware of the ruling regime's attempts to undermine the Judicial Branch, then the ruling party wouldn't face any election consequences for such attempts. The minority party or coalition plays an important role in bringing the public's attention to any abuses of power by the ruling regime, but they can't do it alone. A free press is a critical component to keeping the majority in check, as a state run media wouldn't be able to publish information about the majority party's abuses.

The importance of a free press goes beyond just keeping the majority party in check. Although diffuse support for the court as an institution is what enables the courts to gain and maintain power, diffuse support must be built through individual court decisions that are generally popular with the public (Vanberg, 2005). Thus, the court decisions must be publicized so the public can understand the role the court plays in positively affecting their lives. Furthermore, there needs to be public interest and knowledge of how the Judiciary works. The Judiciary is weakest when public interest in a case is low (Vanberg, 2005). Therefore, it's important for the public to have at least a basic understanding of and interest in how the court system operates, which the media is partially responsible for creating.

### **Judges are Difficult to Remove**

All Federal judges in the United States are given lifetime tenure and are very difficult to remove. In fact, only fifteen federal judges have ever been impeached, and only eight were convicted by the Senate, while another three resigned before facing trial (Clark, 2011). This is important because if justices are easily removed, they have an extremely limited ability to rule against the ruling regime without fear of retaliation. The lifetime tenure of judges must be both written in law and executed in practice. In the example of the impeachment of Associate Justice Samuel Chase, the precedent was set that removing justices shouldn't be purely politically motivated, but if only four more legislators had voted to remove Chase, federal judges in the U.S. may have been protected by law, but not in practice. This was a critical juncture for the U.S. courts because a few Federalist judges had already (deservedly so) been removed, but when Chase was impeached for purely political motives, the impeachment effort was defeated, preserving the precedent that the courts should be mostly isolated from politics. Thus, for the

success of an independent judiciary, the ruling regime must be able to tolerate politically divergent justices.

### **Building Institutional Legitimacy from within a New Court**

As the U.S. case study demonstrated, a new court system is in a precarious position. The justices must use their authority carefully early in the existence of the Judiciary to establish their power and influence. The following are suggestions for justices in a new court system based on the successful case of the Supreme Court in the United States. This section also concisely applies some of the suggestions to the Supreme Constitutional Court in Egypt, which saw a brief period of relative independence during the 1980's, to illustrate the arguments.

#### **Strategically Ally with the Regime**

It's important for the Judiciary to appear as apolitical as possible to build and maintain public support. However, it's sometimes possible for the Court to strategically ally itself with the ruling regime without compromising how the public perceives the institution.

In Egypt, the Supreme Constitutional Court (SCC), despite operating in only a semi-democratic system, provides a good example of how a new Judiciary can establish power by ruling in ways that helped the regime to build power and later using that power to issue decisions in other areas in the 1980's. The first rulings of the Egyptian SCC focused in the economic realm, where the justices restored private property rights and liberalized many areas of the economy (Moustafa, 2007). The rulings were in the same direction the ruling regime wanted to head so they could attract foreign investment, so even when the SCC liberalized the economy in more ways than the other branches had sought to, they didn't challenge the Court (Moustafa, 2007). Although the Supreme Constitutional Court ultimately failed to maintain its independence as the political situation in Egypt devolved, the example demonstrates an important point about

how a new court can establish early power by being useful to the regime. When this occurs, the ruling regime will implement the Court's decisions, which starts to create the precedent that the Court is in fact an independent entity. Over time, it becomes much more difficult to challenge the Court because of the precedent set when the Court ruled in ways that were beneficial to the political ambitions of the regime.

The U.S. Supreme Court was also a clear political ally of various ruling regimes during its early history, as the case study demonstrated, in the realms of consolidating the economy and expanding civil rights to African Americans. The case study also demonstrated that the Court could use their alliance strategically to later challenge the ruling regime. Thus, the order here matters. The Court's earliest decisions should not directly challenge the regime so the regime doesn't want to challenge the court system. The regime will implement the Court's ruling, establishing a precedent. Once the precedent has been established, it becomes more politically difficult to challenge the Court later, especially when there are election pressures from a minority party or coalition. This scenario is clear in the early case of *Marbury v. Madison* (1803) when Chief Justice John Marshall sided with the hostile Jefferson administration in regards to the outcome of the case but also argued that the Supreme Court has the power of judicial review. The Jefferson administration had to accept the ruling because it was in their favor, but the Supreme Court put itself in an important position to challenge the regime in later rulings.

#### Establishing and Protecting Civil Rights

One way for a new court system to begin to challenge established laws, which would indicate that it's truly an independent system, would be to expand and protect civil rights. The Federal Courts in the United States, for example, were pivotal in granting African Americans legal rights before and after the Civil War. The Egyptian Supreme Constitutional Court also

expanded civil rights during its brief period of independence, which did several important things. First, it helped to build diffuse public support for the Court, as millions of Egyptians saw their rights expanded (Moustafa, 2007). Also, it created another critical ally for the courts: international human rights groups (Moustafa, 2007).

In the United States, expanding civil rights to African Americans led to an expansion of the Federal Court system and more power and influence that could be applied to other areas later. In Egypt, the civil rights rulings expanded public support (both domestic and international). Both cases show that this was an important step for the court systems as they established alliances in either Congress or the public. The case in Egypt is important because expanding civil rights to voting constituencies today would likely have a powerful impact on how the public views the Courts. Also, because of the existence today of an influential international coalition of human rights organizations, and pressures from other governments to protect human rights, a new court system in an emerging democracy would likely benefit from expanding civil rights after they have established some precedent as an independent entity.

#### Monitoring Threats to the Court

The case study of the U.S. showed that even after 200 years, the Supreme Court still needs to monitor both court curbing legislation in Congress and public support. Especially early on, the Court must pick its battles with the regime carefully. In Egypt, the SCC not only suffered from a political situation that lacked some of the prerequisites already discussed, but it also may have challenged the regime too directly and too early on. For example, a lot of their rulings that would have made the elections more clean and transparent were largely ignored or complied with in the absolute least way possible (Moustafa, 2007). The direct confrontations between the Court and the regime early on, and the failure of the SCC to ultimately prevail in these confrontations,

challenged the legitimacy of the Court. Therefore, it's better for an emerging court to avoid the confrontations that they're likely to lose, even if it means appearing as though they're less independent from the other branches. Ultimately, the most important aspect to building institutional legitimacy is time. Rushing to have influence in too many areas of public life could cost the Court its ability to have any influence later on, so it's vital that the justices move slowly and cautiously and only pick the early battles they know they can win.

### **Applying the Lessons from the U.S. Case Study to Argentina**

As the U.S. case study revealed, there were many factors that contributed to the power and prestige justices on the Supreme Court enjoy today. First, the Court survived what may have been a fatal blow when the Federalists were able to acquit Associate Justice Samuel Chase in his impeachment trial, establishing a precedent that it should be difficult to remove federal justices and it shouldn't be done for political gain. Further, this example demonstrates how the Federalist Party realized the Federal Judiciary could be used as a political ally, establishing another precedent of legislators expanding the Judicial system to accomplish or protect political goals that they themselves cannot. Of course we know this could be taken too far, because a court system that is used only to advance the political agenda of the ruling party could hardly be considered independent. At this critical juncture, two forces operated to ensure the Supreme Court and the Federal Judicial system didn't simply become a pawn of the ruling regime. First, fair and clean elections led to peaceful regime changes, which meant that although the new party could attempt to expand the courts to gain a political advantage, it was difficult for them to remove older justices who were appointed by hostile regimes because of the precedent set by the failure to remove Chase. Thus, the Federal courts were frequently mixed with an important balance of friendly and hostile justices. Second, Supreme Court justices don't always rule in the

way the ruling regime expects or wants them to after they're appointed. However, it's very difficult for the regime to challenge the decisions they don't favor if they've already accepted and implemented other court decisions they viewed more favorably. The United States case study also illustrated that public support for the institution of the court was important because it keeps election pressure on the party in power to follow the Court's rulings so their constituents don't vote them out.

There were a lot of moving pieces in the case study of the Supreme Court of the United States and the Federal Judiciary as a whole. Many forces acted upon the institutional legitimacy of the courts, such as the legislature and the voting public. Other forces came from within the Court, such as when justices acted strategically to prevent decisions from being overruled and when Chief Justice William Taft directly lobbied for the Court to become a more independent entity. Yet it's unclear which factors were absolutely critical to the Court's success and should be considered vital to the success of any court system in an emerging democracy. Does the success of a court system depend more on the justices who are working in the Judiciary or the outside influences that are acting on the system at large? Even if we can begin to establish which factors are the most important, it's also necessary to consider whether the effect can be accomplished by some other means. For example, the U.S. public supported the early expansion of the Judicial system because the country was growing dramatically, both in population and land, and the early judicial framework couldn't keep up. However, with the age of imperial conquest over, will the lay public of another country support a similar judicial expansion? Or will public support have to be derived from something else, such as protecting people from human rights abuses?

Because the importance of a strong Judiciary to check the other branches of government has already been demonstrated in the United States and many other countries, it may be easier

for a new judicial system in an emerging democracy to gain buy-in from the public and other institutions. Furthermore, international pressures may aid a new judicial system in a way that simply wasn't plausible during the early days of the U.S. Supreme Court. Perhaps this could embolden justices to rule against the ruling regime earlier in the Court's tenure, and the potential consequences of such actions aren't entirely clear from the U.S. case study or the brief discussion of the Supreme Constitutional Court in Egypt.

To begin to try to answer these questions, the lessons from the case study of the United States will be applied to the federal court system in Argentina, which has a government largely modeled after that of the United States. Despite the attempts to model the U.S. government, the Argentine Federal Courts operate almost entirely under the influence of outside actors and thus cannot be considered an example of a powerful, independent institution. The following section will explore what went wrong by examining which factors were present in the U.S. that were not present in Argentina. Additionally, the following sections will provide suggestions as to where the Argentine court system can go from here to establish institutional legitimacy and provide the check on the other branches that this democracy needs to succeed.

### **Prerequisites for Success**

This paper explored a number of prerequisites that a court system needs to succeed in previous sections. These prerequisites will now be applied to the case study of Argentina to both test their validity and identify potential causes of the Argentine Supreme Court's failure to achieve independence.

### **Competitive Elections**

Competitive elections, and the factors that contribute to competitive elections like having multiple political parties, peaceful regime changes, and clean elections have existed in Argentina

since the country restored its democratic system from military rule in 1983 (Central Intelligence Agency, 2015). In October of 2011, which was when the most recent elections in Argentina were held, votes were spread across more than five political parties and four main presidential candidates (Central Intelligence Agency, 2015). It should be noted that the presidential election was a landslide, with current President Cristina Fernandez de Kirchner winning 54% of the vote and the next closest candidate, Hermes Binner, receiving only 16.9% of the vote (Central Intelligence Agency, 2015). However, given the history of regime changes in Argentina and term limits, this shouldn't be considered a serious cause for concern because the Argentine citizens are able to express their attitudes in a peaceful and productive manner. Although the democratic system has been challenged several times since 1983, it has remained intact (Central Intelligence Agency, 2015).

There is also evidence that the Argentine population is well informed about the Supreme Court's actions because politicians and legal scholars frequently discuss the actions of specific judges and their decisions, which receives news coverage (Helmke, 2005). Therefore, if the ruling regime wants to challenge the courts, the public would likely be aware of it.

Two important criteria that were extracted from the U.S. case study have been met in Argentina. First, Argentina's competitive elections suggest that the public can express displeasure with their elected officials and vote them out of power. The public is also informed about the cases the Supreme Court is hearing, which could be a factor they consider when voting. Therefore, if the Argentine Supreme Court was a popular institution, the executive and legislative branches would likely be hesitant to challenge a court decision for fear of upsetting their constituents.

### **Justices are Difficult to Remove**

Like in the United States, federal judges in Argentina serve life time appointments (Central Intelligence Agency, 2015). They are nominated by the president and approved by the senate (Central Intelligence Agency, 2015). Also similarly to the United States, formal impeachments of federal judges are rare in Argentina (Helmke, 2005). However, judges are routinely forced to resign through various forms of coercion when a new regime takes power, and judges who remain can face severe consequences for deciding cases against the ruling party (Helmke, 2005).

Unlike in the United States when Associate Justice Samuel Chase was spared from a conviction in the Senate to ultimately set a precedent that federal judges should be difficult to remove from their posts, Argentine President Juan Peron set the opposite precedent when he removed three of five Supreme Court Justices when he came to power in 1946 (Helmke, 2005). The tradition was continued, as the majority of justices were removed with each change of government from 1955-1983 without any formal impeachments (Helmke, 2005). Although the Argentine democracy has evolved and changed since Peron and the struggle between civilian and military rule, the precedent he set has remained and has seriously hindered the justices' ability to form a powerful and independent judiciary. The cycle didn't end in 1983, when civilian democracy stuck for good, either, as the new government moved to remove justices who had served under the military (Helmke, 2005). Although it may not have been their intention, this direct interference with the judicial branch has left a lasting legacy of judges who are protected by law but not in practice. Thus, they are not able to rule in the way they see best fit; rather they must rule to appease the ruling regime, which is not how an independent judiciary should operate.

### **Public Support**

Direct interference with the Argentine courts could be prevented if it upset the public, since we've seen that Argentina does support open elections. In fact, voting is compulsory from ages 18-70, so the will of the people should be even more powerful than in the United States (Central Intelligence Agency, 2015). However, the Argentine Supreme Court cannot look to the public for support either. In fact, more than 90% of the country disapproves of the Supreme Court (Helmke, 2005). Therefore, not only does the ruling regime not have to worry about election consequences for challenging the courts, it's actually a politically popular move to directly challenge the Supreme Court and to remove justices. The public acts as an important check on the other branches of government in the United States that prevents elected officials from challenging the federal courts. In Argentina, the opposite is true, so the courts can never look to the public for support if they're in conflict with another branch of government.

### **Judicial Lobbying**

Opportunities for justices to lobby for their own power or independence are limited given their lack of popularity with the public. Furthermore, Latin American Judges act more like civil servants than people pursuing policy objectives, so such behavior would likely be viewed as highly inappropriate and would be unproductive (Helmke, 2005). For judicial lobbying to be successful, it has to be done out of the view of the public to preserve the perception of an apolitical court. However, given the lack of support from the other branches of government, any attempts by the judges to lobby would likely be publicized by other government officials, so this leaves the Argentine justices with very little ability to maneuver in a way that would improve their position.

### **Effects on the Argentine Supreme Court**

The effects of the failure of the political climate in Argentina to meet the prerequisites of having insulated judges that are difficult to remove and the severe lack of public support has resulted in an Argentine Supreme Court that rules based on how they expect the other branches of government to react. Helmke (2005) proposed a separation-of-powers framework, which argues that judges pick the best decision that will not be overruled. It can be argued that a similar situation exists in the United States, but not nearly to the same extent because Supreme Court justices in the U.S. have more options available to them due to their relatively insulated position.

Interestingly, Helmke (2005) does not suggest that this means judges will never rule against the current regime. Instead, judges will “strategically defect” when the popularity of the ruling party wanes in an attempt to gain favor with the likely incoming political party (Helmke, 2005). Justices may also avoid making an important decision until a new government comes to power so they can better align themselves with the new regime (Helmke, 2005). In her research, Helmke (2005) confirmed that the number of rulings against the government increased significantly when the regime was losing power, though justices weren’t necessarily more likely to “duck” decisions by not ruling at all towards the end of the current government’s rule.

“Strategic Defection” throws an interesting caveat into the idea of what makes up an independent judiciary. Helmke (2005) states that judges face the greatest threat from incoming regimes, not the regime that’s currently in power. Thus, it’s important to consider that simply ruling against the government doesn’t necessarily mean that a court system is independent. The Argentine Supreme Court isn’t independent because the justices are in constant fear of being removed, even if it isn’t by the current regime. Thus, they base their rulings almost entirely on what they believe would be the best way to remain a judge. Supreme Court justices in the United States take into consideration how the public and other branches of government would react to a

specific decision, but they balance that concern with their inclinations towards the case. The Argentine Supreme Court has failed to strike that balance.

### **Moving Forward**

The Argentine Supreme Court is in a difficult position because many of the factors that are contributing to their lack of independence are outside of their control. First, the precedent has already been set that the incoming regime can and should remove justices they don't like and replace them with more friendly justices. Second, the Argentine Supreme Court is highly politicized by politicians who frequently discuss the cases the Supreme Court is hearing and how they expect and want different judges to rule (Helmke, 2005). As discussed in the U.S. case study, it is absolutely imperative that the courts be viewed as an apolitical entity if they are ever to gain public support. Even though the U.S. public sometimes disagrees with Supreme Court rulings, they tend to view the Court as working on higher Constitutional grounds, which leads to diffuse support for the Court as an institution (Clark, 2011). Such diffuse support is clearly lacking in Argentina. However, there's little the justices could do to prevent other political actors from politicizing the Court, especially because it is politically popular in Argentina to voice disapproval with the unpopular institution (Helmke, 2005). Third, the Executive Branch in Argentina is very strong and is likely to prevail in a confrontation with the Judicial Branch (Helmke, 2005). Executive strength is compounded by the public's support for such confrontations.

Although the ultimate success or failure of the Argentine Supreme Court and their federal court system as a whole is largely dependent on actors outside of the courts, this paper will now explore some specific tactics Argentine judges could use to bolster their influence and increase the likelihood that they will receive the outside support they're currently lacking.

### **Support Civil Rights**

When Argentina was transitioning to democracy in the 1980s, judges were considered heroes for their human rights work (Helmke, 2005). To begin to reverse the extremely problematic fact that the overwhelming majority of Argentines disapprove of the Supreme Court, judges need to be viewed as heroes once again. According to Human Rights Watch (2014), Argentina faces issues concerning the freedom of government critics to express themselves, police abuse, poor prison conditions, torture, and protecting the rights of indigenous people.

These are all areas where the Argentine Supreme Court has an opportunity to increase its popularity among certain minority groups and international human rights groups. Rulings that directly challenge the current government are no doubt dangerous and would likely lead to the removal of the justices on the Supreme Court, but it could begin to create outside groups that can act as allies and advocates to the courts, which is pivotal for judicial independence. In the case of the impeachment of Associate Justice Samuel Chase, it was the minority party in Congress that was able to defend the Court, which demonstrates how powerful minority groups can be when defending the court system. In order to reverse the precedent of removing judges every time a new regime comes to power, there need to be outside allies advocating for the independence of the federal court system. This is something that will have to be done over time and over multiple regime changes, but it's important to begin building alliances now.

### **Strategic Alliances with Government Officials**

Ideally, as we saw in the U.S. case study and the discussion on the Supreme Constitutional Court in Egypt, the Argentine Supreme Court would find ways to help advance the regime's political goals without compromising its independence. In the U.S. and Egypt, the highest courts advanced some regime policies to build up support from the regimes. They were

later able to successfully challenge the ruling parties because it would look hypocritical and contradictory to challenge the courts after accepting earlier rulings. However, the enforcement mechanism in both cases was public support because the ruling parties feared that challenging the courts could lead to them being voted out of power. This enforcement mechanism doesn't exist in Argentina currently, so the strategy is likely to fail. Furthermore, even when the Argentine justices have tried to ally themselves with the incoming regime through strategic defection, they've been removed anyway, so that strategy is unlikely to be successful.

Still, the Argentine Supreme Court may be able to find political allies outside of the ruling party and the party coming into power. Although small groups of legislators would be unable to protect the justices on their own, similarly to the discussion on protecting civil rights, it's important that the Supreme Court has some allies somewhere. If the Court rules in a way that is favorable to a certain minority party, perhaps the constituents who voted for that party would begin to support the Supreme Court, which would mean that at least some Argentines support and want to defend the institution. Again, they won't have the power to single handedly defend the institution of the Supreme Court, but the current back-and-forth posturing of the judges who strategically defect hasn't created any allies in more than 30 years. Therefore, the justices need to look elsewhere for support.

If the Supreme Court is able to build some strategic alliances, there will be other politicians and citizens advocating for the independence of the Supreme Court. Although any justices that choose this route will almost certainly be removed, it's important that an outside group strikes up the conversation about depoliticizing the courts and building an independent judiciary. If (former) judges try to take on this task, it would likely make the Court be viewed as even more political.

Support from a minority political party could also be beneficial in changing the culture around appointing justices in Argentina. Currently, there's an interesting paradox: the easier it is to remove justices, the less time that goes into selecting them (Helmke, 2005). Even if they're ultimately unsuccessful, if a minority party or a coalition of minority parties are able to challenge the appointment and confirmation of justices when they go through confirmation in the Senate, it may force the majority party to more carefully consider who they're appointing. If this occurs, they may be less willing to remove their appointed justices later because of all the effort it took to appoint them in the first place and the effort it would take to appoint a replacement. All of this time is time that the ruling regime would prefer to spend on their more salient political goals. If the regime simply tires of the appointment process, justices will have more leeway to challenge the regime without being removed.

### **Extrapolating to other Developing Democracies**

By examining the failed case of the Argentine Supreme Court and comparing it to the successful case of the U.S. Supreme Court, we can begin to hypothesize about which factors were the most pivotal to the success in the United States and thus which factors will be most important for emerging democracies now and in the future. Perhaps the most important lesson from the Argentine case study is that the success or failure of the judicial branch is largely dependent on outside actors and without support from outside groups, there is little the justices within the system can do. The precedent of removing justices without a formal impeachment process when new regimes came to power is outside of the judges' control, yet it appears to be the factor that most prevents the Court from achieving independence. The claim that there is little the justices could do was supported by Helmke (2005) as she provided evidence that the judges would strategically defect in an effort to gain favor with the incoming government. However, as

we know from the cases study, the strategic defections failed to protect the judges from the incoming regimes, who consistently replaced the justices when they came to power.

Public support is a second factor that is at least partially out of the control of Federal Justices. Although judges can rule in ways that might build public support, they cannot control other government officials who politicize the Court and thus prevent it from being seen as an independent institution. In fact, any efforts by judges to prevent government officials from politicizing the Court will only cause the courts to appear more political, which further hurts their cause. Also, because judges largely have their hands tied by either the current or future ruling regime, there's little they can do to build public support with their rulings. For instance, one potential solution this paper proposed was for justices in Argentina to rule in favor of human rights, even if the ruling regime wouldn't favor the ruling. Although this could start to build some public support, those justices would likely be removed quickly and replaced with justices who would rule in lockstep with the regime, which would ultimately not increase support for the Court. In this example, it's clear how little power the judiciary has when they lack outside support, and the same can be expected in other countries where the idea of a supreme court that acts as an independent institution is foreign and undermined instead of supported by elected officials.

The fact that a federal judiciary's success is so largely dependent on outside actors cannot be overstated. In a new democracy such as Afghanistan, it's pivotal that elected officials support the idea of an independent judiciary, even if it means sacrificing some of their own power. The first regime change is a critical moment in a new democracy for a variety of reasons, but it's especially important for the judiciary, which must be able to remain above the political entanglement we saw in Argentina. As discussed in the U.S. case study, there are steps that

justices can take to ally with regimes and appear as less of a threat, but the cooperation must be a two-way street and not wholly dependent on whether the regime favors a court ruling. Also, public support for the judiciary as an independent entity can act as an enforcement mechanism during regime changes, but this assumes there are free and fair elections and that the regime doesn't attempt to undermine the Court's public support by politicizing its actions.

This paper also posed the question as to how a court can build public support now that the age of imperial conquest is finished and the need to expand a court system to administer justice, like in the U.S., is no longer needed. Argentina isn't necessarily a good example of how to do this given their lack of public support, but it can provide some clues. First, the Argentine Supreme Court was popular during the transition to democracy in the 1980s, suggesting human rights cases can increase public support, assuming the regime isn't undermining those efforts like is common in Argentina (Helmke, 2005). Also, as countries transition to democracy, it's likely that the justice system will need to be expanded to correct for past abuses. Thus, even though the country's territory isn't expanding, the judicial system may still need to expand just like in the early days of the United States. Again, however, it's important to note that the justices can only expand and protect civil and human rights if the regime isn't actively interfering.

Finally, this paper asked if the successful example of an independent judiciary and other western democracies, combined with international pressures for emerging democracies to reform, could help establish judicial independence. The discussions on both Argentina and Egypt answered this question with a resounding "no." In Egypt, the Supreme Constitutional Court had built up significant international support, but that support had not been enough to prevent the Court from continuing to thrive or to prevent the democracy in Egypt from devolving. The Argentine Supreme Court is legally modeled after that of the United States, yet it operates

entirely differently. Thus, despite an apparent effort to replicate the U.S. Supreme Court, the model was not sufficient to compensate for other deficiencies in the Argentine democracy.

This observation is an important one because it further supports the idea that the leading politicians in an emerging democracy are the most responsible for the Court's eventual success or failure. Incentives from international organizations such as the World Bank to run a fair democracy with an independent judiciary are insufficient. Politicians must either tread the thin line of using the Court as a political ally without the justices becoming political pawns such as what happened in the United States, or there needs to be an intrinsic motivation to see the democracy succeed. It's important that politicians see the value in an independent judiciary, both to their own political ambitions and to the success of the democracy as a whole. Judges can take an active, though not public, role in forming those alliances, but ultimately the success of a judiciary in a new democracy is dependent on the leading politicians accepting the offer.

### **Conclusion**

This paper examined what it takes to build an independent judiciary in an emerging democracy. From the case study of the United States, we discovered how the first Supreme Court was able to establish itself as the powerful institution it is today. The U.S. case study illustrated that the basic functioning of a democracy, such as competitive elections with peaceful regime changes, need to be established if a court system is to succeed. In the failed removal of Associate Justice Samuel Chase, we also learned that it's critical that justices in an independent judiciary are difficult to remove both in law and in practice. The U.S. case study also demonstrated how political parties in the United States bolstered the court system in an effort to achieve or preserve their political ambitions, effectively viewing the judiciary as an asset instead of a threat. With their newfound power, Supreme and Federal Court Justices were able to expand their rulings into

areas the regimes hadn't necessarily intended. At this juncture, the public support for the institution of the courts was enough to incentivize the ruling regimes to implement both the rulings they favored and those that ran contrary to their goals. Once the courts were established, they became increasingly difficult to challenge because there was always the risk of being voted out of office if the regime challenged a popular institution. The Supreme Court does not act completely unrestrained however, so the justices must monitor both court curbing legislation in Congress and the public attitude to ensure they maintain the leverage they need should another branch of government challenge them.

In Argentina, where a constitution was modeled after that of the United States, the results were very different. The failure to create an independent judiciary in Argentina sheds some light into which factors were the most important in the United States and will be most important for future democracies. In Argentina, a majority of judges are removed with each regime change, even though none of them have gone through the formal impeachment process. Thus, the judges are protected by law but not in practice, as all of the judges have been removed via informal pressure. Lacking the continuity in judges, the public has turned against the Argentine Supreme Court, so much so that it's actually a politically popular move to remove the judges when a new regime comes to power. Unlike in the United States where the public helps to shield the judiciary from attacks, the public in Argentina encourages the attacks.

The application of the lessons learned from the United States to the failed court system in Argentina is useful for predicting what will happen in other emerging democracies. We learned, for example, that the influence of outside actors is absolutely critical to the success of a new court system. The ruling regime and the future regimes need to buy into the importance of an independent judiciary and view the courts as allies, not enemies. Once the judiciary is established

and the justices are not removed with each regime change, the courts can begin to rule against the regime because they are protected both by precedent and the public.

This paper has demonstrated that the judges have a role to play in the establishment of a new judiciary, but they cannot do it alone. At a minimum, every successful judiciary needs outside support from the regime and the public even when the justices issue an unpopular ruling. Justices need to be insulated from the whims of public opinion without ignoring it completely to maintain their legitimacy once it's established. New judiciaries are in a particularly precarious position, as their fate is largely outside of their control. Yet with the proper support from outside actors, a judiciary can flourish and play its critical role in protecting the democracy as a whole.

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