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Overruling the Executive: Judicial Strategies to Resist Democratic Erosion

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Abstract

How can autonomous apex courts with specific attitudes and role conceptions counter executive aggrandizement? This article theorizes two causal mechanisms through which justices can resist democratic erosion. The first mechanism involves apex courts employing judicial review to neutralize autocratic legalism by blocking strategies such as institutional conversion, replacement, and layering that executives use to expand their power. The second involves apex courts building coalitions within and beyond the judiciary, enabling diverse actors – including judges, political parties, the media, and NGOs – to leverage their unique resources against executive encroachment. I conceptualize these two mechanisms by combining theory-building process tracing with counterfactual analysis of an unlikely case of democratic resilience: Argentina from 2007 to 2015. Drawing on evidence from 125 elite interviews, over a thousand newspaper articles, hundreds of state documents, memoirs, and other primary sources, this article demonstrates how the Supreme Court nullified President Cristina Kirchner's attempts to undermine freedom of expression and judicial independence, thereby contributing to democratic resilience.

Keywords: democratic backsliding; executive aggrandizement; judicial independence; judicial review

After the end of the Cold War, the central threat to liberal democracies has been their erosion over several years (Lührmann and Lindberg 2019, 1104; Haggard and Kaufman 2021, 6–7). In contrast to an abrupt democratic breakdown via military coup or self-coup, democratic erosion is an autocratization process that involves the gradual and incremental decline of different components of liberal democracy. It is driven by executive aggrandizement, which undermines vertical, diagonal, and horizontal accountability mechanisms (Laebens and Lührmann 2021, 910–913). Executive aggrandizement typically occurs when an illiberal or populist president

or prime minister co-opts actors (such as opposition politicians, judges, prosecutors, journalists, NGOs, bureaucrats, and independent oversight bodies) who could check executive power (Pérez-Liñán, Schmidt, and Vairo 2019, 608). However, the mere presence of populist executives is insufficient to cause democratic erosion (Weyland 2024, 62–66). This raises the question: what conditions and mechanisms strengthen democracies against the threat of executive aggrandizement? Among these, what can the judiciary do to make democracies more resilient?

The goal of this article is to propose an explanation of how apex courts can contribute to blocking executive aggrandizement and producing democratic resilience. First, I identify two causal conditions: (1) justices must possess both preference and decisional independence, and (2) they must hold specific attitudes and role conceptions that motivate them to resist the executive. Second, I demonstrate that these two conditions are necessary to activate two causal mechanisms. In the first mechanism, apex courts use judicial review to block autocratic legalism and three strategies of endogenous institutional change (conversion, displacement, and layering) employed by populist executives. In the second mechanism, apex courts form coalitions with lower-level judges, opposition parties, the media, and civil society organizations to protect one another and resist executive co-optation.

I used theory-building process tracing to theorize these causal conditions and mechanisms (Beach and Pedersen 2019, 269–277). First, I selected a case (Argentina, 2007–2015) in which the two causal conditions and the outcome were present. Second, I created an empirical narrative that explains how, in that case, these conditions led certain actors to engage in specific activities that resulted in the outcome. Third, I identified which abstract causal mechanisms underlay the explanatory narrative of the Argentine case, were responsible for producing the outcome, and could *potentially* travel to other cases.

Argentina (2007–2015) is a relevant case for theory-building since democracy proved resilient despite five conditions that favored democratic erosion: (1) a populist president with sufficient power to enact laws and issue administrative decisions threatening judicial independence and freedom of expression; (2) a six-decades-long tradition of a judiciary lacking both independence and assertiveness; (3) the legislative and electoral dominance of the incumbent party over opposition parties; (4) a commodity windfall and good macroeconomic performance; and (5) considerable public support for the president. By contrasting thousands of pieces of evidence from a wide range of sources, I combined an empirical narrative with counterfactual analysis to explain how the Supreme Court neutralized executive aggrandizement by using judicial review and building support networks with other judges, opposition parties, NGOs, and the media.

Theory: Conditions, mechanisms, and assumptions

The judiciary can play a crucial role in preserving democracy since executive aggrandizement occurs through *autocratic legalism* (Corrales 2015, 38; Scheppele 2018). In this process, the executive exploits legal loopholes by adhering to the letter of the law while using it to dismantle democracy (Strauss 2018, 380). The bending and abuse of the law increase the executive's powers, benefit its allies, and neutralize the opposition (Weyland 2013, 23). Judges are crucial actors in either neutralizing, facilitating, or promoting autocratic legalism since formal rules and laws do not self-define and always need to be interpreted. As the state actors responsible for having the final word in

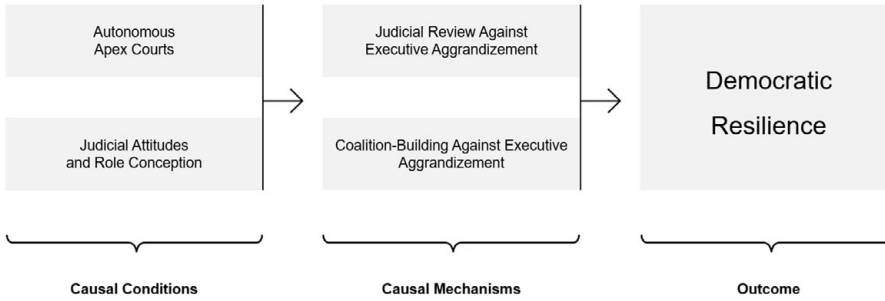

Figure 1. Causal Diagram.

interpreting legal norms, judges oversee "the boundaries of regime rules" and act as a "fire alarm monitoring system" (Staton, Reenock, and Holsinger 2022, 22). I argue that if the executive does not quickly co-opt the apex courts (disabling the judiciary's "fire alarm function") before attempting to undermine other components of liberal democracy, the likelihood of democratic resilience increases. The reason for this is that apex courts that remain autonomous can activate two causal mechanisms to counter executive aggrandizement: the use of judicial review and coalition-building strategies.

Causal conditions

I identify two causal conditions that are necessary for apex courts to trigger or activate two mechanisms against executive aggrandizement (Beach and Pedersen 2019, 78; see Figure 1).[1]

The first condition is that judges must possess autonomy over their preferences and decisions (Garcia-Holgado 2023a, 70–72). This means that (1) judges' preferences are neither identical to nor merely proxies for those of the executive, and (2) the executive has no *ex post* control over judges (Brinks 2005, 598–602).

The second condition is that judges must have specific attitudes, preferences, and role conceptions that motivate them to challenge the executive. There can be a wide array of motivations and preferences that push judges to rule against the executive (Epstein and Knight 2013, 18–24). For instance, judges might reject executive aggrandizement because they (1) have ideological or policy preferences opposed to the executive; (2) expect a reward in terms of their professional reputation, job prospects, or income; (3) identify with an opposition party; (4) have a personal problem, issue, or disagreement with the president or prime minister; and/or (5) are under the control of economic or social actors who oppose the executive. Additionally, in the context of democratic erosion, one powerful motivation for judges to resist erosion can be their self-understanding as defenders of liberal democracy (Hilbink 2012, 589–597). This means prioritizing rulings against the concentration of power in the executive, even at the expense of other preferences or considerations that, in normal times, would be their primary focus.

[1]Causal conditions activate causal mechanisms which are composed of actors who engage in activities that contribute to generating an outcome through a causal chain made up of sequences of events. The actors who are part of the mechanism transmit "causal force or energy" as a consequence of their constitutive characteristics (or properties) (George and Bennett 2005, 137–141; Beach and Pedersen 2019, 38, 53).

Also, regardless of why judges oppose executive aggrandizement, they must have a role conception that allows them to consider embracing legal interpretations that are not necessarily the most reasonable ones from, for example, a textualist or originalist perspective, to counter an executive who undermines democracy by bending the law without clearly breaking it. For the same reason, judges must be willing to challenge interpretive approaches that advocate for judicial restraint, the political question doctrine, narrow standards for standing, and a deferential stance toward the executive. Furthermore, judges must be "imaginative and creative" (Hilbink 2012, 615) and open to thinking about nontraditional strategies to resist executive aggrandizement (e.g., holding press conferences, organizing protests, going on strike, meeting privately with journalists and opposition politicians, and giving interviews to respond to attacks from the executive) (Šipulová 2021, 165–168).

The use of judicial review against executive aggrandizement

This first causal mechanism involves judges interpreting the law to neutralize autocratic legalism (a crucial tool for achieving executive aggrandizement). In particular, judges are uniquely equipped to block three strategies of endogenous institutional change that could dismantle democracy.

First, by using *institutional conversion*, executives can alter the meaning of formal rules without explicitly rewriting them. The aim is to achieve "goals, functions, or purposes" that may contradict the meanings previously attached to these rules (Mahoney and Thelen 2009, 17–18; Hacker, Pierson, and Thelen 2015, 185–186). Autonomous courts can rule that the executive's reinterpretation of the meaning of legal norms is illegal. For instance, in 2013, President Cristina Kirchner in Argentina enacted a law that modified the Judicial Council, which plays a crucial role in sanctioning, removing, and appointing lower court judges. The Constitution's Article 114 says that in the Judicial Council, there must be an "equilibrium among the representation of popularly elected political organs, judges of all instances, and federally licensed attorneys." The traditional interpretation of the word "equilibrium" was that no actor could unilaterally control the Council. However, the law enacted by the executive was designed so the incumbent party would have a majority in the Judicial Council. Therefore, Cristina Kirchner, through ordinary legislation, proposed an alternative interpretation of the Constitution's Article 114 without rewriting it through an amendment. In this way, she tried to *bend* the Constitution without necessarily breaking it. The Supreme Court, with only one dissenting opinion, blocked this institutional conversion, arguing that the proposed law distorted the correct meaning of "equilibrium" in Article 114 (i.e., none should unilaterally control the Judicial Council). Most justices opted for a constitutional interpretation that favored judicial independence and impeded executive aggrandizement.

Second, executives can also implement *institutional displacement*, which involves replacing existing rules with new ones (Mahoney and Thelen 2009, 16). The new constitutions created by the Constituent Assemblies of Venezuela (1999) and Ecuador (2007–2008) demonstrate how displacement can lead to democratic erosion if the executive has previously co-opted the apex courts (Garcia-Holgado 2023a, 103). In contrast, in Honduras, an autonomous Supreme Court ruled against President Zelaya's failed attempt to organize a Constituent Assembly that could have replaced the 1982 Constitution.

Third, executives attack democracy by altering an institution's purpose and effects by introducing "amendments, revisions, or additions," which is known as *institutional layering* (Mahoney and Thelen 2009, 16). As in the case of conversion and displacement, autonomous courts can use judicial review to block layering. For example, Álvaro Uribe in Colombia enacted a reelection referendum bill to run for a third term. According to Landau (2015, 202, 327), five out of nine of the justices of the Constitutional Court ruled that the reelection amendment was unconstitutional since allowing Uribe's third reelection would have undermined the constitutional principles of checks and balances and electoral competition. In this way, the justices held that the proposed constitutional reform would have modified the underlying logic of the Colombian Constitution.

In addition to legally blocking institutional conversion, displacement, and layering, this first causal mechanism also plays an "informational function." When judges identify certain executive actions as autocratization events, they publicly signal that the executive is crossing a "bright line" against democracy (Staton, Reenock, and Holsinger 2022, 22). In this way, courts help opposition parties to make their case against the executive. Of course, the executive can disobey court rulings (Staton, Reenock, and Holsinger 2022, 10–12). However, if it moves forward, it will be revealed that the supposed executive's respect for the law and democracy is merely a façade. In this situation, the executive faces three options: backing down (leading to democratic resilience), engaging in overt forms of autocratization (i.e., a democratic breakdown via a self-coup), or co-opting the courts (i.e., eliminating judicial autonomy by court-packing). Therefore, if the judiciary resists co-optation and remains autonomous, the executive's ability to covertly erode democracy under the guise of legality ("stealth authoritarianism") (Varol 2015, 1684–1712) will likely decline, leaving democratic breakdown as the only alternative autocratization process available.

Coalition-building strategies against executive aggrandizement

The second causal mechanism that promotes democratic resilience is the courts' coalition-building strategies. As executives delay co-opting the apex courts (or they are unable to do so), justices have a window of opportunity to create coalitions (inside and outside the judiciary) whose interactive effects form a defensive wall leading to democratic resilience (Figure 2).[2] Since executive aggrandizement implies the co-optation of accountability actors, they will be better protected if they combine their resources to remain autonomous.

First, apex courts can create coalitions within the judiciary. Since the judiciary is not a unitary actor, populist executives may selectively co-opt some judges and use them to neutralize others. Therefore, judges from different levels and jurisdictions can coordinate their actions and protect themselves by fostering unity and crafting a narrative that emphasizes the judiciary is committed to safeguarding liberal democracy. First, judges can rule on similar lines in cases of paramount importance to the executive. In this way, the incumbent party cannot point to a division within the judiciary as evidence of different legitimate ways of interpreting the law. Second, when one court is under attack by the executive, other judges can issue public

[2]Transnational and foreign actors can also play an important role in this mechanism.

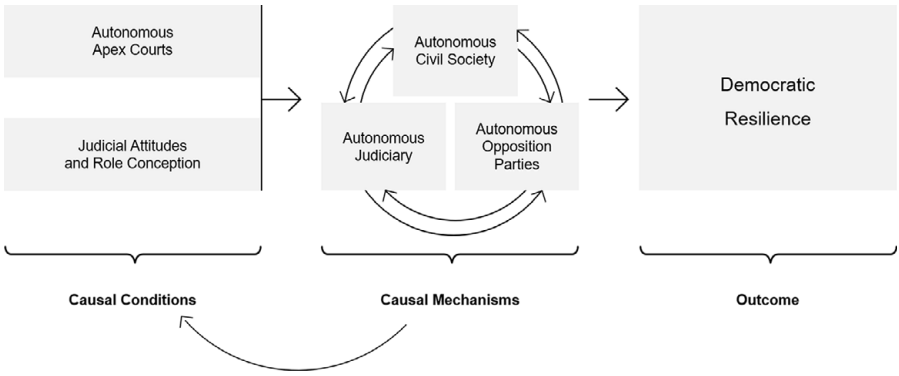

Figure 2. Coalition-Building Mechanism.

comments supporting their colleagues. Third, if the incumbent party files criminal lawsuits against judges or their families to intimidate them, the judges in charge of these criminal law cases can dismiss those accusations. Fourth, in many countries, judges have representatives in judicial councils, which can act in such a way as to impede the sanctioning, impeachment, and removal of their peers. Fifth, when the executive files motions for the recusal of judges in important cases, other judges can block these requests.

Second, apex courts can build support networks with non-judicial actors. Three types of actors can contribute to democratic resilience by enforcing *horizontal* accountability (e.g., the judiciary and opposition parties in Congress), *vertical* accountability (e.g., opposition parties competing in elections), and *diagonal* accountability (e.g., the media, civil society organizations, and citizens protesting) (Laebens and Lührmann 2021, 912–914). These actors who enforce horizontal, vertical, and diagonal accountability can only contribute to democratic resilience if they remain autonomous (i.e., the executive fails to co-opt them). How can they do that? I claim that if the actors mentioned above cooperate and coordinate their resistance actions, they will be better equipped to remain autonomous. If each actor uses their resources to protect the others, it becomes less likely that populist executives will succeed in co-opting each of them individually and subsequently using them to co-opt the rest.

Actors who enforce horizontal, vertical, and diagonal accountability can protect each other in multiple ways. When the executive attempts to implement co-opting interventions that would undermine judicial independence or target individual judges through verbal attacks or legal actions, non-judicial actors can leverage their resources to protect judges. First, the media can craft and spread a narrative criticizing the executive and defending the judiciary's legitimacy and autonomy. For instance, journalists can encourage citizens to protest against the threats to judicial independence. Second, opposition parties can mobilize their supporters in the streets, obstruct/delay the packing of the apex courts in congress, convince some members of the incumbent party to reject the attempt to co-opt the courts, and reach out to foreign actors. Third, NGOs can publish reports debunking the executive's arguments and use social media to disseminate information to citizens and transnational actors about how the executive is trying to undermine liberal democracy.

Furthermore, if these three actors act simultaneously, they can amplify the effect of their actions; for instance, journalists can disseminate the reports made by NGOs, interview politicians, and attend press conferences organized by NGOs and politicians. Therefore, if the media, opposition parties, and NGOs are united, cohesive, and coordinate complementary strategies to protect the courts, it will be less likely that the executive will be able to co-opt the courts, all else being equal. For this reason, protecting non-judicial actors becomes a matter of self-defense for judges.

Similarly, when the executive uses autocratic legalism against non-judicial actors, those who would be weakened by media laws, electoral rules, penal laws, tax laws, and administrative regulations will resort to the judiciary for protection. When the executive tries to implement these measures, autonomous apex courts can use judicial review to invalidate them on the grounds that they violate constitutional rights or international human rights treaties. In this way, courts use their interpretive powers to block autocratic legalism and protect journalists, opposition parties, and civil society organizations from being co-opted by the executive. Moreover, these actors can raise the cost for the executive of not complying with courts' rulings that protect them from executive encroachment. Thus, protecting the courts becomes an act of self-defense for non-judicial actors.

The cases of Argentina (2007–2015) and Colombia (2002–2010) illustrate how the coalition-building mechanism contributes to democratic resilience. In Argentina, judges, opposition parties, and the media blocked executive aggrandizement by protecting each other over several years. For instance, when the executive implemented various measures to limit freedom of expression between 2009 and 2015, the courts blocked each of these actions. When the executive targeted the judiciary, the mainstream media crafted a narrative defending judicial independence, opposition parties prevented the executive from obtaining the legislative supermajorities needed to pack the Supreme Court or control the Judicial Council to remove lower-level judges, civil society organizations issued numerous reports and statements condemning the executive's attempts to co-opt the judiciary, citizens took to the streets to protest the 2013 Judicial Reform, and judges protected each other from criminal lawsuits brought by the executive.

In Colombia, the coalition-building mechanism was also in play. In February 2010, the Constitutional Court ruled against a proposed constitutional amendment that would have allowed Uribe to run for a third term. Opposition parties' tactics to (a) delay the approval of the law calling for the referendum to amend the Constitution and (b) expose irregularities in the funding used to collect the signatures necessary to introduce the bill to Congress, provided arguments to the Constitutional Court to rule against the referendum on procedural grounds (Gamboa 2022, 164–171). Per my theory, democratic resilience in Colombia was the consequence of the *interaction* between a broad constellation of different actors (autonomous justices, opposition parties, and some media outlets) who built an effective rampart against executive aggrandizement.

The central causal dynamic of the coalition-building mechanism is the mutual self-reinforcement of horizontal, vertical, and diagonal accountability, which reduces the likelihood of executive aggrandizement. In this way, coalitions formed by judges, civil society actors, and political parties, produce positive feedback loops that protect the interlocking system of institutions, rights, and procedures that make up liberal democracy (Coppedge et al. 2022, 233, 239). The arrow from the causal mechanisms

to the causal conditions in Figure 2 represents how this coalition-building mechanism self-reproduces over time, making democratic resilience more likely.

In contrast, this coalition-building mechanism begins to fall apart if the executive gains control over one of the actors who enforce *horizontal*, *vertical*, or *diagonal accountability*. If that occurs, the others inevitably become more vulnerable, and, as a result, democracies gradually cease to function as self-reinforcing mechanisms. For instance, in Venezuela (1999–2013), Hungary (2000–present), Poland (2015–2023), Ecuador (2007–2017), and Turkey (2003–present), when the populist president or prime minister controlled the apex court responsible for judicial review, loyalist judges engaged in abusive judicial review against opposition politicians, the media, NGOs, and any actor posing a challenge to the executive (Landau and Dixon 2020, 1345–1374). One by one, these actors were weakened and divided. A domino effect took place as the fall of each one meant that the executive now had an additional resource to use in co-opting the rest. Executive aggrandizement unfolded, erosion occurred, and, in some of these countries, democracy even broke down.

Assumptions

Theories always rely on assumptions that must be true for the logical connections between the causal conditions, the mechanisms, and the outcome to hold. Making these assumptions explicit is crucial for better assessing the argument logically and empirically, including how generalizable it is. My theory states that autonomous apex courts can use judicial review and coalition-building strategies to protect democracy from executive aggrandizement. The following are some key assumptions underlying these two causal mechanisms.

First, these two mechanisms rest on the idea that if judges do not uphold the executive's autocratic legalism, the appearance of legal normalcy becomes less credible, making democratic erosion harder to achieve. This statement makes two assumptions. First, the president or prime minister cares about maintaining a veneer of legality and prefers to expand their powers through democratic erosion (via endogenous institutional change and executive aggrandizement) rather than through overt forms of autocratization, like self-coups à la Alberto Fujimori in Peru (1992) and Jorge Serrano in Guatemala (1993). Second, it assumes that if the courts forge alliances with non-judicial actors, they can raise the costs for executives who try not to comply with rulings (Šipulová 2021, 166–168). This implies that at least a sizable number of voters and powerful domestic and international actors perceive the courts with some legitimacy. Furthermore, it presumes that the presence of judicial rulings helps these actors identify which "bright lines" the executive is trying to cross regarding liberal democracy. In turn, I assume that these actors will react to "punish" the executive for disobeying the courts (even if doing so means overriding other preferences).

Second, the mechanisms assume that lower court judges either share the justices' attitudes and role conceptions or will not push back against them. One causal condition of my argument affirms that justices must be open to embracing non-traditional strategies to resist the executive. This assumes that there will be no internal resistance from "traditionalist" lower court judges, and that the justices can coordinate their actions despite these open disagreements or differing legal

interpretations. Furthermore, it presumes that the legal culture (both inside and outside the judiciary) must at least tolerate "nontraditional" judicial behavior against the executive and not provoke a massive backlash.

Third, for the coalition-building mechanism to exist, I assume that opposition parties, the media, NGOs, and other actors are willing and able to collaborate with the judiciary. This, in turn, implies that these actors share the goal of stopping executive aggrandizement despite other disagreements they might have, and can coordinate their efforts. Also, these actors must have a good strategic sense of the timing of events and recognize (and take advantage of) windows of opportunity that might open up before the executive co-opts them (Šipulová 2021, 170). This mechanism also assumes that these actors recognize that they need each other to survive and, therefore, they are motivated to defend each other. Finally, my argument assumes that the actors opposing executive aggrandizement are not aiming to undermine democracy themselves by gaining control of the executive in the future.

Fourth, for the coalition-building mechanism to have the expected effects, different actors must possess unique resources that they choose to use to protect each other. For instance, it assumes that the media can influence the perceptions of citizens and elite actors (e.g., political party leaders) by crafting narratives that support the judiciary. Similarly, it assumes that political parties have some legislative power to protect the courts (for example, by rejecting attempts by the executive to undermine them) and have sufficient popular support to organize demonstrations against executive aggrandizement. Regarding the courts, it assumes that judges have the legally recognized capacity to engage in judicial review of norms enacted by the legislative and executive branches. Finally, it is assumed that these actors value their autonomy and are willing to resist co-optation by the executive by allying with each other and the courts.

Contributions

First, this article contributes to the literature that highlights the positive impact of judicial independence on democratic resilience (e.g., Gibler and Randazzo 2011, 697–699; Boese et al. 2021, 896–899; Laebens and Lührmann 2021, 912–914; Weyland 2025, 9). It enriches this research by theorizing in detail *how* the use of judicial review against autocratic legalism and specific coalition-building strategies can protect democracy. While Staton, Reenock, and Holsinger (2022, 22–29) do develop a detailed mechanism, their argument focuses on how judicial independence incentivizes the executive to be prudent and refrain from trying to undermine democracy. In contrast, I focus on how apex courts can stop politicians who are actively trying to undermine liberal democracy.

Second, this article also contributes to the literature that has stressed the importance of other actors, such as opposition parties, in preserving democracy. For instance, my two mechanisms that focus on the unique role of courts in protecting democracy are complementary to Gamboa's innovative theory (2022, 33–47), which centers exclusively on how opposition parties' strategies and goals can prevent democratic erosion. My mechanisms are also compatible with her empirical analysis of the Colombian case, which shows that democratic resilience was the consequence of the interaction between opposition parties (who implemented institutional and extra-institutional strategies with moderate goals) *and* autonomous courts willing to

use judicial review against the executive (Gamboa 2022, 129–131, 140–148, 154–155, 161–172).

Third, this paper contributes to the theoretical debate on how much agency and structural constraints matter in explaining democratic resilience. Weyland (2025, 13) convincingly argues that opposition actors "make the greatest difference" in intermediary cases where populist executives are neither extremely weak (posing no real threat to democracy) nor extremely powerful (where democracy is doomed from the outset). In my view, explaining democratic resilience in cases that fall between these two extremes is theoretically fertile. Focusing on these intermediary cases is useful to demonstrate how actors can exploit opportunities within the contextual conditions surrounding them to alter other actors' environments. By employing theory-building process tracing of an intermediary case, I show how judges, opposition politicians, and the media can constitute themselves into a contextual condition that constrains the executive and promotes democratic resilience.

Fourth, this article also contributes to the literature that shows how apex courts use networks of support with politicians, the media, foreign actors, and lawyers to increase their power and autonomy in different contexts and for different purposes (e.g., Moustafa 2007, 43–45, 54–56; Trochev and Ellett 2014, 69–80; Bakiner 2016, 133–135; Bakiner 2020, 604–608; Gerzso 2023, 3–4; Šipulová 2024, 10–14). This article adds to these works by showing how support networks can contribute to democratic resilience.

Finally, this article is the first theoretically guided case study of how the Argentinian Supreme Court prevented democratic erosion between 2007 and 2015. In this way, it contributes to the literature on Argentinian judicial politics (e.g., Chávez 2004; Helmke 2005; Finkel 2008; Kapiszewski 2012; Castagnola 2017).

Research design

Since this article aims to theorize causal conditions and mechanisms that show how independent courts can contribute to democratic resilience, I use theory-building process tracing (Beach and Pedersen 2019, 269–277). This method analyzes within-case evidence to explain how certain causal conditions are necessary to activate causal mechanisms (defined as causal chains composed of entities engaging in activities) that contribute to producing an outcome in a case (George and Bennett 2005, 205–229; Beach and Pedersen 2019, 2–4, 29–77).

I proceeded in three steps. First, I selected a single case (Argentina, 2007–2015) where both the causal conditions and the outcome were present. Second, after analyzing the evidence I collected, I created an explanatory narrative that shows how the two causal conditions were necessary to block executive aggrandizement.[3] Third, building on existing theoretical frameworks, I abductively inferred two underlying abstract causal mechanisms from my explanatory narrative of Argentina, which were the driving force toward the outcome (Beach and Pedersen 2019, 273, 276–277).

One crucial source of evidence for creating the narrative that explains democratic resilience in Argentina was the 125 semi-structured elite interviews I conducted,

[3]I also used counterfactual analysis to argue that if the two causal conditions had been absent, executive aggrandizement would have led to at least some degree of democratic erosion.

along with personal communications with various elites. These included federal judges from multiple jurisdictions and levels (including justices, presidents of the Association of Magistrates, and appellate judges), many clerks of the Supreme Court, members of the Judicial Council, the president of the Public Bar Association of the City of Buenos Aires, deputies and senators from multiple parties, members of the Néstor and Cristina Fernández administrations, federal prosecutors, journalists, and constitutional law scholars. The author of this article conducted all interviews and personal communications cited in the footnotes. For detailed information on the interviewees, including the dates and locations of these interviews and communications, refer to the Online Supplementary Material.

Additionally, I consulted multiple textual sources. I extensively analyzed newspapers from diverse political orientations (covering twelve years), specialized judicial newspapers, memoirs written by important actors, books by investigative journalists, and multiple primary documents produced by the Judicial Center of Information, the Judicial Council, the National Conferences of Judges, the Supreme Court, and local and foreign NGOs.

Regarding case selection, Argentina (2007–2015) is a relevant case to focus on. The combination of a president *willing* to produce executive aggrandizement, and four favorable contextual conditions that created the *opportunity* for erosion, makes Argentina an unlikely case of onset democratic resilience (Mahoney and Goertz 2004, 653–58; George and Bennett 2005, 120–123; Boese et al. 2021, 886). The first contextual condition was a six-decades-long tradition of court crafting by incoming presidents and a weak and submissive judiciary (Chávez 2004, 28–52; Kapiszewski 2012, 81–83; Castagnola 2017, 35–64). Second, President Cristina Kirchner won in 2007 and 2011 by landslides; she had the support of more than 50% of Congress (except for the period 2009–2011), and she faced fragmented and uncoordinated opposition. Asymmetrical party system fragmentation favored executive aggrandizement since Cristina Kirchner enacted laws that, if they had not been blocked by the courts, would have undermined freedom of expression and judicial independence. Third, during Cristina Kirchner's administration, there was a commodity windfall, a 7.2% increase in real GDP per capita,[4] an expansion in social policies, a decline in unemployment, and a massive increase in government spending. Fourth, Cristina Kirchner's approval ratings were high. Apart from 2008 and 2009, she consistently had at least 45% approval, reaching 55% in 2011, and 50% in 2012 (Carlin et al. 2019).[5]

Resisting executive aggrandizement: Democratic resilience in Argentina (2007–2015)[6]

One necessary cause of democratic resilience in Argentina was the emergence of an assertive and independent judiciary. This process started during Néstor Kirchner's administration (2003–2007). When he took office, five out of nine justices were about

[4]GDP per capita (constant 2015 USD) – Argentina. Source: World Bank national accounts data, and OECD National Accounts data files. License: CC BY-4.0. Aggregation method: Weighted average. Base period: 2015.

[5]These approval ratings were above 42% of popularity, which seems necessary for Latin American presidents to change the Constitution (Corrales 2018, 210).

[6]See Garcia-Holgado (2023a, 223–334) for a more detailed narrative of this case and an expanded analysis of the evidence discussed in this section.

to rule against his economic policy (Hauser 2016, 35–42; Boschi 2017, 37–38). Kirchner reacted by creating a coalition in Congress with opposition parties to impeach those five justices. Lacking powerful allies in Congress, the media, and civil society, these justices either resigned or were removed by Congress (Castagnola 2017, 53–56).[7]

In an absolute break with an informal practice created in 1947, Néstor Kirchner appointed four justices without deep personal, political, or ideological ties to either him or his party: Eugenio Zaffaroni, Carmen Argibay, Elena Highton de Nolasco, and Ricardo Lorenzetti. He believed that he could pay a reputational cost if he appointed justices who had a clear and overt political, ideological, and/or personal loyalty to him (Fernández 2011, 135, 139).[8] As Justice Zaffaroni told me, "It was natural that [Néstor] Kirchner did something manifestly and publicly different to what [Carlos] Menem had done; otherwise, what he was doing could not be legitimate."[9] On this point, Chief Justice Lorenzetti indicates that "because of the crisis that existed in the Supreme Court and because of the strong pressure from public opinion, the majority of us who were appointed did not have that type of previous relationships [with politicians]" (Lorenzetti 2015, 14).[10]

The Supreme Court: Judicial attitudes and role conception (2005–2015)

By 2005, the four new justices were appointed, and the new composition of the Supreme Court was established. As one federal appellate judge told me, all the justices were strongly committed to creating "for the first time a more proactive Court that defends a prominent role for the judiciary as one independent branch of government."[11] In Justice Lorenzetti's words, the goal was "to restore the judiciary as a branch of government, to be strong, to bear the pressures, and establish limits to what was going to come" (Boschi 2017, 82).

The justices believed that citizens distrusted the judiciary because of its lack of independence: there was "a demand for a stronger Supreme Court" that would "face the other two branches" (Lorenzetti 2007, 4; Lorenzetti 2015, 23–24). To increase their legitimacy, the justices believed the Court should not receive its distinctive character from the executive. As Chief Justice Lorenzetti said: "We [the justices] all agreed that the Court had to have its own institutional agenda and its own identity.

[7]Interviews with Jorge Yoma, a federal appellate judge (D) (second), a federal appellate judge (F), Rubén Giustiniani, and Adrián Ventura.

[8]Interviews with Jorge Yoma, Julio Bárbaro, two high-ranking officials from the Néstor Kirchner's Administration (B and C), Laura Alonso, Diana Conti, and an anonymous source (C).

[9]Personal communication with Eugenio Zaffaroni. Corroborated with interviews with Hernán Cappiello, Jorge Yoma, a high ranking official from the Néstor Kirchner's Administration (C), and Laura Alonso. President Carlos Menem packed the Supreme Court in 1990. In the years that followed, there was significant backlash against the loyal justices he appointed, who were widely seen as enablers of numerous abuses of executive power.

[10]Kirchner's decision mirrors those of insincere states that ratify human rights treaties because they believe the immediate benefits outweigh the future costs of non-compliance. Sometimes states cannot anticipate the opposition they will face if they don't comply due to unforeseen shifts in "political conditions" that "rearrange the stakes" (Simmons 2009, 58, 77–79). This was precisely the case in Argentina. Kirchner's choice to appoint autonomous, respected justices was widely supported. However, one anticipated that the new Supreme Court would later implement coalition-building strategies and judicial review that would constrain Cristina Kirchner.

[11]Interview with a federal appellate judge (E). Confirmed by an anonymous source (D) in an interview.

This was the central issue I insisted on a lot because, in Argentinian history, the Supreme Court was always the Court of each President" (Boschi 2017, 243–44).[12] For the justices, "the idea of an independent judiciary is present in our constitution, but not in the history of the political-institutional culture of the country" (Lorenzetti 2015, 25–26).

Committed to establishing an independent judiciary, the justices were guided by exemplary models who embodied these ideals. In a private conversation in 2007, Lorenzetti mentioned that he admired the United States judicial system and, more importantly, that what Chief Justice William Taft did was a "judicial reform model that he wanted to implement in Argentina" (O'Donnell 2014, 184).[13] Taft was a "reform model" to follow because he was a skillful political entrepreneur who used his networks with newspapers, lawyers, and politicians to pass the Judicial Conference Act (1922) and the Judiciary Act (1925), which empowered the judiciary (Crowe 2007, 76–82).

Although the Court was not ideologically opposed to either Néstor or Cristina Kirchner and avoided obstructing many of her most important public policies, the justices were not willing to be used as tools of the executive. In an interview after Cristina Kirchner left office, Lorenzetti stated, "Our great contribution was that the Court had its own identity, and it was a relevant institutional factor" (Boschi 2017, 244). The presence of these determined and autonomous justices, with a strong preference for judicial assertiveness, was a *necessary condition* for breaking the six-decade-long tradition of weak, compliant, and dependent courts.

Coalition-building strategies: Building a defensive wall against executive aggrandizement

In this section, I demonstrate how the previously described attitudes led the Supreme Court to establish support networks aimed at enhancing its autonomy. The justices' coalition-building strategies, both within and beyond the judiciary, were necessary to break a tradition of weak, co-opted, and deferential courts that had adhered to the political question doctrine and judicial restraint for over half a century.

Building coalitions within the judiciary

The justices wanted the entire judiciary to recognize that the Supreme Court was leading a new phase of "institutional rebuilding and strengthening" (Lorenzetti 2007, 1–2, 7).[14] As a first-instance judge said in an interview, the goal of the Supreme Court was to "position itself as the head of the judiciary to increase the material and effective

[12]Interviews with Manuel Garrido, Pablo Hirschmann, Silvana Boschi, Hugo Alconada Mon, Adrián Ventura, Néstor Esposito, Martín Angulo, and three anonymous sources (B— fourth interview—, C, E, and F). See also, see also Hauser (2016, 258) and "El desafío es volver a los viejos principios," *La Gaceta*, October 14, 2008, https://www.lagaceta.com.ar/nota/295032/tribunales/desafio-volver-viejos-principios.html; Adrián Ventura, "'Debemos procurar que el Poder Judicial sea independiente'," *La Nación*, September 3, 2007, https://www.lanacion.com.ar/politica/debemos-procurar-que-el-poder-judicial-sea-independiente-nid940307/.

[13]See also interviews with Hugo Alconada Mon, an academic close to Chief Justice Lorenzetti, and a federal appellate judge (E), as well as Hauser (2016, 144–146) and Boschi (2017, 25, 31).

[14]Interviews with Hugo Alconada Mon, Federico Delgado (first), Martín Angulo, Adrián Ventura, Javier Leal de Ibarra, Jorge Rizzo, Hernán Cappiello, and Ricardo Guibourg.

power of the judiciary" (Llanos 2014, 282). The justices believed that to resist pressures from the other two branches, judges had to share "feelings, traditions, and ideas," reach agreements, and adopt similar decisions (Lorenzetti 2006, 272; Lorenzetti 2007, 7).[15] In the view of the justices, the courts could resist attacks on their independence only if there was a shared sense of support within the judiciary: "It is very important that judges feel they are part of a branch of government and that they are protected" (Lorenzetti 2007, 8).[16] As one judge observed, the new connections between the Supreme Court and lower-level judges ultimately aimed to consolidate "the judiciary as a real power" (Llanos 2014, 282). To achieve this goal, the Supreme Court implemented four measures within the judiciary.

First, the justices organized six *National Conferences of Judges* between 2006 and 2014, where hundreds of judges gathered to plan how to strengthen the judiciary. In 2006, the First Conference of Judges' final document stated: "The judiciary's goal is to defend the Constitution, controlling that the other branches of government stay within their limits."[17] In that event, Lorenzetti's closing remarks stressed that an independent judiciary was necessary for "the protection of the tripartite equilibrium between the branches of government" (Lorenzetti 2006, 273–274). According to a federal judge who had interacted with Lorenzetti many times, "he almost had an obsession in repeating these things all the time, and he was especially interested in all judges also repeating these ideas. He wanted the judiciary to have a unified message."[18] Additionally, the conferences fostered links among judges, created cohesion, and developed an "esprit de corps" (Lorenzetti 2007, 7–15; Lorenzetti 2015, 28; Boschi 2017, 29-30).[19] These meetings reinforced a common understanding among judges regarding their institutional role, and they all started to use the same language (Lorenzetti 2015, 28).

Second, the Court created the *Committee of Presidents of the Federal Chambers of Appeals*, where federal appellate judges met with Chief Justice Lorenzetti monthly to discuss possible solutions to existing problems. Judges could transfer demands to the Supreme Court, and Lorenzetti was also aware of which issues were being discussed in different jurisdictions.[20] It was an arena for judges to express their concerns to the Supreme Court.[21]

Third, Lorenzetti forged an alliance with the Association of Magistrates[22] (Lorenzetti 2007, 7) and established a personal relationship with many influential federal judges (Hauser 2016, 93, 293–294).[23] One of these judges shared with me that

[15]Interviews with Federal judge (A), Pablo Hirschmann, and an anonymous source (F).

[16]On this point, see also Hauser (2016, 256).

[17]"Conclusiones de la I Conferencia Nacional de Jueces," March–April 2006, https://www.cij.gov.ar/adj/ADJ-0.519372001226526460.pdf.

[18]Interview with a federal judge (B).

[19]Interviews with Ricardo Recondo (first), Luis María Cabral (first), federal appellate judge (C) (second), a federal appellate judge (D) (third), a federal judge (B), academic close to Chief Justice Ricardo Lorenzetti, and Javier Leal de Ibarra.

[20]Interviews with Eduardo Freiler (first), an anonymous source (B) (first), and Silvana Boschi.

[21]Interviews with Luis María Cabral (first), a federal judge (B), Ricardo Recondo (first), Luis Bunge Campos, federal appellate judges (D—third interview— and E), and Javier Leal Ibarra.

[22]Interviews with Ricardo Recondo (first) and Luis María Cabral (first).

[23]Interviews with Hugo Alconada Mon, a federal appellate judge (D) (third), two anonymous sources (A and B—first interview), a federal appellate judge (C) (first), Carlos Mahiques (first), a federal prosecutor (A), Carlos Rozanski, Diana Conti, and Eduardo Freiler (first).

Lorenzetti frequently emphasized in private conversations the importance of acting "en bloc to be strong vis-à-vis powerful groups, especially the executive power."[24] The same judge noted that many judges greatly appreciated having "a door they could knock on, ask for advice […] this was very unusual in the judiciary that a judge ask another 'tell me, what do you think about this?'"[25]

Fourth, the justices rejected the executive's attempts to strip the Court of having control over the judicial budget, allowing the Court to provide lower court judges with necessary resources (Boschi 2017, 100–102).[26] At multiple moments, Lorenzetti requested the executive to increase the level of autonomy of the judiciary over its own budget and successfully obtained increases in judges' salaries.[27] By controlling the judicial budget, Lorenzetti favored lower-level judges who actively supported the Court: "As Chief Justice Lorenzetti had 'the pen': he could make appointments, create new positions, or promote people."[28]

According to my interviews and other textual sources, the Supreme Court's strategy to create unity within the judiciary was very effective. For instance, many lower court judges felt that the Supreme Court would support them if the executive attacked them.[29] As a first-instance judge expressed: "The message to lower court judges was that the Supreme Court backed them" (Llanos 2014, 282). Three federal judges who decided cases of utmost importance for the executive told me they were reassured by Lorenzetti's public and private statements regarding the Court's determination to protect judicial independence.[30] In many of the meetings of the Committee of Presidents of the Federal Chambers of Appeals, there were discussions about how the Court could help judges who were being attacked by the executive.[31] Moreover, a member of the Judicial Council told me that Lorenzetti personally intervened in many cases to protect judges persecuted by the executive.[32] At a more structural level, the justices safeguarded the autonomy of lower courts by invalidating the 2013 Judicial Reform, which would have led to the complete co-optation of the lower courts.[33]

Building coalitions outside the judiciary

The justices knew that to create support for the judiciary, they had to convince social and political actors that they would defend the Constitution (Lorenzetti 2007, 4). Therefore, judges needed to spread the narrative that they would "limit the other

[24]Interview with federal appellate judge (A). See also Boschi (2017, 29–30).

[25]Interview with federal judge (A). Corroborated by an interview with an anonymous source (A).

[26]Interviews with a member of the Judicial Council (2006–2010) (first and second), a federal judge (B), Martín Angulo, Hernán Cappiello, Alejandro Fargosi, Samuel Cabanchick, and Julián Álvarez.

[27]Interviews with a Federal appellate judge (D) (third) and Carlos Mahiques (first).

[28]Interview with an anonymous source (A). See also Hauser (2016, 143, 266–268) and interviews with Hugo Alconada Mon and Pablo Hirschmann.

[29]Interviews with a federal appellate judge (D) (third), an anonymous source (A), Gustavo López, Ricardo Recondo (first), and Graciela Medina. See also Hauser (2016, 134).

[30]Interviews with federal appellate judges (E and B) and Luis María Cabral (first).

[31]Interview with a federal appellate judge (E).

[32]Interview with a member of the Judicial Council (2006–2010) (second). See also the interview with Pablo Hirschmann, and Hauser (2016, 293–294).

[33]Interviews with Manuel Garrido and Graciela Medina.

branches of government" (Lorenzetti 2007, 2, 4).[34] With this goal in mind, the Court radically modified its relationship with civil society (Barrera López 2009, 145–146).[35] The Court disclosed the circulation of case files among the justices, made its rulings easily accessible, institutionalized public hearings, and accepted amicus curiae presentations (Lorenzetti 2015, 52; Hauser 2016, 70, 148–160).[36] Lorenzetti also built close ties with owners of important media organizations, journalists, opposition politicians, economic actors, the Buenos Aires Bar Association, law schools, and the United States Embassy (Hauser 2016, 137, 143, 258; Boschi 2017, 25, 31).[37]

As part of this strategy, the Court created a press agency to publish rulings, report events, and judicial decisions (Lorenzetti 2015, 31; Boschi 2017, 87–91). This agency published relevant rulings with summaries, emphasizing certain topics, framing them in specific ways, and influencing their interpretation (Hauser 2016, 202–212).[38] For instance, when the Supreme Court validated the constitutionality of the Media Law in 2013, this press agency stressed that state funds could not benefit only some media actors, a non-partisan organization should apply the law, and the property rights of media owners must be protected. This was not unique to Argentina. In other cases, courts built their legitimacy by implementing innovative public relations strategies (Staton 2010, 53–64).

NGOs, the media, and legal experts (among other opinion-making actors) played a crucial role in spreading the narrative that this Supreme Court was transparent, independent, and committed to the Constitution (Barrera López 2009, 147–148). In particular, journalists actively promoted the idea of a newly independent Supreme Court.[39] For instance, Lorenzetti's speeches were disseminated, and he used the media to differentiate the Court from the executive.[40] Lorenzetti institutionalized weekly private meetings with journalists in which he explained the most critical rulings decided by the Court.[41] In turn, the media saw Lorenzetti as a potential ally in a conflict with the executive branch or Congress.[42]

To convince society that the judiciary is as essential as the executive and legislative branches, Lorenzetti also implemented "the opening of the judicial year."[43] He gave an annual speech in front of federal judges and journalists, highlighting the main topics of concern to the justices and explaining rulings and documents published at the conferences of judges. Additionally, Lorenzetti reiterated the need to strengthen judicial independence and limit abuses of power countless times in interviews,

[34]Interview with an anonymous source (D). See also Boschi (2017, 82).

[35]Interviews with Silvana Boschi, Pablo Hirschmann, and an anonymous source (B) (second).

[36]Interview with a federal appellate judge (D) (third).

[37]Interviews with an academic close to Chief Justice Ricardo Lorenzetti, an anonymous source (B) (second), and Néstor Espósito.

[38]Interviews with Hernán Cappiello and Carlos Mahiques (first).

[39]Interviews with three anonymous sources (B— first and second interviews—, F, and H).

[40]Adrián Ventura, "Exigió Lorenzetti que el Estado no persiga a los que piensan diferente," *La Nación*, March 7, 2012, https://www.lanacion.com.ar/politica/exigio-lorenzetti-que-el-estado-no-persiga-a-los-que-piensan-diferente-nid1454474/.

[41]Interviews with Néstor Espósito, Martín Angulo, and Silvana Boschi.

[42]Interviews with Silvana Boschi and Pablo Hirschmann.

[43]Interviews with Javier Leal de Ibarra, Luis Bunge Campos, two anonymous sources (B—third interview — and D), and two federal appellate judges (E and F).

academic events, at the Conferences of Judges who were covered by journalists, and in private meetings with journalists.[44]

This behavior was also replicated by the rest of the justices: "Whether in newspaper and magazine interviews, conferences, seminars, symposia, expert gatherings, press conferences, reports, or public hearings, Justices appear themselves as the agents of a change oriented toward a new (Court's) engagement with society" (Barrera López 2009, 149).[45] For example, in 2005, one justice said to a journalist that "it is essential that we prove that the Supreme Court is independent"[46] and Justice Fayt stated that "we are not justices of the President, this is evident. Each one has its own sphere of action."[47] In 2007, Justice Argibay affirmed that "in the previous court there was an automatic majority, which meant that justices took into consideration the wishes and necessities of another political branch […] In this new Court there is no automatic majority, and it will never exist. This Court is independent."[48]

The interviews I conducted with journalists, politicians, academics, practicing lawyers, members of the Judicial Council, and judges, as well as the analysis of articles from all the major newspapers, indicate that the coalition-building strategies were very effective in changing the image of the Supreme Court.[49] As Gustavo López, undersecretary of the presidency under Cristina Kirchner, told me: "The media built a positive image of the Court by saying 'these are the ones who defend the law and the government is the one that attacks institutions.'"[50] This success is probably related to the fact that the Supreme Court's message resonated with the identity marks of the large number of anti-Peronists within the country: the defense of civic behavior, republican institutions, the rule of law, pluralism, and checks and balances. Therefore, it is not surprising that important actors who opposed Cristina Kirchner considered that the Supreme Court's independence was an institutional guarantee against her populist administration.[51] While it is very hard to assess empirically whether these actions harmed the president's popularity, that was never the objective of this strategy, and it was unnecessary to generate support for the Supreme Court.

[44]Interviews with Hernán Cappiello and Martín Angulo.

[45]Adrián Ventura, "Alto perfil para diferenciarse," *La Nación*, September 24, 2009, https://www.lanacion.com.ar/sociedad/alto-perfil-para-diferenciarse-nid1178210/; Adrián Ventura, "Preocupa a la Corte que Kirchner sume tanto poder," *La Nación*, October 15, 2006, https://www.lanacion.com.ar/politica/preocupa-a-la-corte-que-kirchner-sume-tanto-poder-nid849550/.

[46]Adrián Ventura, "La Corte busca ser percibida como un tribunal independiente," *La Nación*, February 15, 2005, https://www.lanacion.com.ar/politica/la-corte-busca-ser-percibida-como-un-tribunal-independiente-nid679796/.

[47]"Nueva advertencia de la Corte a Kirchner," *La Nación*, May 24, 2005, https://www.lanacion.com.ar/politica/nueva-advertencia-de-la-corte-a-kirchner-nid706810/.

[48]Laura Di Marco, "Carmen Argibay: 'Puedo separar lo que es justicia'," *La Nación*, July 22, 2007, https://www.lanacion.com.ar/opinion/carmen-argibay-puedo-separar-lo-que-es-justicia-de-lo-que-es-venganza-nid927703/.

[49]Interviews with Pablo Tonelli, Federico Pinedo, Laura Alonso, Ernesto Sanz, Mario Cimadevilla, Carla Carrizo, Rubén Giustiniani, Samuel Cabanchik, Juan Manuel López, María Eugenia Estenssoro, Ricardo Gil Lavedra, Ricardo Cuccovillo, Julio Rivera Jr., Alfonso Santiago. Personal communications with Ángel Rozas and Pablo Mosca.

[50]Interview with Gustavo López. Corroborated by an interview with an anonymous source (B) (third).

[51]Interview with Julián Álvarez.

Judicial review against executive aggrandizement: Protecting freedom of expression (2009–2015)

When Senator Cristina Kirchner assumed the presidency in December 2007, she had no plans to co-opt the Supreme Court. This was because most of the justices supported Néstor Kirchner's two key public policies (Brinks 2005, 599; Lorenzetti 2015, 163–175; Boschi 2017, 23, 62–65). Before appointing them, Néstor Kirchner had explicitly asked the four justices about their views on human rights and economic governance (Fernández 2011, 138; Hauser 2016, 36, 63; Boschi 2017, 27). Moreover, given the tradition of submissive courts, there was no indication that the justices would oppose any crucial policies from Cristina Kirchner's administration. In sum, there was no reason for Cristina Kirchner to consider co-opting the Supreme Court when she took office (Castagnola 2020, 73).

A few months after she took office, the executive and agricultural producers confronted each other over a proposed export tax rate. The President accused the media of defending these powerful economic actors against the people, following a populist script (Garcia-Holgado 2023b, 52–55). In this context, she implemented five legal strategies against *Grupo Clarín* (Argentina's biggest media conglomerate) and other media outlets. These included accusing the top executives and owners of *Clarín* and *La Nación* (a prominent newspaper) of money laundering, committing crimes against humanity during the last military dictatorship (1976–1983), and attempts to expropriate the only Argentinian paper-producing company and collect a special tax from newspapers.[52] The judiciary systematically blocked this legalistic executive encroachment over the media (Garcia-Holgado 2023a, 279–281).

Additionally, the executive enacted a Media Law in October 2009 to force *Grupo Clarín* and other important media organizations to break up into smaller firms. Regarding the Media Law, between 2009 and 2013, lower court judges, with the backing of the Supreme Court, blocked its implementation (Hauser 2016, 217–18). After the justices upheld the law's constitutionality in 2013, they supported new injunctions by lower courts that delayed the breakup of *Grupo Clarín* between 2014 and 2015. By the time Cristina Kirchner left office in December 2015, the Media Law had still not been implemented.

In December 2009, the Civil and Commercial Federal Court No. 1 of the City of Buenos Aires issued an injunction against the application of the Media Law.[53] In October 2010, the Supreme Court upheld this injunction but suggested that lower courts should establish "a reasonable term" for it.[54] While the Civil and Commercial Federal Chamber of Appeals (hereafter Federal Chamber) established that the injunction's due date was November 2013, the Supreme Court clarified that the

[52]Interviews with anonymous sources (D, E, and F). See also Horacio Verbitsky, "Regalo de Reyes," *Página 12*, January 6, 2013, https://www.pagina12.com.ar/diario/elpais/1-211307-2013-01-06.html; Irina Hauser, "Con una ayudita de sus amigos," *Página 12*, December 13, 2015, https://www.pagina12.com.ar/diario/elpais/1-288159-2015-12-13.html.

[53]"Una causa que atravesó un largo camino en la Justicia," *Clarín*, April 17, 2013, https://www.clarin.com/politica/causa-atraveso-largo-camino-Justicia_0_rJNmEzFsDXx.html.

[54]Irina Hauser, "Amparo vigente, pero con limitaciones y plazos," *Página 12*, October 6, 2010, https://www.pagina12.com.ar/diario/elpais/1-154433-2010-10-06.html.

injunction would end by December 7, 2012.[55] However, on December 6, 2012, when the Federal Chamber extended the injunction, the justices validated this decision.[56] In this way, multiple judges used their interpretative powers to gain time and delay the implementation of the Media Law.

Cristina Kirchner reacted with four strategies to force lower court judges to rule quickly against *Clarín*. First, the executive tried to sanction, suspend, and impeach judges in the Judicial Council (the entity that sanctions, removes, and appoints lower court judges).[57] This failed since the lower-level judges, opposition politicians, and practicing lawyers deprived the incumbent party of the required votes in the Judicial Council.[58] Indeed, Judge Guarinoni (a member of the Federal Chamber who ruled in favor of *Clarín*) told me that these actors' actions were crucial to block the government's attempt to co-opt them.[59] This was a successful instance of the coalition-building mechanism.

The executive's second strategy involved applying public pressure on judges. For instance, the state TV channel, along with co-opted newspapers and radio shows, attacked judges daily. As one appellate judge told me: "It was terrible, horrible, what the government did with those judges […] they investigated them, their families, they insulted them."[60] To counter this, journalists who remained independent strongly defended the courts daily. Third, the executive failed to criminally prosecute judges who ruled in favor of *Clarín*, since other judges who dealt with criminal law dismissed the executive's criminal complaints.[61]

Fourth, the Federal Administrative Contentious Chamber of Appeals rejected the government's recusals of those who ruled in *Clarín*'s favor.[62] As one high-ranking Cristina Kirchner's administration official told me, these actions were ineffective since "judges are the ones who decide on lawsuits against judges […] They believe they have to protect themselves and other judges."[63] This was precisely the goal of the Supreme Court's coalition-building mechanisms within the judiciary.

Four years after the Media Law was sanctioned, the Supreme Court ruled it was constitutional in October 2013. While the executive initially interpreted this as a significant achievement, it did not realize that Lorenzetti detailed in his vote that (1) the Law's implementation should respect *Grupo Clarín*'s property rights, (2) the government should not use funds to benefit only some media actors or use public

[55]"Ley de medios: la Corte precisó el plazo de vigencia de la medida que suspendió el artículo 161," Centro de Información Judicial, May 23, 2012, www.cij.gov.ar/nota-9152-Ley-de-medios–la-Corte-precis–el-plazo-de-vigencia-de-la-medida-que-suspendi–el-art-culo-161.html.

[56]"Ley de Medios: la Cámara prorrogó la medida cautelar hasta que se dicte sentencia definitiva," *Centro Información Judicial*, December 6, 2012, https://www.cij.gov.ar/nota-10434-Ley-de-Medios–la-C-mara-prorrog–la-medida-cautelar-hasta-que-se-dicte-sentencia-definitiva.html.

[57]Interview with Graciela Medina. See also "El oficialismo estudia impulsar un jury contra la Cámara," *Página 12*, December 10, 2012, https://www.pagina12.com.ar/diario/ultimas/20-209565-2012-12-10.html.

[58]Interviews with Daniel Ostropolsky and Ricardo Recondo (first).

[59]Interview with Ricardo Guarinoni. Corroborated by an interview with Luis María Cabral (first).

[60]Interview with a federal appellate judge (E).

[61]Interviews with Ricardo Guarinoni, Luis María Cabral (first), a federal appellate judge (C) (first and second), and Ricardo Recondo (first).

[62]Interview with Graciela Medina.

[63]Interview with a high ranking official (Néstor Kirchner's administration) (A).

media in a partisan way, and (3) the bureaucratic entity in charge of implementing the Media Law had to be autonomous and impartial (Boschi 2017, 117–121).[64]

These criteria were so ambiguous that judges used them to block the Law's application. According to three sources who have a deep knowledge of the Supreme Court, Lorenzetti's criteria on how the Media Law had to be applied was a resource that lower court judges used to justify their future decisions in favor of *Grupo Clarín*.[65] Moreover, the Chief Justice clarified to the press that the ruling only referred to the "general constitutionality of the Media Law" and not to the "application phase of the law."[66] For this reason, Lorenzetti affirmed that "this ruling does not end the fight over the Media Law."[67] In sum, Lorenzetti provided *Grupo Clarín* with a "plan of action" against the implementation of the Media Law.[68]

When the executive called for public auctions to sell *Grupo Clarín*'s licenses in October 2014, the media conglomerate requested an injunction referring to the criteria laid out by Lorenzetti.[69] A lower court judge, the Federal Chamber, and the Supreme Court accepted *Clarín's* arguments to freeze the application of the Media Law for six months.[70] They argued that the entity responsible for implementing the Media Law failed to adhere to Lorenzetti's criteria.[71] In July 2015, the same lower court judge extended the injunction for another six months, again supported by the Supreme Court.[72] When Cristina Kirchner left office in December 2015, the Media Law remained inapplicable. As Julián Álvarez, Cristina Kirchner's Secretary of Justice, lamented to me: "We did not have any more margin of time to apply the law, additional legal obstacles appeared, and then we lost the elections [2015], and everything came to nothing."[73]

Judicial review against executive aggrandizement: Protecting judicial independence (2013)

The failure of the executive's informal and formal co-optation mechanisms to force judges to rule against the media was the direct cause of the 2013 judicial reform.[74] As

[64]Justices Highton de Nolasco, Petracchi, Argibay, and Maqueda also included these criteria in their votes. Interviews with anonymous sources (B— third interview—, E, and F).

[65]Interviews with anonymous sources (E, F, and D).

[66]"Ricardo Lorenzetti: 'No hablé de la ley con la Presidenta'," *Perfil*, November 3, 2013, www.perfil.com/noticias/politica/ricardo-lorenzetti-no-hable-de-la-ley-con-la-presidenta-20131103-0007.phtml.

[67]Adrián Ventura, "Lorenzetti dijo que el fallo no pone fin a la pelea por la ley de medios," *La Nación*, October 31, 2013, https://www.lanacion.com.ar/politica/lorenzetti-dijo-que-el-fallo-no-pone-fin-a-la-pelea-por-la-ley-de-medios-nid1634064/.

[68]Horacio Verbitsky, "Crustáceos sin saberlo," *Página 12*, November 3, 2013, https://www.pagina12.com.ar/diario/elpais/1-232791-2013-11-03.html. See also interviews with Beinusz Szmukler (second), Néstor Espósito, and anonymous sources (B— (third interview— and C).

[69]"Freno judicial a la adecuación de oficio de Clarín," *Clarín*, November 1, 2014, https://www.clarin.com/politica/Ley_de_Medios-Grupo_Clarín-Adecuacion-cautelar-Horacio_Alfonso_0_rJ3-VSO9DXx.html.

[70]"Ley de Medios: confirman fallo que suspende el proceso de adecuación de oficio del Grupo Clarín," *Centro de Información Judicial*, February 20, 2015, https://www.cij.gov.ar/nota-14887-Ley-de-Medios–confirman-fallo-que-suspende-el-proceso-de-adecuaci-n-de-oficio-del-Grupo-Clar-n.html.

[71]Interviews with two anonymous sources (D and E).

[72]"Otra cautelar para Clarín," *Página 12*, July 17, 2015, https://www.pagina12.com.ar/diario/elpais/1-277286-2015-07-17.html.

[73]Interview with Julián Álvarez.

[74]Interviews with Manuel Garrido, Luis María Cabral (first), and Julián Álvarez.

Judge Graciela Medina told me: "By 2013, the government had realized that as a consequence of how the judiciary was structured and organized, it was very difficult to impede judges from being independent."[75] This is consistent with what another appellate judge shared with me when reflecting on the courts' resistance to the executive: "[that] proved that judges can be independent from the government if they want to be independent."[76] Judge Ricardo Guarinoni concurred when he told me, "I think the Kirchners realized too late the role that an independent judiciary can play to preserve the Republic."[77] For this very reason, the proposed judicial reform sought to severely undermine the judiciary's independence (Llanos 2014, 283–286). In particular, it primarily targeted three key areas: (1) modifying the Judicial Council, (2) stripping the Supreme Court of its control over the judiciary's budget, and (3) creating three federal chambers of cassation.

The first proposed reform would have given the executive unilateral control over the Judicial Council (which plays a crucial role in sanctioning, removing, and appointing lower court judges).[78] Until then, judges and lawyers elected their representatives to the Council through professional associations, and public university chancellors chose academic representatives. In contrast, the 2013 Reform proposed that judges, lawyers, and academics who sought to join the Judicial Council had to run in nationwide elections as representatives of political parties.

The Reform was designed to make it very difficult for opposition actors to control the Judicial Council. The political party (or coalition of parties) that wanted to present candidates needed to be present in at least eighteen of the twenty-four provinces and have the same denomination. Also, if a group of parties agreed to propose the same candidates for the Council, they also had to share the candidates for senator, representative, and president.[79] It would have been very unlikely that opposition parties could have a unified list of candidates for all these offices, given their incapacity to present unified lists in presidential and legislative elections during Néstor and Cristina Kirchner's administrations.[80] For this reason, Lorenzetti says that the Council's composition would be determined by the executive's electoral ballot (Boschi 2017, 245).

Under this Reform, if the party winning a simple majority of the national vote also controlled the executive and had a majority in Congress, it would have enough votes in the Judicial Council to impeach or suspend a judge and send potential judicial appointees to the executive (Garcia-Holgado 2023a, 306–307).[81] The first election of lawyers, academics, and judges to join the Council would have been in the August 2013 primary legislative elections. Had that occurred, and since the incumbent party reached a simple majority of the national vote, had more seats in Congress, and

[75]Interview with Graciela Medina.

[76]Interview with a federal appellate judge (E).

[77]Interview with Ricardo Guarinoni.

[78]Ley 26.855, Congreso de la Nación Argentina (2013), http://servicios.infoleg.gob.ar/infolegInternet/anexos/215000-219999/215215/norma.htm.

[79]Gabriel Sued, "La elección de los consejeros altera el armado electoral," *La Nación*, April 13, 2013, https://www.lanacion.com.ar/politica/la-eleccion-de-los-consejeros-altera-el-armado-electoral-nid1572358/.

[80]Interview with Graciela Medina.

[81]Ley 26.855, Congreso de la Nación Argentina (2013), http://servicios.infoleg.gob.ar/infolegInternet/anexos/215000-219999/215215/norma.htm.

controlled the executive, Cristina Kirchner would have controlled the Judicial Council.

The second proposed reform would have transferred the administration of the judicial budget from the Supreme Court to the Judicial Council.[82] Therefore, in the context of the previous reform of the Judicial Council, the executive would have controlled the judicial budget.[83] The third proposed reform would have created three Federal Chambers of Cassation (intermediary courts between all the Chambers of Appeals and the Supreme Court).[84] This court-curbing strategy would have delayed lawsuits against the government and nullified negative rulings from trial courts and chambers of appeals.[85] Additionally, the creation of Chambers of Cassation would have limited the influence of the Supreme Court for two or three years since these new courts would have absorbed any appealed case (including the rejection of temporary injunctions).[86] Since the executive did not have enough votes in Congress to pack the Supreme Court, it created these new Courts of Cassation.[87] Regarding the constitution of these Chambers of Cassation, the law authorized the government to quickly appoint provisional judges (Bianchi 2014, 1965–1968).[88]

While Congress discussed the 2013 Judicial Reform, media outlets, business associations, lawyers' associations, NGOs, and law schools strongly opposed it.[89] Representatives from all opposition parties gathered at the Association of Magistrates and signed a document defending judicial independence.[90] Within the judiciary, the Supreme Court got almost unanimous support from federal judges.[91] Almost all the Federal Appeals Chambers published statements supporting the Supreme Court.[92] The justices felt strongly supported by the actions of judges, the Association of Magistrates, the media, and civil society actors (Boschi 2017, 129).[93] Indeed, this

[82]"Qué dice la carta que los camaristas le hicieron llegar a Cristina Kirchner," *La Nación*, April 23, 2013, https://www.lanacion.com.ar/politica/que-dice-la-carta-que-los-camaristas-le-hicieron-llegar-a-cristina-kirchner-nid1575515/.

[83]Interview with Ernesto Sanz.

[84]Ley 26.853, Congreso de la Nación Argentina (2013), https://servicios.infoleg.gob.ar/infolegInternet/anexos/210000-214999/214383/norma.htm.

[85]Interviews with a high ranking official (Cristina Kirchner's administration) and Eduardo Freiler (second).

[86]Interviews with anonymous sources (B —third interview— and E), Manuel Garrido, Pablo Hirschmann, and Graciela Medina.

[87]Interview with Javier Leal de Ibarra.

[88]Paz Rodríguez Niell, "La Presidenta podrá designar jueces sin esperar los concursos," *La Nación*, April 28, 2013, https://www.lanacion.com.ar/politica/la-presidenta-podra-designar-jueces-sin-esperar-los-concursos-nid1577069/.

[89]Interviews with Hernán Gullco and Antonio María Hernández. Personal communication with Pablo Mosca. See also Paz Rodríguez Niell, "Entidades de abogados y jueces criticaron las reformas," *La Nación*, April 10, 2013, https://www.lanacion.com.ar/politica/entidades-de-abogados-y-jueces-criticaron-las-reformas-nid1571252.

[90]Interview with Ricardo Recondo (second).

[91]Interviews with anonymous sources (B —third interview— and F) and a federal judge (B).

[92]"La Corte recibió el respaldo de organizaciones del Poder Judicial y de Cámaras Nacionales y Federales," *Centro de Información Judicial*, April 30, 2013, https://www.cij.gov.ar/nota-11301-La-Corte-recibio-el-respaldo-de-organizaciones-del-Poder-Judicial-y-de-Camaras-Naciónales-y-Federales.html.

[93]Interviews with Javier Leal Ibarra, Luis María Cabral (second), an anonymous source (F), and Silvana Boschi.

massive reaction from judicial and non-judicial actors in support of the Supreme Court showed the effectiveness of coalition-building strategies.

This reaction to support the Supreme Court was not spontaneous. For instance, Chief Justice Lorenzetti asked the Committee of Presidents of the Federal Chambers of Appeals to issue a public statement demanding that the Supreme Court keep control of the judiciary's budget (Hauser 2016, 261–263).[94] Lower court judges viewed their support for the Supreme Court as an act of self-defense since they knew that the justices would later protect them by invalidating the rest of the Judicial Reform.[95] Simultaneously, the justices also sent a private note to the executive (and Lorenzetti met privately with Cristina Kirchner) explaining why the Court should keep control of the judiciary's budget (Llanos 2014, 288–289; Boschi 2017, 132–134).[96] This strategy was effective. Representative Diana Conti, a key actor in Congress, told me that the executive believed that if the Supreme Court continued to administer the judicial budget, Lorenzetti would support the rest of the Judicial Reform.[97] Julián Álvarez, Secretary of Justice between 2010 and 2015, told me: "We wanted the laws that composed the Judicial Reform to come into effect, and we understood that taking away resources from the Supreme Court implied that the reform was going to be declared unconstitutional."[98] Other anonymous sources shared with me that Lorenzetti acted deliberately to protect the Court's legitimacy, aiming to avoid the perception that the Court was protecting its own funds.

After Cristina Kirchner enacted the Law on Judicial Reform, Argentina's "legal complex" responded quickly. As Jorge Rizzo (President of the Public Bar Association of the City of Buenos Aires) told me, NGOs, political parties, and associations of lawyers and judges coordinated lawsuits in various courts to maximize the likelihood of obtaining favorable rulings against the Judicial Reform.[99] In June 2013, the Supreme Court ruled that the Judicial Reform was unconstitutional.[100] As a prosecutor critical of the Supreme Court told me, this decision was the culmination of a "long process that drove the Supreme Court to become a tutelary organ of political decisions."[101]

Will and opportunity for judicial autonomy in Argentina (2007–2015)

Between 1947 and 2005, the Supreme Court's composition was modified ten times for political reasons (Castagnola 2017, 35–64). In most of these instances, the executive

[94]Interviews with Javier Leal Ibarra, Samuel Cabanchick, anonymous sources (B —third interview— and E), and Pablo Hirschmann.

[95]Interview with Hernán Cappiello.

[96]Adrián Ventura, "Lorenzetti dialogó con la Presidenta sobre los cambios," *La Nación*, April 24, 2013, https://www.lanacion.com.ar/politica/lorenzetti-dialogo-con-la-presidenta-sobre-los-cambios-nid1575710/.

[97]Interview with Diana Conti.

[98]Interview with Julián Álvarez.

[99]Interview with Jorge Rizzo. See also "Presentan por lo menos 16 acciones judiciales contra la reforma del Consejo," *La Nación*, May 28, 2013, https://www.lanacion.com.ar/politica/presentan-por-lo-menos-16-acciones-judiciales-contra-la-reforma-del-consejo-nid1586191/.

[100]*Rizzo, Jorge c/ Estado Nacional*, Corte Suprema de Justicia de la Nación (2013), available at www.cij.gov.ar/nota-11694-La-Corte-declar–inconstitucional-cambios-en-el-Consejo-de-la-Magistratura.html.

[101]Personal communication with a federal prosecutor (B).

had the unilateral capacity to appoint a new composition of the Court. Unsurprisingly, the Supreme Court was "an indispensable element of political support for the sitting president" during this period (Bianchi, 1997).

What changed after 2005? In addition to the justices' attitudes, two factors enabled the emergence of an autonomous and assertive Supreme Court: (1) an institutional design favoring judicial autonomy and (2) coalition-building strategies implemented by the Court to protect itself from executive co-optation. Regarding the first factor, the Argentine Constitution establishes that (a) to remove a justice, the executive needs approval from two-thirds of the members present in both Chambers of Congress; and (b) to appoint a justice, the executive requires support from two-thirds of the members present in the Senate (Brinks and Blass 2018, 23–27, 149, 157–169).

Regarding the second factor, non-judicial actors who used their resources to protect the courts were crucial to preserving judicial autonomy. Argentina's institutional design was effective in preserving judicial autonomy only because the Radical Party (the main opposition party)[102] and other small parties decided to resist executive co-optation and leveraged their veto power in Congress to reject Cristina Kirchner's candidates for the Supreme Court (2015), block potential additions to the Court, and reject attempts to remove a justice.[103] As shown, the Radical Party also played a crucial role in blocking the co-optation of lower courts through the Judicial Council.

Given that the Radical Party (and other opposition parties) had supported the removal of five justices between 2003 and 2005 because of their total submission to Carlos Menem's Administration, it could not have been assumed that they would automatically defend the Supreme Court between 2007 and 2015. It was the justices' attitudes and behavior that convinced the Radical Party to do so. In fact, this was precisely one of the reasons why, after 2005, the Supreme Court chose to take a decisive break with the past. It was the Supreme Court's decision to implement coalition-building strategies that shielded the justices from any form of co-optation.

The case of Argentina demonstrates that some formal rules can safeguard democracy only if actors choose to use them for that purpose. If opposition members in Congress are divided or co-opted by the executive, constitutional supermajorities alone will not safeguard judicial independence. This was evident in Mexico in 2024 when a constitutional amendment to reform the judiciary reached the necessary

[102]This does not mean that there was a systematically unified, cohesive, and unbreakable opposition. On the contrary, non-Peronist parties experienced steep deinstitutionalization, decay, fragmentation, and denationalization (Gervasoni 2018). Moreover, Cristina Kirchner's running mate in 2007 was a governor from the Radical Party and the executive peeled off numerous opposition legislators to vote for some of her most consequential public policies (Garcia-Holgado 2023a, 226). Adrián Ventura, "Lorenzetti dijo que el fallo no pone fin a la pelea por la ley de medios," *La Nación*, October 31, 2013, https://www.lanacion.com.ar/politica/lorenzetti-dijo-que-el-fallo-no-pone-fin-a-la-pelea-por-la-ley-de-medios-nid1634064/.

[103]Interview with Julián Álvarez. See also, "Cristina retiró el pliego de Carlés y propuso dos nombres para la Corte," *La Nación*, October 29, 2015, https://www.lanacion.com.ar/politica/cristina-retiro-el-pliego-de-carles-y-propuso-dos-nombres-para-la-corte-nid1840773/?R=184c31; Lucía Pereyra, "El último antecedente del kirchnerismo: el juicio político a Fayt, una embestida que se disipó en el tiempo," *La Nación*, January 29, 2023, https://www.lanacion.com.ar/politica/el-ultimo-antecedente-del-kirchnerismo-el-juicio-politico-a-fayt-una-embestida-que-se-disipo-en-el-nid29012023/; "Julián Álvarez no descarta sumar jueces de la Corte tras la salida de Zaffaroni," *Perfil*, October 14, 2014, https://www.perfil.com/noticias/politica/Julián-Álvarez-no-descarta-sumar-jueces-de-la-corte-tras-la-salida-de-zaffaroni-20141014-0027.phtml.

support of two-thirds of the members present in the Senate because of the actions of two senators from opposition parties.[104]

Counterfactual analysis and alternative explanations for the Argentine case

Three realistic counterfactual scenarios between 2003 and 2006 could have resulted in a weaker, less assertive Supreme Court, thereby facilitating democratic erosion. The first scenario envisions Néstor Kirchner appointing justices with "preference independence," but who (a) believed their role was limited to ruling on individual cases, (b) endorsed judicial restraint and maintained a deferential attitude toward the executive, and (c) adhered to a textualist approach to the law. Importantly, such "traditionalist" and "isolationist" justices could have been appointed with strong support from the opposition, as they would have been independent of Kirchner. At the time, the main concern of opposition parties was to create a Supreme Court independent from the executive, in contrast to the co-opted Supreme Court during Carlos Menem's presidency.

Once appointed, these justices, due to their attitudes and role conception, would have been less likely to effectively confront the executive. Cristina Kirchner's legal strategies were not blatantly unconstitutional when interpreted narrowly and textually. Consequently, justices embracing self-restraint, textualism, and deference to the executive would have been less inclined to rule against her. This illustrates the cunning of autocratic legalism: its ability to exploit formal legality to undermine liberal democracy from within.

Even if these justices had considered ruling against the executive on purely legal grounds, they likely would not have pursued coalition-building strategies (again, due to their attitudes and role conception). Consequently, they would have been isolated from other actors. Given Argentina's lack of a tradition of assertive courts, an isolated judiciary would have been unlikely to block Cristina Kirchner's measures effectively. Lower-level judges lacked connections with the Supreme Court before 2006/2007; between 2001 and 2005, the judiciary faced an unprecedented legitimacy crisis; and the Supreme Court between 1990 and 2003 was disunited, divided, and accused of corruption and dependence on the executive. It's hard to see how that judiciary could have stopped the executive.

In a second counterfactual scenario, Néstor Kirchner could have appointed independent justices with either "a weak character" and/or a previous record that made them vulnerable to blackmail and other informal pressure mechanisms that Cristina Kirchner implemented (including the use of intelligence services). In other words, these justices might have had "preference independence" but lacked "decisional independence" (Brinks 2005, 598–602).

A third counterfactual scenario could have involved the appointment of independent judges with conflicting personalities and ambitions, leading to a divided and paralyzed Court. This would have made it less likely that the Court would have agreed to the implementation of the coalition-building mechanism, as it relied heavily on Chief Justice Lorenzetti's leadership. His leadership, in turn, depended on his excellent working relationship with the other justices, who, after all, were the ones

[104]Elia Castillo Jiménez, "La reforma judicial hiere de muerte a la oposición," *El País*, September 12, 2024, https://elpais.com/mexico/2024-09-12/la-reforma-judicial-hiere-de-muerte-a-la-oposicion.html.

electing him as Chief Justice every three years. A divided Court without clear leadership would have been more vulnerable to the pressures of the executive. In all three counterfactual scenarios, the likelihood of the Supreme Court effectively blocking the executive's measures against freedom of expression and judicial independence would have been significantly lower.

Two alternative explanations argue that the absence of some additional causal condition was sufficient to explain why there was democratic resilience. The first alternative explanation claims that democracy experienced no erosion because Cristina Kirchner lacked sufficient legislative power to *unilaterally* secure the necessary supermajorities to amend the Constitution or to remove and appoint justices. In this view, the mere lack of legislative supermajorities provided enough protection against democratic erosion. However, Cristina Kirchner's legislative coalition was powerful enough to pass ordinary legislation that could have undermined freedom of expression and judicial independence. Absent the Supreme Court's attitudes and the coordinated actions of opposition parties and justices, the executive would likely have implemented those laws (and many other decisions), as she did have sufficient legislative support to do so. As a federal judge told me, "All the strategies that the Kirchners used against *Clarín* would not have failed if they had counted on loyal judges."[105]

The second alternative explanation could claim that Cristina Kirchner never achieved the very high level of popular support that appears necessary for populist leaders, such as Hugo Chávez, Rafael Correa, and Evo Morales, to "suffocate democracy." This was, in turn, the consequence of the absence of a massive hydrocarbon windfall (Weyland 2024, 150). Given her limited popular support, this alternative explanation highlights the importance of the large protests against the executive in 2012 and 2013, which were critical in preventing the lifting of term limits (Weyland 2024, 150–151). Additionally, the division within the Peronist Party between 2013 and 2015, numerous conflicts between the executive and major unions, and the absence of a commanding victory in the 2013 midterm elections could also be interpreted as significant constraining factors on Cristina Kirchner. However, the combination of all these limitations was not sufficient to prevent her from enacting laws and implementing administrative measures that could have undermined freedom of expression and judicial independence.

In conclusion, I do not affirm that, if my two causal conditions and two mechanisms had been absent, Cristina Kirchner would have caused a democratic breakdown à la Hugo Chávez. My claim is different. I argue that if the Supreme Court had not acted as it did, judicial independence and freedom of expression (two essential components of liberal democracy) would have declined. This would have certainly led to a deterioration of democracy, which is the essence of democratic erosion (a concept that is distinct from democratic breakdown or a transition to a hybrid/competitive authoritarian regime).

Conclusion

This article argues that two conditions enable apex courts to play a unique role in resisting executive aggrandizement: (1) justices must possess both preference and

[105]Interview with a federal judge (B).

decisional independence, and (2) they must hold specific attitudes and role conceptions that motivate them to resist the executive. These conditions are necessary to activate two causal mechanisms in favor of democratic resilience: (a) the use of judicial review to counter autocratic legalism and (b) the formation of coalitions between actors who enforce horizontal, vertical, and diagonal accountability.

The case of Argentina (2007–2015) illustrates how these mechanisms actually work. By employing judicial review, the Supreme Court frustrated President Cristina Kirchner's attempts to implement legal strategies against media owners and journalists. In turn, the media portrayed the justices positively and criticized the executive. Despite their fragmentation, opposition parties were united in rejecting any attempt to co-opt the Supreme Court or lower court judges. This coalition-building mechanism created a robust defensive wall that blocked executive aggrandizement. Neither regime outcome (democratic resilience versus erosion) in Argentina was predetermined by conditions existing before 2003; democratic resilience was the consequence of the preferences and strategies of the actors involved in this process.

This case study underscores a broader theoretical point. It is a conceptual mistake to reify terms such as "institutions" and "checks and balances," treating them as if they were things, something other than human products, such as facts of nature (Berger and Luckmann 1966, 106). So-called "institutional constraints" (Weyland 2024, 36–39), such as "inter-branch checking-and-balancing" (Weyland 2025, 9), are not impersonal forces or devices that automatically react to constrain executives. Such constraints are activated only if the actors who constitute the courts, legislatures, oversight agencies, and the bureaucracy have both the will and the determination to use their resources toward that end.

After all, the "institutional constraints" that impeded Donald Trump from altering the 2020 election results became effective only through the actions of dozens of Republican politicians, state officials, and judges (Abel 2024, 77–248). Institutions' constraining effects depend on how actors interpret the formal rules they must enforce and the decisions they make. If illiberal presidents replace key autonomous actors with loyalists, the same formal rules that were used to constrain executive power can be easily reinterpreted to promote executive aggrandizement. For instance, depending on which justice interprets it, the same Article II of the US Constitution can be used to limit or enhance the power of the President (Driesen 2021, 122–140). In the end, democratic resilience is sustained less by specific institutional designs than by the commitment and strategies of actors who use formal rules against executive aggrandizement.

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