

CONSTITUTIONAL TRANSPLANTS AND THE MUTATION EFFECT

HORACIO SPECTOR*

INTRODUCTION

This paper is concerned with legal transplantation, that is, the borrowing of legal institutions from foreign jurisdictions.¹ Constitutional transplants are a species of legal transplants. By constitutional transplants, I mean both the borrowing of constitutional texts from foreign jurisdictions and the borrowing of judicial doctrines espoused in precedents from foreign supreme courts or constitutional courts. In general, borrowing of precedents is more likely when there has been a prior transplantation of constitutional texts, though this is by no means necessary.

There is a trend in literature that regards transplantation of constitutional texts with great skepticism. Frederick Schauer suggests that political, social, and cultural factors tend to impede constitutional borrowing. With regards to the Estonian experience, Schauer says that “to have an American constitution is quite different and would suggest a loss of sovereignty, control, and much of the essence of what helps to constitute a nation as a nation in the first place.”² In the same vein, Keith Rosenn and Carlos Rosenkrantz are critical of the transplantation of constitutional models into Latin America. For Rosenn, factors such as concentration of land ownership and inexperience with self-government have led to the failure of constitutionalism in Latin America.³ From a political and philosophical stance, Rosenkrantz claims that cultural heterogeneity and the democratic ideal of self-government make constitutional transplantation undesirable.⁴ Against this skepticism, and using the case of constitutional transplantation in Ar-

* Dean and Professor of Law, Universidad Torcuato Di Tella, Buenos Aires (Argentina).

1. For the concept of legal transplants, see ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 21–30 (2d ed. 1993). A helpful typology of transplants can be found in Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 *AM. J. COMP. L.* 839 (2003).

2. Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, in *GOVERNANCE IN A GLOBALIZING WORLD* 253, 257 (Joseph S. Nye, Jr. & John D. Donahue eds., 2000).

3. Keith S. Rosenn, *The Success of Constitutionalism in the United States and its Failure in Latin America: An Explanation*, 22 *U. MIAMI INTER-AM. L. REV.* 1, 21–24 (1990).

4. Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 *INT’L J. CONST. L.* 269, 288–89 (2003).

gentina, I will argue that the borrowing of constitutional texts can be successful over long periods of time, and that when the transplanted texts fail, this failure is not easily attributable to transplantation alone.

A second goal of this paper is to introduce the notion of “mutation effect” to the theoretical analyses of judicial transplants.⁵ By “mutation” of precedents, I mean the process of continuing to extend the scope of a holding, regardless of its factual basis, to cover situations not even contemplated in the reasoning that grounded the original decision. The eminent Argentine jurist, Genaro Carrió, noted this phenomenon with respect to the handling of autochthonous precedents. Carrió suggested that this kind of mutation results from two intellectual traits associated with Argentine civilian culture: (1) a lack of training in judicial interpretation, and (2) an urge toward abstractness. Carrió is worth quoting:

We have not developed, however, a good technique for rightly founding a ruling on precedents. We have not been, nor are we, trained in the handling of precedents as source of decisions. We are skilful, instead, in handling statutes. Instead of analyzing the facts of prior cases to establish, with the greatest possible precision, what the holding of the decision was, we prefer to deduce the solution to the problem at stake from loose paragraphs, more often than not taken out of context.⁶

Carrió describes the civilian urge toward abstractness in the following terms:

There is a sort of urge toward abstractness, a wish to surpass the limits of the case's facts, using them as springboard to jump to constructions of great scope. . . . For this reason, when we have to deal with norms that have arisen out of the contact with facts, we hasten to cut the umbilical cord that bound them up with the latter, and we finally remain with the norm as an independent and autonomous bearer of meaning. This disdain for the facts of the case involves serious risks. If we abstract from the norms created by the courts the indispensable factual references that shaped their birth, and, along with it, their meaning, there is the danger that the pure norm resulting from this process of abstraction will be later utilized as point of departure for a new series of deductions that, relieved now from any factual control, will likely lead anywhere.⁷

In the quoted passages Carrió refers to the mutation of local precedents. As used in this paper, the label “mutation effect” denotes the mutation of transplanted precedents—i.e., foreign precedents. While Carrió's intellectual explanation might work well in relation to domestic precedents, I do not think that this is the best explanation of the mutation effect (though

5. The word “mutation” was suggested to me by Eduardo Baistrocchi.

6. GENARO R. CARRIÓ, *RECURSO DE AMPARO Y TÉCNICA JUDICIAL* 174 (2d ed. 1987) (unless otherwise noted, all translations herein are the author's own).

7. *Id.* at 177. I am grateful to Alberto Garay for referring me to Carrió's book in this connection.

I concede that this explanation could be partially relevant). Instead, I contend that the mutation effect occurs when a supreme court or a constitutional tribunal stretches borrowed precedents, without due consideration to their factual bases, in order to legitimize heterodox interpretations of its Constitution. When a supreme court claims that a new situation falls under the borrowed precedent, it seeks to extend the authority or persuasive force of the precedent to the new ruling. This extension is made by interpreting the precedent in such a broad form that the new ruling looks to be just an implication of the precedent. In this way, the decision is vindicated by a distorted variant of the original precedent.

I will demonstrate the mutation effect by using the doctrine of economic emergency, as invoked by the Argentine Supreme Court to justify the government's expropriations of bank deposits. We will see that this doctrine was inflated beyond its original scope of application to cover factual situations that the U.S. Supreme Court did not contemplate. By invoking this doctrine to justify heterodox interpretations of the Constitution of 1853/1860, the Argentine Supreme Court maintained the persuasive force attached to the original rulings, while creating a new doctrine different from the transplanted precedent. With this rhetorical maneuver, the Argentine Supreme Court has awarded the President greater powers and has ultimately altered the division of powers as laid down in the historical Constitution. This new equilibrium of power was formally acknowledged in the constitutional amendment of 1994. Of course, the mutation effect could take place in other jurisdictions as well.

This paper also examines two lines of economic research on legal transplantation. First, the so-called "LLSV paper" implies that developing countries should transplant corporate and financial law from common law jurisdictions, because this legal family affords stronger protection for investors (e.g. creditors and shareholders) than civil law.⁸ Though the LLSV paper is only concerned with creditors' rights in corporate law, I interpret it as arguing that, in general, common law provides greater protection for investments than civil law, so that transplants from common law have a greater chance to provide the right incentives for maximizing investment and growth.

Second, Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard introduced the label "transplant effect" to describe the ineffectiveness

8. Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113, 1151 (1998) [hereinafter the *LLSV paper*]. For a criticism from a Continental European perspective, see Sofie Cools, *The Real Difference in Corporate Law Between the United States and Continental Europe: Distribution of Powers*, 30 DEL. J. CORP. L. 697 (2005).

of legal transplants that result from insufficient local demand for the transplanted law. Local demand is often weak either because the transplanted law has not been adapted to local conditions, or because the local population is not familiar with the borrowed institution.⁹ The legal transplant is only effective if it meets local demand and is well adapted to local conditions.

In this paper, I will argue that the transplantation of judicial precedents is exposed to the mutation effect, and that the mutation effect can critically affect the conclusions that could be drawn both from the LLSV and the transplant-effect papers. In the Argentine experience, the mutation effect has played a persuasive role in altering the division of powers and the protection of property as laid out in the original Constitution.

I. THE SUCCESS OF CONSTITUTIONAL TRANSPLANTATION IN ARGENTINA (1860–1930)

The Argentine experience in constitutional transplantation started with the drafting of the Constitution, enacted in 1853 and put into full force in 1860. The drafter of the Argentine Constitution, Juan Bautista Alberdi, borrowed extensively from the American Constitution in order to carry out the Pampas Madison's political and economic program. The Argentine Constitution copied the Preamble and various provisions from the U.S. Constitution, and added other provisions that strengthened its commitment to laissez-faire ideology.¹⁰ Thus, both constitutions contain similar clauses with respect to property rights. The Fifth Amendment of the U.S. Constitution says that no persons shall be "deprived of . . . property, without due process of law." It adds: "[N]or shall private property be taken for public use, without just compensation." The Argentine Constitution establishes in Article 17: "Property is inviolable and no inhabitant of the Nation shall be deprived of it but in virtue of a court decision founded on law. Expropriation because of public utility must be so qualified by a law and previously indemnified."¹¹ As is clear, the protection of private property in the Argentine Constitution is as robust as it is in the U.S. Constitution. Moreover,

9. Daniel M. Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163, 168 (2003).

10. See Alberto F. Garay, *Federalism, the Judiciary, and Constitutional Adjudication in Argentina: A Comparison with the U.S. Constitutional Model*, 22 U. MIAMI INTER-AM. L. REV. 161, 162 (1991).

11. CONST. ARG. art. 17, available at http://www.argentina.gov.ar/argentina/portal/documentos/constitucion_nacional.pdf, translated in http://www.argentina.gov.ar/argentina/portal/documentos/constitucion_ingles.pdf.

Article 14 of the Argentine Constitution guarantees the right to “use and dispose of property.”

In both Argentina and the United States, private property encompasses creditor rights arising out of contracts, such as bank deposits. In fact, this is clearly the case in the U.S. Constitution as a result of the Contracts Clause in Article I, Section 10. Moreover, the U.S. Supreme Court has held that reliance interests are included in property.¹² The Argentine constitutional background is much the same. In effect, the Argentine Supreme Court has declared that the term “property” covers “all interests a man can possess, outside himself, his life, and liberty, as well as all rights that have a recognized value, either emerging from private law relations or administrative acts.”¹³

The transplantation of constitutional texts led to the borrowing of constitutional precedents. From the 1880s through the mid-1890s, the Argentine Supreme Court used American precedents as authoritative sources to legitimize its decisions.¹⁴ This experience in constitutional transplantation was very successful until 1930, when the first military coup put an end to a long period of constitutional stability.

The Argentine constitutional experience challenges skepticism about constitutional transplantation. In fact, from 1860–1930, a period of seventy years, Argentina had an astonishing record of economic and demographic growth.¹⁵ This shows that constitutional transplantation can carry the day. Of course, one could argue that constitutional transplantation was responsible for the long period of military interventions and political instability that lasted from 1943 to 1983. But scientific rigor does not allow us to make this claim by pointing to military intervention and political instability when there have already been transplanted constitutional texts and precedents. There are too many other relevant factors that stand in the way of this inference. The *ceteris paribus* clauses involved in historical causal proposi-

12. See *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577–78 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970); *Nordlinger v. Hahn*, 505 U.S. 1, 13 (1992).

13. Corte Suprema de Justicia [CSJN], 14/12/1925, “Bourdieu, Don Pedro Emilio v. Municipalidad de la Capital / sobre devolución de sumas de dinero,” Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (1925-145-307, 327) (Arg.).

14. 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); see also 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, 79 (1997) [hereinafter *Judicial Review and Constitutional Stability*].

15. See Lee J. Alston & Andrés A. Gallo, *The Erosion of Checks and Balances in Argentina and the Rise of Populism in Argentina: An Explanation of Argentina’s Economic Slide from the Top Ten* 3–4 (Inst. of Behavioral Sci., Univ. of Colo., Working Paper No. PEC2005-0001, 2005), available at <http://www.colorado.edu/ibs/pubs/pec/pec2005-0001.pdf>.

tions make it very difficult to isolate a single factor as the cause of stability or instability. For instance, what was the role of the Law of Universal Suffrage, passed in 1912, in threatening powerful interest groups? What was the role of the Great Depression? What ideological influence did European totalitarian movements have in Argentina? All these factors could have been relevant even in the presence of a wholly autochthonous constitution. I believe that transplantation itself plays little role in political phenomena. Institutional errors can happen with or without transplantation. In fact, before transplanting the U.S. model in 1853/1860, Argentina suffered a long period of political instability which the locally-developed constitutions of 1819 and 1824 could not suppress.

II. THE DOCTRINE OF ECONOMIC EMERGENCY

When under macroeconomic distress, it is natural to regard infringements of the freedom of contract and of private property as grounded in public interest reasons. Indeed, resolving an emergency situation fits the paradigm of serving the public interest. The idea of emergency allows individual rights to be sacrificed when doing so is necessary to avert a social or economic catastrophe. Emergency norms typically contradict “regular” norms. This does not prevent the legal system from being coherent, however, because emergency norms suspend, for a period of time, the application of “regular” norms. During the state of emergency, such norms are authoritative—they still belong to the legal system—but their application is suspended.¹⁶ From a philosophical viewpoint, it is interesting to observe that even natural rights theories could accept that it may be morally permissible to infringe individual rights in emergency situations.¹⁷ Thus, Argentine Judge and law professor Martín Farrell contends that utilitarian considerations outweigh rights-based considerations when respecting individual rights will lead to tragic consequences. While a judge’s moral obligation is to enforce rights, under conditions of political unrest or social emergency, a judge can allow the infringement of individual rights if doing so is necessary to avert tragic consequences.¹⁸

16. RICARDO V. GUARINONI, *La Emergencia y los Jueces*, in DERECHO, LENGUAJE Y LÓGICA 90–91 (2006).

17. Robert Nozick, author of the most important natural rights treatise of the twentieth century, says: “The question of whether these side constraints [individual rights] are absolute, or whether they may be violated in order to avoid catastrophic moral horror, and if the latter, what the resulting structure might look like, is one I hope largely to avoid.” ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 30 n.* (1974).

18. Martín Diego Farrell, *Los planes económicos y la Corte Suprema*, FILOSOFÍA DEL DERECHO Y ECONOMÍA 17 (2006).

During the 1920s and 1930s, the Argentine Supreme Court transplanted the doctrine of economic emergency from the U.S. Supreme Court as an appropriate interpretation of the Argentine Constitution.¹⁹ In the landmark decision *Avico v. de la Pesa*, the Court upheld the constitutionality of a law passed in 1933 that established a three-year moratorium on mortgage payments and foreclosures, and capped the interest rate at six percent.²⁰ This decision transplanted the U.S. doctrines in *Nebbia v. New York*²¹ and *Home Building & Loan Ass'n v. Blaisdell*.²² As is well known, in *Blaisdell* a Minnesota statute imposed a limited moratorium on the foreclosure of mortgages. James W. Ely describes the position of Chief Justice Hughes, who spoke for the Court in *Blaisdell*:

Clearly influenced by the economic emergency, Chief Justice Charles Evans Hughes ruled that contracts were subject to the reasonable exercise of the state police power. The police power encompassed the authority to give temporary relief for extraordinary economic distress. Although susceptible of a narrow construction limiting valid impairments of contracts to emergency situations, Hughes's opinion also suggested in broad terms that the state's interest in regulating economic affairs could justify interference with contracts.²³

In *Avico*, Attorney General Horacio L. Larreta created a four-condition test using the requirements imposed in *Blaisdell* for a moratorium to be constitutional: (1) the conditions existing must have created an emergency situation; (2) the fundamental purpose of the measure, and of government acts in general, is to safeguard the public and promote general welfare to the people; (3) the postponement of mortgage foreclosure sales must be reasonable; and (4) the change in legislation must have been provided in a temporary manner.²⁴ Larreta also opined that a moratorium does not violate the guarantee to property established in Article 17 of the Constitution, but instead limits the right to use and dispose of property fixed in

19. See generally NARCISO J. LUGONES, ALBERTO F. GARAY, SERGIO O. DUGO & SANTIAGO H. CORCUERA, *LEYES DE EMERGENCIA: DECRETOS DE NECESIDAD Y URGENCIA* (1992); William C. Banks & Alejandro D. Carrió, *Presidential Systems in Stress: Emergency Powers in Argentina and the United States*, 15 MICH. J. INT'L L. 1 (1993); Garay, *supra* note 10; *Judicial Review and Constitutional Stability*, *supra* note 14; Rosenkrantz, *supra* note 4.

20. CSJN, 7/12/1934, "Avico, Don Oscar Agustín v. de la Pesa, don Saúl G. / sobre consignación de intereses," Fallos (1934-172-21) (Arg.), available at http://www.garridocordobera.com.ar/pagina_nueva_572.htm.

21. 291 U.S. 502, 538-39 (1934).

22. 290 U.S. 398, 444-48 (1934).

23. JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 121 (2d ed. 1998).

24. *Avico*, 172 Fallos at 34-35.

Article 14, a right already subject to the restrictions established by laws regulating its exercise.²⁵

Larreta maintained that “a moratorium does not attack property, which is maintained with all its attributes, and only *delays* the application of the remedies that are available to the creditor.”²⁶ Following *Blaisdell*, judge Roberto Repetto in his dissenting *Avico* opinion stressed the difference between substance of property and remedies:

The State’s intervention through the judiciary is necessary when law is not fulfilled by men’s voluntary compliance. In this case the State awards creditors a remedy addressed to obtain performance of the obligation by compulsory means in a judicial process. The right correlative to the obligation and the remedy are two different rights. One thing is the right to the object of the contract and quite another claiming State’s coercion through the remedy granted to the creditor by Art. 505 of the Civil Code. . . . The remedy or action has not been created by the parties’ consent; it is prior to that consent and flows from the law-making will directed to the enforcement of contractual transactions.²⁷

Thus, the doctrine in *Blaisdell* and *Avico* is that, for emergency reasons, Congress may modify the “time dimension” of property rights, provided that its modification is reasonable.²⁸

III. FIRST MUTATION: THE CRISIS OF 1989

The *Avico* court’s borrowing of the emergency paradigm would prove very useful many decades later to sustain the constitutionality of emergency decrees in financial crises. The most important decision in this area came in the context of the economic crisis of 1989, in the early days of President Menem’s administration. Before implementing the Convertibility Plan, President Menem issued Decree 36/90, which converted time deposits into public bonds (the 1989 Bonos Externos de la República Argentina, or BONEX). The publicized goal of the measure was to reduce the burden of the increasing internal public debt. In the famous *Peralta v. Nación Argentina* decision,²⁹ the Supreme Court acknowledged the constitutional validity of Decree 36/90 by invoking the doctrine used by the U.S. Supreme Court in *Blaisdell*, which had been transplanted into Argentine law various decades earlier in *Avico*. The Court defined “emergency” in *Peralta* as

25. *Id.* at 33.

26. *Id.*

27. *Id.* at 88–89 (Repetto, J., dissenting).

28. For a four-dimensional analysis of property in which time is the fourth dimension, see LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* ch. 2 (2003).

29. CSJN, 27/12/1990, “Peralta, Luis Arcenio v. Nación Argentina / acción de amparo,” Fallos (1990-313-1513) (Arg.).

referring to “an extraordinary situation that hovers over the economic-social order, with its burden of accumulated troubles, in the form of scarcity, poverty, penury or indigence, and creates a state of necessity which must be put to an end.”³⁰

The Court’s decision in *Peralta* exemplifies the mutation effect in that it openly inflated the emergency paradigm as set in *Blaisdell* and *Avico*. In fact, the Court in *Peralta* discussed two different issues: (1) whether the President possesses emergency powers of a legislative nature, and (2) whether the relevant authority (Congress or the President) can, in a state of emergency, defer the paying out of deposits by restructuring them into public bonds. Indeed, there are two possible sides to the doctrine of economic emergency: *functional emergency* and *regulatory emergency*. Functional emergency means that the state of emergency can justify an alteration of the separation of powers established by the Constitution, so that the President can exercise, with or without Congress’s prior approval, abilities “normally” reserved to Congress. Regulatory emergency, on the other hand, refers to the government’s wider powers of regulatory interference with constitutional rights that are grounded on the need to protect fundamental aggregate goals (e.g. the preservation of the whole constitutional order).

As regards the regulatory emergency, *Peralta* apparently rested on the doctrines used in *Blaisdell* and *Avico*:

In our law as well as in that of the United States of America, the laws dictated in emergency situations have not been taken to be outside the Federal Constitution in disregard of the right to property, when they either limited themselves to not suspending indefinitely the exercise of the creditor’s rights, or did not make difficult the fulfillment of the obligations with excessively long terms.³¹

But *Peralta* equated a congressional moratorium (the measure challenged in *Blaisdell* and *Avico*) to a financial restructuring scheme introduced by presidential decree, thus “stretching” the borrowed precedent from a regulatory emergency to a functional emergency.

The mutation of the doctrine of economic emergency in *Peralta* took an additional direction. As we saw above, *Blaisdell* made a crucial distinction between the nature of an obligation (e.g. a creditor’s right) and the remedies available to obtain its execution. *Peralta* only paid lip service to this doctrine:

When for necessity reasons, [the State] promulgates a norm that does not deprive private individuals of legitimately recognized patrimonial bene-

30. *Id.* at 1549.

31. *Id.* at 1548–49.

fits or withhold their property and only temporarily limits the receipt of such benefits or restricts the use that one could make of that property, there is no violation of Article 17 of the National Constitution, but a limitation imposed by the necessity of attenuating or overcoming a crisis.³²

In fact, the compulsory swap of deposits for public bonds altered the substance of the obligations, thus violating the right to property.³³ The emergency doctrine permits deferral of the available remedies under situations of crisis when the deferral (e.g. a moratorium) is a necessary means for overcoming the crisis, but it disallows an alteration, even temporarily, of the nature of the underlying obligations. A compulsory swap for government bonds modifies the essence of an obligation because, among other things, it substitutes the government for the original obligor.

Finally, *Peralta* assimilated a short-term moratorium in *Blaisdell* (just over two years) and *Avico* (three years) to a ten-year banking restructuring (the “BONEX Plan”). By stretching the borrowed precedent in all these ways, the Court concluded that the President has an emergency power to postpone for ten years the lawful exercise of property rights. This postponement does not require compensation. *Peralta* paradigmatically represents the mutation effect. By inserting President Menem’s decree of expropriation of bank deposits within the doctrine of economic emergency, the Court could imply that it was following U.S. precedents, even though the facts in *Blaisdell* were quite different from those in *Peralta*.

IV. SECOND MUTATION: THE MEGACRISIS OF 2001

The Argentine crisis of 2001 had catastrophic effects on the country’s economy.³⁴ On November 30, overnight interest rates in pesos averaged 689% on fears of devaluation and deposit freeze, and the “bank run” accelerated at high speed. On December 1, 2001, the government announced a bank deposit freeze. By Decree 1,570/2001, Section 2, the government prohibited cash withdrawals of more than two hundred and fifty pesos or two hundred and fifty dollars per week by any holder or holders from the total balance of the bank accounts opened with each financial entity. On December 19th and 20th, respectively, Minister Cavallo and then-President

32. *Id.* at 1554.

33. MARTA MACÍAS, REVISIÓN DEL FALLO BUSTOS SEGÚN LA DOCTRINA DE SUS PRECEDENTES: ANÁLISIS DE LA JURISPRUDENCIA CITADA EN EL VOTO DE LOS DRES. BELLUSCIO Y MAQUEDA (2005) (Arg.), available at LexisNexis Argentina, Doc. No. 0003/011625 or 0003/011629.

34. In fact, GDP fell 28%, and unemployment rose from 18.3% in 2001 to 23.6% in 2002. Poverty rate rose from 25.9% in 1998 to 38.3% in 2001 and 57.5% in 2002. For a helpful narrative of the Argentine crisis, see JOINT ECON. COMM., 108TH CONG., ARGENTINA’S ECONOMIC CRISIS: CAUSES AND CURES (2003) (Jim Saxton, Vice Chairman), <http://www.house.gov/jec/imf/06-13-03long.pdf>.

De la Rúa resigned in the middle of great social and political turmoil. Then, between December 20th and December 31st, interim presidents Ramon Puerta, Adolfo Rodríguez Saa, and Eduardo Camaño took office. On January 1, 2002, Eduardo Duhalde was appointed President by the two Houses of Congress. On January 6, Congress enacted the Public Emergency and Exchange Regulations Reform Law 25,561 (called “the Emergency Law”), which ended the “convertibility” monetary system that had been in effect since 1991. This law also applied the exchange rate of Arg. \$1 per U.S. \$1 for a certain group of debts with financial entities not exceeding the sum of U.S.\$100,000, including mortgage and individual loans. On January 9, by Decree 71/2002, President Duhalde devalued the Argentine Peso to 1.40 per dollar for certain transactions, and established a managed, floating system for the rest of operations and transactions. Later, on February 4, the President issued Decree 214/2002, pursuant to which all bank deposits were “pesified” at \$1.40 per dollar, and reprogrammed at various time periods. The order also provided for the application of an index of inflationary correction (the CER) to all rescheduled bank deposits. Because Decree 214/2002 “pesified” loans with the financial system at \$1.00 per dollar—a measure that greatly benefited local and foreign corporations—the overall system was known as “asymmetric pesification.” Successive decrees and lower norms gave depositors the ability to obtain government bonds for the difference between the official and the free exchange rate. On May 31, Decree 905/2002 awarded depositors the option to swap all rescheduled deposits for government bonds in U.S. dollars (called BODENs); depositors who did not opt for the swap were given certificates of rescheduled deposits (called CEDROs). Finally, Decree 1836/2002 granted depositors various options to swap all or part of Cedros for government bonds.³⁵ The obvious goal of both decrees was to put 2001 depositors at a position no worse than those under the BONEX Plan.

Depositors perceived all these measures as confiscations of their assets and started a massive social and political mobilization involving assaults on banks, popular assemblies, and demonstrations. Judicialization of the protest was incredibly quick, especially after the judicial holiday of January 2002. By April 2002, the Attorney General reported that 210,188 injunctions (“*amparos*”) were filed in the federal justice system against the suspension of cash payments (“*corralito*”) and the freezing and pesification of

35. For a detailed account of all normative changes, see Gabriel Gómez Giglio, *Argentine Supreme Court of Justice Confirms Pesification of Bank Deposits*, 22 J. INT’L BANKING L. & REG. 224, 224–27 (2007); Gabriel Gómez Giglio, *Argentina and the Changing Nature of Financial Regulation*, 19 J. INT’L BANKING L. & REG. 317 (2004); Gabriel Gómez Giglio, *Emergency Law and Financial Entities in Argentina*, 18 J. INT’L BANKING L. & REG. 397 (2003).

deposits (“*corralón*”).³⁶ Federal and provincial courts throughout the country allowed cautionary exceptional measures, often decided *inaudita parte*, that compelled banks to return deposited sums in U.S. dollars to plaintiffs without deciding the substantive issues.³⁷

Doctrinally, it could be thought that the Court would follow the *Peralta* decision in testing the constitutional validity of the various emergency measures taken. In fact, when President de la Rúa suspended the convertibility of both demand and time deposits into cash by Decree 1,570/2001, the Court initially held that exceptional cautionary measures (*amparos*) were illegal because they violated procedural due process.³⁸ However, a few weeks later, the Court decided in *Smith* to adjudge the substance of the case and struck down the decree.³⁹ Still under the sway of the emergency paradigm and its underlying property/public interest matrix, the “Menem Court” ruled that restrictions on bank withdrawals and the establishment of a new monetary policy amounted to confiscation of property. The *Smith* decision represents a curious return to *Lochner*-type jurisprudence. Thus, the Court declared:

The right to freely dispose of the funds invested or deposited with banking and financial institutions is based on constitutional principles, regardless of any other legal standards acknowledging it. It is clear that any condition or restriction on such right will affect the intangibility of property and impair the goal of promoting justice. Such clashes with constitutional principles, given their seriousness and the absence of crucial reasons for them, cannot be understood as the result of reasonable regulations based on such principles, nor do they arise from Article 28 of the Constitution (Decisions 305:945, par. 8, last paragraph). This is clearly the case of the situation at stake in the case *sub lite*, in which successive regulations went too far, imposing conditions and restrictions on the free disposal of private property that flagrantly violated the said constitutional principles.⁴⁰

The Court made an attempt to distinguish the facts in *Smith* from those in *Peralta* by resorting to the doctrine of “vested rights”:

In the light of the case law criteria mentioned above [vested rights cases], the plaintiff’s property has been violated, given that the deposits

36. Catalina Smulovitz, *Judicialization of Protest in Argentina: The Case of Corralito*, in ENFORCING THE RULE OF LAW: SOCIAL ACCOUNTABILITY IN THE NEW LATIN AMERICAN DEMOCRACIES 55, 60 (Enrique Peruzzotti & Catalina Smulovitz eds., 2006).

37. Héctor A. Mairal, *El Derecho en Tiempos de Cólera*, ACTUALIDAD JURÍDICA URÍA & MENÉNDEZ, Nov. 2002, at 9, 20.

38. CSJN, 28/12/2001, “Banco de la Ciudad de Buenos Aires / medidas cautelares,” Fallos (2001-324-4520, 4526–27) (Arg.) [hereinafter *Kiper* case].

39. CSJN, 1/2/2002, “Smith, Carlos Antonio v. P.E.N. / medidas cautelares,” Fallos (2002-325-28) (Arg.).

40. *Id.* at 38–39.

had been made while a system guaranteeing their inviolability was in force. Furthermore, such guarantee had been recently strengthened by Law 25466, which had declared deposits intangible, with intangibility being defined as the impossibility by the State to alter the conditions agreed upon by deposit holders and the financial institution, as well as the prohibition to swap deposits for State bonds, postpone payments, or restructure their maturity (Sect. 1 to 4); these circumstances did, in fact, exceed those described in the *Peralta* case recorded in Fallos 313:1513.⁴¹

Thus, it might be thought that the Court considered the suspension of deposits' intangibility by Emergency Law 25561 as a new circumstance that was absent when it decided the *Kiper* case.

There is little doubt, however, that Menem's appointees in the Court were mainly guided by political factors. In *Smith*, these judges (usually called the "automatic majority" because they generally voted *en bloc* in favor of the President's policies) made a preemptive strike to deter Duhalde's impeachment plans by challenging his economic policies. Thus, it can be asserted that *Smith* must be given an *externalist* explanation, that is, an explanation that is not premised on judicial or doctrinal reasoning, but on political influences.⁴² Apart from the political background of the decision, widely documented in Argentine newspapers, two reasons support this claim. First, it is difficult to explain why the Court decided to adjudicate the substantive question of law in *Smith* while it had declined to do so on in the *Kiper* case. The reason the Court invoked in *Smith* is not persuasive: "[T]he injunction requested and granted matches the object of the appeal."⁴³ In fact, the plaintiffs in both the *Kiper* case and in *Smith* claimed cautionary injunctions through *amparos*. Second, as Horacio M. Lynch acutely observes, it is ironic that after decades of validating the most diverse invasions of private property and contractual freedom, such as minimum prices, rent control legislation, freezing of deposits, and so on, the Supreme Court would suddenly return to a *Lochner*-type conception of private property and freedom of contract.⁴⁴

41. *Id.* at 39–40.

42. For a description of the internalist/externalist divide, and an internalist explanation of Supreme Court decisions during the New Deal that separates them from President Roosevelt's "Court-packing" plan, see generally Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052 (2005).

43. *Smith*, 325 Fallos at 34.

44. Horacio M. Lynch, *Emergencia, Derecho, Justicia y Seguridad Jurídica (Reflexiones Sobre la Crisis y las Libertades Económicas)*, Revista Jurídica Argentina—La Ley [L.L.], May 29–30, 2002, at 1287.

In *Provincia de San Luis*,⁴⁵ the last case on pesification decided one year later by the so-called “automatic majority,” the Supreme Court restated the fundamental doctrines in *Smith*. The Court held that pesification of bank deposits went beyond the emergency powers because it altered the substance of the depositors’ property rights, instead of simply putting off the remedies available to depositors. Justices Eduardo Moliné O’Connor and Guillermo A. F. López placed great emphasis on Intangibility Law No 25466 because, they declared, this law strengthened the constitutional protection of depositors’ vested rights. The judges held that “the energetic wording of those norms uncontroversially reveals the existence of an economic policy addressed to capture deposits, creating for such purpose a high degree of trust, which public power defrauded almost immediately with the passing of those norms here questioned.”⁴⁶ The Court ordered Banco de la Nación Argentina (“the Nation”) to pay off the dollar deposits to Provincia de San Luis (“the Province”), but also instructed the Nation and the Province to agree on the method and dates of repayment within sixty days, without modifying the substance of the decision, under penalty of the Court’s deciding the issues itself.

In 2004, a divided Court (under a partially renovated personnel appointed by President Kirchner) overruled *Smith* and *Provincia de San Luis* and sustained the constitutionality of pesification in *Bustos*.⁴⁷ In *Bustos*, the majority of the Court went back to the doctrines in *Avico* and *Blaisdell*, that is, to the emergency doctrine, which permits the impairment of property rights and the obligation of contracts on the grounds of public interest under a state of emergency. Thus, according to *Bustos*, in a state of emergency Congress or the President may establish the compulsory conversion of U.S. dollar-denominated bank deposits into Argentine pesos at an official exchange rate.

Justices Augusto Belluscio and Juan Carlos Maqueda deemed *Smith* an “unfortunate” decision. They also offered a critical assessment of the economic policies adopted in the 1990s:

Thus, it is evident that the prolonged maintenance of an artificial value equivalence between the Argentine peso and the U.S. dollar, together with economic circumstances that the mentioned absence of evidence impedes to clarify, led to a process of worsening of the national productive apparatus—with its aftermath of unemployment, misery and hun-

45. CSJN, 5/3/2003, “Provincia de San Luis v. Estado Nacional / amparo,” Fallos (2003-326-417) (Arg.).

46. *Id.* § 37.

47. CSJN, 26/10/2004, “Bustos, Alberto Roque v. Estado Nacional / amparo,” J.A. (2005-III-189) (Arg.) (judges Augusto C. Belluscio, Juan C. Maqueda, Antonio Boggiano, Eugenio R. Zaffaroni and Elena Highton de Holasco concurring).

ger—to which the unusual interest rates offered for dollar deposits were relevant, to a threat of bank run that the Government tried to avert by means of these rates, and finally to a certain risk that that threat really should occur or start, which were the determinants of the measures adopted by the Executive Branch and the Congress with the goal of impeding the generalized insolvency of the banking system and the subsequent ruin of the set of depositors.⁴⁸

Belluscio and Maqueda availed themselves once again of Larreta's four-condition test and ruled that, in the absence of contrary evidence, the conditions must be considered as met.

Today, the Court holds to this doctrine, though most federal courts still follow *Smith* and *Provincia de San Luis*. In the recent *Massa* decision, the Court again applied the emergency paradigm.⁴⁹ It ruled that applying the conversion formula established by Decree 214/2002—in an extended version that also covers the period of legal proceedings—plus an annual interest rate fixed at four percent, does not cause economic damage when restitution is made at the time of the decision. Justices Elena I. Highton de Nolasco, E. Raúl Zaffaroni, and Ricardo Luis Lorenzetti stated:

[A]n interpretation contrary to this fundamental regime of economic working [the “emergency legislative bloc,” which includes the new exchange system], if adopted years after the implementation of this regime, would yield very grave institutional sequels, which is contrary to the interpretative standard that requires to ponder over the consequences that result from judicial decisions.⁵⁰

It is important to notice that in *Bustos* and *Massa*, the Court applied the doctrine of emergency in a mutated form. In fact, the conversion of dollar deposits into rescheduled pesos deposits in 2002 (even considering the option to swap deposits for dollar-denominated government bonds) altered the substance of the obligations, and did not merely postpone the available remedies. The same applies to the conversion of bank deposits into pesos at an “official” rate, because it modifies the economic value of the deposit.⁵¹

Bustos and *Massa* also represent a second form of mutation of the doctrine of economic emergency, because Congress (or the President acting under congressional delegation) now has the power to change the currency denomination of financial contracts, including demand deposits. Under

48. *Id.* § 8.

49. CSJN, 27/12/2006, “*Massa, Juan Agustín v. Poder Ejecutivo Nacional – Decreto No. 1.570/01 / amparo*,” J.A. (2007-I-187) (Arg.).

50. *Id.* at 189 (judges Elena Highton de Nolasco, E. Raúl Zaffaroni, Ricardo Luis Lorenzetti and Carmen Argibay concurring).

51. This opinion was expressed by Justice Carmen Argibay of the Argentine Supreme Court in her vote in the *Massa* case. *Id.* at 192–97 (Argibay, J., concurring).

Peralta, the President could substitute U.S. dollar-denominated bonds for U.S. dollar-denominated time deposits. According to *Bustos* and *Massa*, the government can convert both time *and* demand-dollar deposits into re-scheduled pesos deposits. Arguably, the President can exert this emergency power without prior congressional authorization.

CONCLUSION

We saw that the Argentine Court declared in *Peralta* and *Bustos-Massa* that it was following the doctrine in *Blaisdell* and its Argentine analogue (*Avico*). If *Peralta* and *Bustos-Massa* involve such doctrinal changes, why has the Court maintained that it was following *Blaisdell-Avico*? The mutation effect says that this declaration played a rhetorical function in the Court's discourse—it sought to retain the persuasive force of *Blaisdell* and *Avico* in concluding that the Argentine Constitution allows the expropriations of deposits (a very heterodox interpretation of the constitutional text).

The fact that judicial borrowing plays a persuasive function is undeniable. In this context, it is interesting to note how the Argentine Supreme Court defended the borrowing of U.S. precedents in *Avico*:

Our Constitution, in adopting to a great extent the principles of the Constitution of the United States of America, has given us the great advantage, among others, of putting at our disposal the wise interpretation of their Supreme Court with respect to the principles that we have adopted. The guarantee to property established in Article 17 of the National Constitution has its antecedent in the Amendments to the American Constitution. It is then of the utmost interest to study how the American Supreme Court has construed the nature, extension and limits of this guarantee, with the purpose of also adopting it, if its foundations are reasonable, as the most authentic and wise interpretation of the principle that we have adopted in our own Constitution.⁵²

By the same token, mutated transplanted doctrines can also play a useful persuasive function. Persuasion 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."

52. CSJN, 7/12/1934, "Avico, Don Oscar Agustín v. de la Pesa, don Saúl G. / sobre consignación de intereses," Fallos (1934-172-21, 40) (Arg.).

When the Argentine Supreme Court extended the emergency precedents to cover expropriations of financial assets, it omitted any reference to the frequency of the precedents' application, probably because making explicit the frequency of application would affect the persuasive force of the borrowed precedent. Yet there is a striking difference between applying a rule of expropriation once every hundred years and once every ten years. Because frequency of application is often considered exogenous to law, the Argentine Supreme Court could claim that it provides *the same degree* of property protection as the American Supreme Court. As is obvious, however, background is as relevant as formal rules when it comes to assessing the strength of an institution. Property protection should be measured by considering both formal law and "law in action."⁵³

An additional conclusion is also worth mentioning. The transplantation of the doctrine of economic emergency runs afoul the general implications of the LLSV and transplant effect papers. First, transplantation from a common law jurisdiction (i.e. the United States) has not afforded stronger protection to investors (i.e. bank depositors). Second, though the local demand for the borrowed precedents was very high, the transplant was largely ineffective. Local demand was very high because U.S. constitutional law has been well known in Argentina since the drafting of the Argentine Constitution, and because the emergency doctrine seems admirably adapted to a country that has had so many economic crises. However, transplantation of U.S. judicial precedents has not been effective in developing a robust banking system. In 2005, Argentines had as much as U.S. \$108.5 million deposited abroad or kept outside the banking system.⁵⁴

53. For this distinction, see ALF ROSS, ON LAW AND JUSTICE 17–24 (The Lawbook Exchange, Ltd. 2004) (1959).

54. Alejandro Rebossio, *Se Frenó la Fuga de Capitales en 2004*, LA NACIÓN, Mar. 23, 2005, at 1, available at <http://www.lanacion.com.ar/689799>.