Washington University
Global Studies Law Review

VOLUME 20 NUMBER 4 2021

SUPREME COURT APPOINTMENTS IN THE U.S. AND ARGENTINA

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ABSTRACT

This Article presents a comparative study of the appointment process to the Supreme Court in the United States and Argentina. The study reviews the Executive Branch's role, focusing on the selection criteria of potential candidates, such as age, professional expertise, and gender. As far as institutional design is concerned, the Article compares the procedures that can guarantee external evaluation and enhance the participation of interest groups and society at large, prior to formal nominations. A particular focus is laid upon recess appointments, to evaluate the extent to which this interim procedure conforms to current demands for improving the democratic legitimacy of the Judicial Branch. Furthermore, this Article explores and discusses the Senate's role, comparing procedural rules and recent institutional practices in both countries. Finally, using insights drawn from Game Theory, this study provides a model to better understand political dynamics and recently failed nominations.

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INTRODUCTION

The appointment of new Justices to the Supreme Court will inevitably bring along different approaches to the final interpretation of the supreme law of the land. Hence, the procedures that define the composition of the Court are of the utmost political importance.

Indeed, the Supreme Court plays a critical role in countries with democratic constitutions in upholding the rule of law and the principle of separation of powers. Moreover, judge-made law has become probably one of the most prominent sources of contemporary Constitutional Law, and it is indisputable that judicial decisions can affect "the polity quite radically."[1] In particular, in countries such as the United States and Argentina, the relevance of the decisions of the Supreme Court are paramount since they are structured upon a "strong-form" of judicial review.[2] This is a central feature of governance because public policies will not have a substantial impact if they are deemed unconstitutional by the highest judicial instance.

The United States and Argentina provide an adequate case study for an "inference-oriented" and "controlled" comparison.[3] This is primarily because of the profound influence that U.S. constitutional law had on the design of the Argentine constitutional text and institutional practice.[4] After the constitutional conventions of 1853 and 1860, Argentina promulgated its first Constitution, following the model of division of powers, checks and balances, and judicial review as formulated in the U.S. Constitution.[5] The letter and design of the fundamental structure of both Constitutions are almost identical. In particular, the organization of the Supreme Court and "the federal judicial power under the Argentine Constitution [are] strikingly

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1 Richard S. Kay, *Formal and Informal Amendment of the United States Constitution*, 66 AM. J. COMPAR. L. 243, 263 (2018)

2 *See* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 33 (2008) (defining "strong-form judicial review" as a system in which judicial interpretations of the Constitution are final and not revisable by ordinary legislative majorities).

3 *Cf.* Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMPAR. L. 125, 134 (2005) (explaining that an "inference-oriented" methodology seeks to draw causal explanations from "controlled" variables, that is, identified and verifiable facts, and claiming that this should be the predominant methodology in the social sciences and Comparative Law).

4 *See* 4 EMILIO RAVIGNIANI, ASAMBLEAS CONSTITUYENTES ARGENTINAS 468 (1939), (stating at the Constitutional Convention of 1853 that the Argentine Constitution was "cast in the mold of the Constitution of the United States").

5 *See generally* MANUEL J. GARCÍA-MANSILLA & RICARDO RAMÍREZ CALVO, LAS FUENTES DE LA CONSTITUCIÓN NACIONAL Y LOS PRINCIPIOS FUNDAMENTALES DEL DERECHO PÚBLICO ARGENTINO (2006).

similar to that of the United States Constitution."[6] Finally, the socio-cultural differences, divergent historical features, and uneven development of the political process in the two countries make it possible to isolate variables, underscore causal inferences, and in turn, provide valuable theoretical claims.

This Article focuses on those critical points of the appointment process to elaborate on causal explanations of similar or divergent outcomes. Upon this premise, the Article draws conclusions that can enrich both legal systems.

The Article is divided into five parts. First, it expounds the essential characteristics of both constitutional frameworks. This allows for identification and isolation of those variables that may prove useful for this case-study and set the foundations for meaningful and controlled comparative inferences.

In the second part, this Article analyzes the role of the Executive branch in the process of selecting prospective nominees. It will give an account of the formal and informal procedures used to vet possible candidates. It will also identify the advantages and disadvantages of different selection criteria and evaluative methods at the nomination stage.

In the third part, this Article will look at the Recess Appointments clauses in the U.S. and Argentine constitutions. Even though historically justified, this exceptional procedure for temporary appointments currently meets resistance and doubts as to its democratic legitimacy. The comparison between both systems aims at identifying common patterns that may help explain the present public concern with this particular type of interim appointment.[7]

In the fourth part, this Article analyzes the role of the Senate. The procedure for selecting Supreme Court judges is a complex, integrated federal act that requires coordinated action of two different branches of government. In this section, it will review the kind of balance or control that should be contemplated. Based on Game Theory, this Article will offer a

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6 Alberto F. Garay, *A Doctrine of Precedent in the Making: The Case of The Argentine Supreme Court's Case Law*, 25 SW. J. INT'L L. 258, 262 (2019); *see also* Carlos F. Rosenkrantz, *Against Borrowings and Other Non-Authoritative Uses of Foreign Law*, 1 INT'L J. CONST. L. 269, 270 (2003).

7 *See, e.g.*, Adam Liptak & Steven Greenhouse, *Impact of the Court's Ruling on Recess Appointments*, N.Y. TIMES (June 26, 2014), https://www.nytimes.com/2014/06/27/us/impact-of-the-courts-ruling-on-recess-appointments.html; Adrian Ventura, *La Jura de los Nuevos Jueces de la Corte, con Fecha Indefinida*, DIARIO LA NACIÓN (Dec. 26, 2015), https://www.lanacion.com.ar/politica/la-jura-de-los-nuevos-jueces-de-la-corte-con-fecha-indefinida-nid1855342/.

model to explain the almost identical institutional developments that took place within both Senates and resulted in recent rejections of specific nominees.

In the fifth and final part, this Article will present the conclusions that result from comparing these different aspects of the legal regimes and institutional practices of both countries.

I. CONSTITUTIONAL FRAMEWORKS

The comparative approach involves identifying and describing variables that allow us to make valid inferences. We start by describing shared constitutional rules and procedures and then present differences in institutional practices, propensities, and performances. Then, in the subsequent parts of this study, we provide theoretical claims regarding the appointment process of Supreme Court Justices.

A. The Appointment Process in the U.S.

In the U.S., the Supreme Court is comprised of a Chief Justice and eight Associate Justices,[8] who are appointed by the President and confirmed with the "advice and consent" of the Senate.[9] The Justices thereby appointed to the Court continue to hold office during good behavior[10] and may only be removed by Congress by means of impeachment proceedings.[11]

The confirmation process in the Senate usually prompts action by a large number of lobby groups that campaign for or against the nominee.[12] The Senate's Judiciary Committee holds public hearings to examine the qualifications of the nominee. These defining hearings usually "affect the odds of a successful nomination."[13] Then, the nomination moves to a floor vote by the full Senate, for its confirmation or rejection.[14]

From a formal point of view, the vote for the Senate's consent requires a simple majority.[15] This means that at least a majority of the senators

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8 28 U.S.C. §1 (1948).

9 U.S. CONST. art. II, § 2, cl. 2.

10 *Id.* art. III, § 1.

11 *Id.* art. II, § 4.

12 *See* DAVID A. YALOF, PURSUIT OF JUSTICES 16–17 (1999).

13 LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 88 (2005).

14 U.S. CONST. art. II, § 2, cl. 2.

15 *Id.*; *see also* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF

present vote favorably to confirm the nomination. In some cases, the Senate may reject a nominee explicitly or just abstain from voting until the President withdraws the nomination and a new appointment process is set in motion.[16]

Senators opposing a nomination have several procedural options. To start with, they may try to block or delay the activity of the Judiciary Committee requesting additional information on the candidate, calling for hearings and witnesses, a more thorough background check, or simply pressing for a more detailed report before forwarding the nomination to the Senate floor for its consideration.

Once the nomination has moved through the Committee to the floor and is ready to be voted on, opposing senators may try to gather enough votes for a formal rejection or threaten a "filibuster" that would delay the confirmation process indefinitely.[17] In response, the Senate adopted Rule 22, "providing a method by which debate could be brought to a close and a vote ordered on the motion on the floor. For half a century this rule required support from two-thirds of those present and voting to impose cloture."[18] In 1975, Rule 22 was amended, "changing the requirement to an absolute standard–60 votes–to close the debate,"[19] invoke "cloture,"[20] and force a vote on the matter being filibustered. Then, in 2013, the Senate eliminated the 60-vote rule on federal judicial appointments, a change that Democratic Senators "said was necessary to fix a broken system but one that Republicans said will only rupture it further."[21] Finally, in 2017, pending the confirmation process of Neil Gorsuch, a Republican dominated Senate eliminated the rule in its application to Supreme Court nominations.[22] In both cases, the majority of the Senate moved to change the rules to eliminate

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APPOINTMENTS TO THE SUPREME COURT 118 (1974).

16 *See* ABRAHAM, *supra* note 15, at 32; Donald E. Lively, *The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities*, 59 S. CAL. L. REV. 551 (1986).

17 *See* Stephen G. Calabresi, *Pirates We Be,* WALL ST. J. (May 14, 2003, 12:01 AM), https://www.wsj.com/articles/SB105287594162194800; Bruce Fein, *Confirmation Treachery*, WASH. TIMES (Mar. 23, 2003), https://www.washingtontimes.com/news/2003/mar/23/20030323-090150-5537r/.

18 David W. Rohde & Kenneth A. Shepsle, *Advising and Consenting in the 60-Vote Senate: Strategic Appointments to the Supreme Court*, 69 J. POL. 664, 664 (2007).

19 *Id.*

20 *Id.*

21 *Cf.* Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option'; Eliminate Most Filibusters on Nominees*, WASH. POST, (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-votethat-would-alter-centuries-of-recedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html.

22 *Cf.* Matt Flegenheimer, *Senate Republicans Deploy 'Nuclear Option' to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html.

the possibility of filibusters in this sort of debate, in what is usually called the "nuclear option."[23]

Thus, as of 2017, a supermajority is no longer required, and the concurrence of 51 senators (or a majority of the members present) guarantees the Presidential nominee's confirmation. This explains why the recent nominations of judges Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett were confirmed with fewer than sixty votes, following a vote closer to party lines than to broad social consensus.[24]

B. The Appointment Process in Argentina

Argentina's Constitution, originally promulgated in 1853 and amended in 1860, followed the U.S. model almost to the letter. It states that the federal judiciary be vested in the Supreme Court of Justice, which is the highest Court in Argentina, and in such other federal courts as might be created by Congress.[25]

The President has the power to appoint Justices to the Supreme Court, subject to confirmation by the Senate.[26] As originally worded, the confirmation required a majority vote of the Senators present (as in the U.S.) and that the vote should take place in closed sessions.[27]

However, even if the original constitutional wording was the same in both countries, significant differences have emerged over time due to divergent institutional practices. As noted by many Argentine scholars, "the most striking difference with the U.S. system as far as the appointment of federal judges is concerned lies in the way in which the Senate gave (and continues to give) its consent."[28]

In the U.S., hearings before the Judiciary Committee are usually scheduled with enough time for the nominee to provide as much information

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23 Gail Collins, Opinion, *The Public Needs a Nap*, N.Y. TIMES (Nov. 21, 2013), https://www.nytimes.com/2013/11/21/opinion/the-public-needs-a-nap.html ("Every once in a while, the majority gets fed up with all this stone-walling and threatens to change the rules. This is known as the 'nuclear option 'because change is worse than an atomic war.").

24 Robin B. Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President's Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. 53, 83 (2016) (explaining that the tradition of requiring a supermajority of sixty votes "has typically functioned is by helping to produce relative consensus appointments to the Supreme Court").

25 Art. 108, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

26 *Id.* art. 99, § 4.

27 2 MARÍA A. GELLI, CONSTITUCIÓN DE LA NACIÓN ARGENTINA 461 (5th. ed. 2018).

28 *Id.* at 462.

as possible and answer questionnaires forwarded by individual senators.[29] In addition, as noted above, the procedures in the U.S. have been traditionally public and high-profile: the hearings are televised, the senators subject the nominees to a thorough evaluation of their qualifications, abilities, beliefs, and past. Finally, each senator votes individually so that they are accountable to their constituency for the nominees they support or reject.

The experience in Argentina during the twentieth century was quite the opposite. The Senate met in closed sessions, and the nomination proposals that the senators approved sometimes contained minimal information regarding the nominee.[30]

During the debates of the Constitutional Convention of 1994, political forces agreed that every appointment of Justices to the Supreme Court was tantamount to an indirect constitutional amendment and therefore, the members of the Convention reached a consensus on the premise that the majority required to confirm a Justice should be the same as that needed to advance a reform of the Highest Law.

The Constitution was then amended, stating that the Senate must give its consent in a public session with a qualified majority vote of two-thirds of the members present.[31] This single provision created a significant change in the existing institutional practice, with the result that the proceeding became more transparent, gained prominence on the agenda of public debate, and led the President to nominate less divisive candidates.

Finally, the term of appointment for Supreme Court justices differs between Argentina and the U.S. In the United States, the original framework stated that Supreme Court justices continue to serve during good behavior. However, in Argentina, the 1994 amendment introduced the requirement that a justice be reappointed upon turning seventy-five years of age; the reappointment is for five years and may be renewed indefinitely.[32]

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29 EPSTEIN & SEGAL, *supra* note 13, at 88.
30 GELLI, *supra* note 27, at 461.
31 Art. 99, §4, CONST. NAC. (Arg.).
32 *Id.*

II. THE EXECUTIVE

The appointment of members to the Supreme Court is complex in both countries, entailing coordination and integration of the President and the Senate.

In making appointments, the Executive has historically exercised ample authority and espoused a number of standards and selection criteria, evaluating the nominee's political views, judicial philosophy, and even their personal life choices.[33] In both countries, the nomination is subject to the sole political discretion of the Executive.[34] Nevertheless, based on institutional practice and history, attempts have been made to provide procedural safeguards, and describe objective criteria that may contribute to the soundness of the selection process.

A. Procedural Checks

There are apparent differences between the gathering and processing of information to advise the President on the nomination of a Supreme Court nominee and filling any other office. Since the political stakes and institutional implications are significantly high, background investigations on Supreme Court nominees can range from teams of law professors examining the future judge's legal briefs to reports prepared by official investigators.

1. U.S.

In the U.S., there are no formal rules governing the nomination procedure. Consequently, certain agencies, advisors, interest groups, and the civil society at large participate through informal channels. It is not unusual for the FBI to conduct checks on prospective nominees in order to root out problematic candidates before nomination.[35] However, as the focus

33 *See, e.g.*, Catherine Pierce Wells, *Clarence Thomas: The Invisible Man*, 67 S. CAL. L. REV. 117 (1993) (explaining that during Clarence Thomas' confirmation hearings focused almost exclusively on the candidate's "personal history", or that Douglas H. Ginsburg withdrew from the confirmation process after it was disclosed that he frequently smoked marijuana at law school parties).

34 *See* GELLI, *supra* note 27, at 462; 2 GREGORIO BADENI, TRATADO DE DERECHO CONSTITUCIONAL 1263 (2004); 2 GERMÁN J. BIDART CAMPOS, TRATADO ELEMENTAL DE DERECHO CONSTITUCIONAL ARGENTINO 325 (1995); 1 LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 678 (3d ed. 2000); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 298 (6th ed. 2000).

35 Adam Goldman & Rebecca R. Ruiz, *How the F.B.I. Will Investigate the Kavanaugh Accusations*, N.Y. TIMES (Sept. 28, 2018), https://www.nytimes.com/2018/09/28/us/politics/kavanauagh-fbi-background-check.html (explaining that for background checks of federal judicial nominees, FBI agents

is set "more on candidates' personal background and fitness than on their professional merit," the record shows that this procedure has not been enough to prevent "major gaffes."[36]

On the academic and professional front, the Executive has historically relied on the rating and advice of the American Bar Association ("ABA"). For decades, the ABA has intervened in the federal judicial nomination process by vetting nominees and giving them a note.[37] The review is conducted by a committee completely insulated from the rest of the ABA's activities.[38] Nominees are rated as "well-qualified," "qualified," or "not qualified." If the President selects a prospective nominee, the committee chair then notifies the White House, the Department of Justice, the members of the Senate Judiciary Committee, and the nominee about the Committee's rating.

However, the ABA's influence over judicial selection "has ebbed and flowed."[39] In recent years, this informal vetting procedure sparked controversy. President Trump decided to notify the ABA "of the decision to cut them out of the vetting process."[40] In response, ABA President Linda A. Klein released a statement highlighting the role the ABA's independent Standing Committee on the Federal Judiciary had since the Eisenhower administration in vetting U.S. Supreme Court nominees, underscoring that they hope their recommendations are considered in the appointment process "to ensure that the Senate can make an informed decision about the professional qualifications of this and future Supreme Court nominees."[41]

In the case of the recent nomination of Amy Coney Barrett, the ABA issued a statement saying that the nominee was "well qualified."[42] In this case, the Republican Party senators expressly cited this endorsement in support of the Coney Barrett nomination[43]. This reflects that at present, the qualification given by the ABA is taken into account by the political bodies

typically focus on their professional lives interviewing "a minimum of 30 people with whom nominees worked, including judges, lawyers and law enforcement officials").

36 *Cf.* EPSTEIN & SEGAL, *supra* note 13, at 70.

37 *Id.* at 71.

38 *Id.* at 72.

39 MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENT PROCESS 230 (2000).

40 Adam Liptak, *White House Ends Bar Association's Role in Vetting*, N.Y. TIMES (Mar. 31, 2017), https://www.nytimes.com/2017/03/31/us/politics/white-house-american-bar-association-judges.html.

41 *Id.*

42 Debra Cassens Weiss, *Judge Amy Coney Barrett Rated 'Well Qualified' for Supreme Court by ABA Standing Committee*, ABA J. (Oct. 12, 2020, 9:45 AM), https://www.abajournal.com/news/article/amy-coney-barrett-is-rated-well-qualified-for-supreme-court-by-aba-standing-committee.

43 *Id.*

according to the convenience of the specific case. Therefore, it seems unclear if it will hold a stable and substantial role within institutional practice.

In summary, it follows that the information and control mechanisms that the Executive has at its disposal are not sufficiently formal—since they can be set aside by its decision alone—nor sufficiently broad, since a more open public participation and debate only occurs after the presidential nomination is made public.

2. Argentina

In Argentina, the presidential selection of a Supreme Court candidate has historically been handled behind closed doors and with the utmost secrecy. However, after the constitutional amendment of 1994, the nomination process's initial phase started to gain relevance in the public agenda. In 2003, the President signed Decree No. 222/2003,[44] creating a procedure to enable participation of individuals and NGOs in the process of vetting, questioning, and selecting Supreme Court candidates before the Executive's nomination is formally made.

Moreover, Decree No. 222/2003 laid down several substantive criteria to limit Executive's own discretion in the selection of a candidate. These serve as mere guidelines and do not restrain or limit the President's constitutional power, because the Decree can be repealed by a subsequent executive order at any time.

These substantive guidelines thus provide that the "moral and technical" competency of the nominees must be ensured, as must their specific "commitment to democracy and to the defense of human rights."[45] Additional criteria were included pointing to issues that are not directly linked to a nominee's competency but to other values and objectives of "architectural" policy, such as diversity of gender, geographic origin, and professional background.[46]

From a procedural point of view, several interesting features set the system apart from its U.S. equivalent. For example, the procedure provides for wide publicity of the personal, professional, and academic records of the potential nominee; the submission of an affidavit regarding any public or

44 Decree No. 222, June 20, 2003, B.O. 2 (Arg.).
45 *Id.*
46 *Id.*

private commitments to which they may be bound; the observance of the requirements set out in the Ethics in Public Office Act; and due compliance with their respective tax obligations.[47]

The purpose of the aforementioned procedural innovations is to allow interest groups or individuals to state whether they endorse or object to the proposed nomination. After examining these statements, the President formally makes the nomination and submits it to the Senate.

This procedure set forth in Decree No. 222/2003 has been used nine times since 2003.[48] In each case, the nominee became subject to heightened public exposure, which sparked a keen interest on the part of public opinion and raised the need of the political branches to pay heed to the terms of this robust social debate when adopting their stance.

It may thus be concluded that the new procedure, working exclusively in the Executive's realm, has proven instrumental in improving the existing institutional practice and, in particular, enhancing transparency and engagement in the selection process. This procedure also constitutes a useful mechanism to ensure that the most controversial issues concerning a prospective nominee be discussed at an initial stage and thus prevent eventual defeats in the Senate.

In sum, a comparison between the U.S. and Argentine models shows that the Executive can benefit from relying on a formal instance to vet candidates before nominating them without compromising its discretionary power.

In the U.S., the informal procedure of independent assessment by the ABA sparked political controversy and was discontinued unilaterally when this proved convenient. This is a setback for transparency, social engagement, and the President's ability to prevent an embarrassing defeat in the Senate.

The Argentine experience shows, on the contrary, that it is possible to provide a plausible procedural framework to structure minimum rules of publicity, participation, engagement, and control, without going to the extreme of unduly conditioning or limiting the discretion that the Constitution itself has granted in this matter. Likewise, the mechanism that allows for an initial nomination, of provisional nature, makes it possible to

47 *Id.*

48 The procedure set forth in Decree No. 222/2003 was used for the appointment of Justices Zaffaroni in 2003, Lorenzetti, Highton de Nolasco and Argibay in 2004, and Rosenkrantz and Rosatti in 2016. It was also used for the failed nominations of Carlés, Sesín and Sarrabayrouse in 2015.

save the presidential authority from a costly defeat in the Senate.

B. Selection Criteria

In both systems, the President is constitutionally empowered to make a nomination at his sole discretion. However, candidates often have different aspects or objective characteristics that, over time, will become decisive to secure the appointment. Thus, it is possible to identify prevalent factors and criteria that are relevant for a comparative approach.

1. Age

The age of a candidate has garnered interest both in the U.S. and in Argentina. In the U.S., this issue has been a matter of occasional public debate, beginning with the appointment of William O. Douglas at age forty, and following with the appointment of Clarence Thomas at age forty-two.[49] Despite the controversy, most senators considered in those cases that "youth cannot by itself be treated as a disqualification,"[50] and the candidates were swiftly confirmed.

However, more recently, some observers have pointed out that "Supreme Court appointees have been skewing somewhat younger of late. In the 1930s, the average age of the ten newly confirmed Justices was about fifty-eight. Gorsuch's swearing-in brought that figure to 51.7 years."[51] When Obama nominated Merrick Garland to the Supreme Court in 2016, commentators underscored that the nominee "was in his early to mid-60s, so it wasn't like they nominated somebody who was 48 years old who would be on the Court for 30 years. Obama did that as a gesture of conciliation."[52] Shortly after Obama's failed nomination of Garland, President Trump took office and nominated forty-nine-year-old Neil Gorsuch. President Trump said that age was one of the decisive factors in nominating his first candidate: "Depending on their age, a justice [can] be active for 50 years

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49 Mark Fahey, *Donald Trump's Top Court Nominee Is Young, But '50 Year' Term Is a Serious Long Shot*, CNBC (Feb. 1, 2017, 10:40 AM), https://www.cnbc.com/2017/02/01/gorsuch-age-donald-trumps-scotus-nominee-is-the-youngest-since-1991.html.

50 Henry P. Monaghan, *Essay on the Supreme Court Appointment Process: The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1211 (1988).

51 Gwynn Guilford, *117 Years of Data Show Why Today's Supreme Court Nominees Have More Influence than Ever*, QUARTZ (July 10, 2018), https://qz.com/1324841/brett-kavanaughs-age-at-53-means-that-he-may-wield-influence-on-the-supreme-court-for-a-very-long-time/.

52 Aaron Blake, *The One Big Reason Republicans Really Love Neil Gorsuch*, WASH. POST (Feb. 1, 2017, 10:58 AM), https://www.washingtonpost.com/news/the-fix/wp/2017/02/01/why-neil-gorsuchs-age-is-a-big-deal-for-republicans-and-the-supreme-court/.

and [their] decisions can last a century or more and can often be permanent."[53]

A similar debate occurred in Argentina in 2015, with the failed nomination of thirty-three-year-old Roberto Carlés. Commentators also pointed out that the most relevant aspect of his nomination was the possibility to serve for almost forty-two years.[54]

When evaluating this aspect, we address two issues of different natures. The first issue is using age as a proxy for personal maturity and competency for the position. In the United States, the Constitution does not require a minimum age to serve as a justice on the Court. In contrast, Argentina adopted the rule that the minimum age to hold office as a Supreme Court justice must be the same as that needed to become a Senator, *i.e.*, thirty years old. The rule laid down in Article 111 of the Constitution is thus calculated to ensure that the nominee possesses substantial professional experience and, above all, "stability of character."[55]

The second issue concerns the relationship existing between the age of a nominee for a lifetime position and the desire of a specific political faction to influence the ideological orientation of the Supreme Court for as many years as possible.

1.1 Maturity

As stated above, the U.S. Constitution does not establish a formal requirement in terms of a judge's minimum age or university degree. The satisfaction of requirements has thus been a matter left entirely to the political prudence of those taking part in the selection process. Nowadays, the U.S. approach is rare. Most constitutions set some sort of eligibility requirement to ensure that candidates to the higher courts are duly qualified and have relevant legal training and professional experience.

In this regard, the Argentine Constitution requires that both age and years of professional experience be taken into account to gauge the competency of the Supreme Court's prospective members. This rule has a

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53 Fahey, *supra* note 49.

54 *¿Quién es Roberto Carlés, el Candidato de Cristina para la Corte Suprema?*, LA NACIÓN (Jan. 28, 2015, 4:18 PM), http://www.lanacion.com.ar/1763831.

55 THE FEDERALIST NO. 62 (James Madison) (arguing that senators should act in their office with a certain "information and stability of character," for which it was necessary to have reached the age of thirty, in order to ensure that they had "reached a point in life when such advantages were more likely to be offered").

long-standing tradition in Argentina.[56] However, its particular threshold requirements of thirty years of age and eight years of professional practice seem outdated.

The minimum age of thirty years was introduced in Argentina borrowing a standard espoused in the U.S. in 1787 for the eligibility of senators, when life expectancy averaged 41.4 years.[57] In turn, Argentina adopted the standard in 1853, when the average life expectancy of its citizens was twenty-nine years.[58]

However, life expectancy at birth has climbed to 75.2 in Argentina[59] and 78.8 in the U.S.[60] It is clear that the original standard, aimed at ensuring that the nominee was at the peak of his personal and professional development cycle, is no longer valid. Therefore, in seeking an objective standard that may prove useful to assert what would be the optimal age of judges, it seems advisable to begin by reviewing the institutional practice over the years. This will give us a more dynamic and vivid insight into the social perceptions of personal maturity and the peak of lawyers' careers.

When we look at the age of the nominees who were appointed to serve on Argentina's Supreme Court since 1983, we notice that their average age is fifty-five years at the time of appointment.[61] If we analyze the sample from a statistical perspective, we can consider a standard deviation of eight years, which allows us to identify a "normality measure" or "interval" that ranges from forty-seven to sixty-three years of age.[62]

In the U.S., as mentioned above, the Constitution does not create an age

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56 Both article 93 of the Argentine Constitution of 1819, and article 112 of the Argentine Constitution of 1826, established that to be a member of the Supreme Court it was necessary to hold a law degree, eight years of professional practice, and to be forty years old. The Constitution of 1853 kept the wording of the 1819 and 1826 Constitutions, eliminated the need for forty years of age, but provided for the resubmission to the requirements to be a Senator. From there arises the parameter of thirty years that includes the current articles 55 and 111 of the Constitution of Argentina, which is none other than that established in article I, section 3, clause 3 of the U.S. Constitution.

57 J. David Hacker, *Decennial Life Tables for the White Population of the United States, 1790–1900*, 43 HIST. METHODS 45 (2010).

58 ORGANIZACIÓN PANAMERICANA DE LA SALUD, SALUD EN LAS AMÉRICAS 4 (2012).

59 MINISTERIO DE SALUD DE LA NACIÓN, INDICADORES BÁSICOS 2 (2012).

60 Elizabeth Arias & Jiaquan Xu, *United States Life Tables, 2017*, 68 NAT'L VITAL STAT. REPS. 1 (2019).

61 Martín Oyhanarte, *Carlés: Lejos del Perfil Adecuado*, CLARÍN (Dec. 8, 2016, 9:07 PM), https://www.clarin.com/opinion/corte_suprema-vacante-roberto_carles-oficialismo_0_rkOcUVqwQl.html.

62 *Id.*; *see also* Douglas G. Altman & Martin J. Bland, *Standard Deviations and Standard Errors*, 331 BMJ 903 (2005) (explaining that in data samples with normal distribution, about 95% of individuals will have values within 2 standard deviations of the mean).

threshold for members of the Supreme Court. Despite this different regulation, the United States' statistical record is strikingly similar to Argentina: in the U.S., the average age of all Supreme Court nominees is 53.6 years.[63]

A review of other countries in the Americas, reveals several constitutional provisions that have also set age and experience requirements. The issue is regulated diversely, but there is a common approach towards a higher minimum age and greater experience in modern constitutions than in constitutions enacted in the eighteenth or nineteenth centuries.

A first group of countries calls for a minimum age higher than what is prescribed in Argentina to serve on the Highest Court. For example, the minimum age in Peru is forty-five years;[64] in Guatemala, El Salvador, Haiti, and Uruguay it is forty years;[65] and Bolivia, Brazil, Costa Rica, Honduras, Mexico, Nicaragua, Panama, Paraguay, and the Dominican Republic require the nominee to be at least thirty-five.[66]

A second group of American countries regulate the issue without any reference to age and solely require a minimum number of years of professional experience. This is the model embraced by Chile and Venezuela, where fifteen years' experience is required regardless of the age of the nominee. [67] This approach was also adopted by European countries like Spain which requires fifteen years of professional practice[68] and Italy which requires twenty.[69]

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63 Guilford, *supra* note 51; Mark Hurwitz & Drew Lanier, *An Historical and Empirical Exploration of Judicial Diversity in Federal Courts*, 96 JUDICATURE 76, 82 (2012).

64 CONSTITUCIÓN POLÍTICA DEL PERÚ Dec. 31, 1993, art. 147.

65 CONSTITUTION DE LA RÉPUBLIQUE D'HAÏTI Mar. 10, 1987, art. 190 *ter*; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA NOV. 17, 1993, Decree No. 18-93, art. 216; CONSTITUCIÓN DE LA REPUBLICA DE EL SALVADOR Dec. 20, 1983, ch. III, art. 176; CONSTITUCIÓN DE LA REPÚBLICA ORIENTAL DEL URUGUAY Nov. 27, 1966, § XV, art. 235.

66 CONSTITUCIÓN POLÍTICA DEL ESTADO [CPE] Feb. 7, 2009, art. 199 (Bol.); CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 101 (Braz.); CONSTITUCIÓN POLÍTICA DE COSTA RICA Nov. 7, 1949, art. 159; CONSTITUCIÓN DE LA REPÚBLICA DE HONDURAS Jan. 11, 1982, tit. V, ch. XII, art. 309; CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [CP] Feb. 5, 1917, tit. 3, ch. IV, art. 95; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [Cn.] tit. VII, ch. 1, art. 161, LA GACETA, DIARIO OFICIAL [L.G.] 9 January 1987, as amended by Ley No. 330, Jan. 18, 2000, Reforma Parcial a la Constitución Política de República de Nicaragua, L.G. Jan. 19, 2000; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ Oct. 11, 1972, tit. VII, ch. 1, art. 204, GACETA OFICIAL NO. 25176, Nov. 15, 2004; CONSTITUCIÓN DE LA REPÚBLICA DEL PARAGUAY June 20, 1992, art. 258; CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA Jan. 26, 2010, art. 153, GACETA OFICIAL NO. 10561.

67 CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] Sept. 11, 1980, art. 78; CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA Dec. 1, 1999, art. 263, GACETA OFICIAL EXTRAORDINARIA NO. 36860.

68 CONSTITUCIÓN ESPAÑOLA [C.E.] Dec. 29, 1978, art. 159.

69 Art. 135 COSTITUZIONE [COST.] (It.).

We now raise the question of how to evaluate candidates who, though formally qualified to be appointed to office, stand considerably far from the statistical paradigm provided by institutional practice and from the trend observed in most American countries throughout the last hundred years.

For analytical purposes, we take two test cases, from Argentina and the U.S. One is that of Roberto M. Carlés, who was nominated at age thirty-three, and the other is that of Clarence Thomas, who was nominated at age forty-two. Within the framework of Argentine institutional practice -and also of that prevailing in the United States- these two ages may be objectively characterized as "atypical," or "outliers" because they are so far below the average.[70] In other words, and from a purely statistical point of view, they probably constitute "a different population than that of the sample values."[71]

It follows that candidates with these atypical characteristics do not meet the conditions historically deemed necessary in either country to be appointed to office. The farther such candidates stand from the average, the greater the need for an in-depth analysis of their adequacy.

This does not mean that a candidate should be dismissed upfront. The case may well be truly exceptional, a "black swan" who, despite young age, has attained exceptional experience and maturity, or someone whose advanced age does not prevent the candidate from keeping intact the vitality, lucidity, and energy that the position requires. Nevertheless, based on historical data, statistical analysis, and comparative law, it can be argued that this aspect of atypical nominees should be subject to rigorous and heightened evaluative standards. Thus, in these rare cases, characteristics that may be taken for granted in most cases should be specifically addressed during the evaluation stages before the Executive and within the Senate when the candidate represents an outlier.

1.2 Age and Ideology

Life tenure for justices in the U.S. and in Argentina make the age of a nominee to the Supreme Court a sensitive selection criterion from a purely institutional perspective.

Indeed, the younger the nominee, the more likely to serve for a longer

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70 *Cf.* FRANK E. GRUBBS, PROCEDURES FOR DETECTING OUTLYING OBSERVATIONS IN SAMPLES 2 (1974).

71 *Id.*

period. This means that, over time, the nominee's ability to influence the Court will be greater. We can see that this factor carries prime importance if we disregard individual cases and adopt the perspective of parties or ideological sectors that struggle for power.[72]

To understand more graphically the relationship between age and the ability to influence the ideological orientation of the Court, legal scholars have drawn on the theory of the "Median Justice." This theory was developed by Duncan Black, who created a model to analyze voting patterns where an absolute majority is required for decision-making.[73]

As applied to the Supreme Court, the theory rests on the assumption that the preferences of judges can be arranged on a one-dimensional, continuous spatial axis by taking into consideration, for example, their ideology or political philosophy ("left-right" or "conservative-liberal" axis).[74] According to this model, and regardless of the axis taken as a variable for analysis, there will always be a judge standing in the center (the "median") of the judges' preferences, arranged sequentially.[75] This judge will have the swing vote in most cases.[76] The most obvious implication is that the Court's case law will tend to lean towards the center of preferences held and embodied by the Median Justice.[77]

Still, we have to underscore that the Median Justice position is a relative function because it does not result from one Justice's attitude but from the overall composition and operation of the Court.[78] Therefore, those seeking to influence the ideological tenor of the Court will try to gradually move

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72 *Cf.* Jonathan N. Katz & Matthew L. Spitzer, *What's Age Got to Do With It? Supreme Court Appointees and the Long Run Location of the Supreme Court Median Justice*, 46 ARIZ. ST. L.J. 41 (2014); Charles Cameron, Jee-Kwang Park & Deborah Beim, *Shaping Supreme Court Policy Through Appointments: The Impact of a New Justice*, 93 MINN. L. REV. 1820 (2009).

73 Duncan Black, *On the Rationale of Group Decision-Making*, 56 J. POL. ECON. 26 (1948).

74 *See generally* Paul H. Edelman & Jim Chen, *The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics*, 70 S. CAL. L. REV. 63 (1996); *The Most Dangerous Justice Rides into the Sunset*, 24 CONST. COMMENT. 299 (2007).

75 Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1277 (2005).

76 *Cf.* Patrick Schmidt & David A. Yalof, *The Swing Voter Revisited: Justice Anthony Kennedy and the First Amendment Right of Free Speech*, 57 POL. RSCH. Q. 209–17 (2004).

77 Pablo T. Spiller, *Review of The Choices Justices Make*, 94 AM. POL. SCI. REV. 943 (2000). It is made clear that admitting this assertion does not necessarily imply ascribing to a purely "attitudinal" model of interpretation, which disregards the institutional constraints and strategic evaluations that influence judges' decision-making. It should also be noted that the fact that a President has nominated a judge does not necessarily mean that they have the same ideology, or that the judge retains the same thinking throughout his or her career. The ideological affinity between a President and a nominated judge is assumed in order to facilitate substantive analysis and because that is what happens in most cases.

78 Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 49 (2008).

that center of gravity towards their position.

If the age of judges is added into the equation, a self-evident conclusion is that in the long run, the party or ideological sector that systematically manages to appoint younger judges of their own ideological complexion will be able to alter the relative position of the median of preferences and thus influence the overall course of the Court's case-law.[79] In particular, this approach has been considered a deciding factor to account for the U.S. Court's move from the center towards the conservative pole over the last years.[80]

Farnsworth explains that this dynamic presents contemporary Presidents with the following dilemma: "if I appoint older justices while presidents from the other party appoint younger ones, I enlarge the influence of those other presidents at my expense; indeed, no matter what the next president of the other party does, I am better off appointing younger Justices."[81]

Under this speculation, the only way of preventing the incumbent party in the Executive from gaining this kind of advantage is to have opposition parties in the Senate give special institutional consideration to the evaluation of age. Demanding that Justices of a suitable age be selected is thus essential to ensure a balance in the Supreme Court caselaw's ideological and political direction.

This issue has not deserved attention in Argentina until the present, because in the past, the ways in which attempts were made to reconfigure the ideological position of the Supreme Court were not subtle: impeachment of the majority of its members (1946, 2002–2005); *de facto* dismissal (1955, 1966, 1976); dismissal as a consequence of reinstating the democratic regime (1958, 1973, 1983); and increase or reduction of the number of members of the Court (1960, 1989, 2006).[82] However, if Argentina continues to hold institutional stability in the future, this framework of analysis will probably take on greater prominence than in the past.

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79 *See* Kathleen A. Bratton & Rorie L. Spill, *Moving Up the Judicial Ladder: The Nomination of State Supreme Court Justices to the Federal Courts*, 32 AM. POL. RSCH. 198 (2004).

80 Katz & Spitzer, *supra* note 72, at 41; Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J.1, 69 (2007); Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100, 1126 (2001).

81 Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 69 U. ILL. L. REV. 407, 428 (2005); *see also* Charles M. Cameron, Jonathan P. Kastellec & Jee-Kwang Park, *Voting for Justices: Change and Continuity in Confirmation Voting 1937–2010*, 75 J. POL. 283, 288 (2013); *accord* Bratton & Spill, *supra* note 79, at 83.

82 HISTORIA DE LA CORTE SUPREMA ARGENTINA (Alfonso Santiago ed., 2014).

Hence, the median age resulting from institutional practice in both countries may be useful as a "focal point"[83] on which to build systemic consensus among the various political sectors.

2. *Expertise*

In the United States, those appointed to the Supreme Court may have pursued careers in different fields and areas of specialization, but in any event, their nomination hinges on their "judicial philosophy."[84] This means that nominees are usually evaluated—either by the Senate or public opinion—considering primarily their positions on fundamental questions of federal law, especially Constitutional Law, and not their background as trial lawyers. In other words, the core of the evaluation will be conducted through a "litmus test" on constitutional issues,[85] *i.e.*, a series of questions oriented to discern the candidate's position on questions that are ideologically divisive. In this sense, it is expected that the media or members of the Senate will investigate these aspects in depth.

In evaluating a candidate's professional background, the main focus is not usually centered on discussing the area of expertise or the branch of law in which the candidate has worked or become specialized. Neither the public opinion, nor political leadership entertains the idea that the Supreme Court should reflect a mix of experts from different branches of the law, or that some positions should be necessarily filled by experts in particular fields.

Although diversity is expected, the concept refers to issues of gender, race, religion, or geographical precedence, and by no means to the different areas of the law. Ideology is "central to Supreme Court nomination politics"[86] and it is "arguably the critical element."[87]

In Argentina, the debate on diversity in the Supreme Court has

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83 *See* THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 57 (1960) (defining a "focal point" or "Schelling point" as a Nash balance that stands out from the rest for reasons of symmetry, optimality or some other feature that makes it an intuitive or reasonable game solution for players).

84 *Cf.* Michael Stokes Paulsen, *The Constitutional Propriety of Ideological "Litmus Tests" for Judicial Appointments*, 83 U. CHI. L. REV. 28, 30 (2016) (arguing that considerations of judicial ideology o philosophy "should be absolutely central to the nomination and consent decisions"); EPSTEIN & SEGAL, *supra* note 13, at 47–83; Keith E. Whittington, *Presidents, Senates, and Failed Supreme Court Nominations*, 2006 SUP. CT. REV. 401, 404 (2007).

85 Paulsen, *supra* note 84, at 32 (explaining that the term, originally taken from chemistry, means here the possibility of asking the candidate a question on law "that yields the maximum possible information about judicial philosophy, sense of judicial role, constitutional interpretive methodology, and public moral courage").

86 Cameron et al., *supra* note 81, at 285.

87 *Id.* at 286.

traditionally revolved around the question of specialization and professional expertise of the nominees, only lately including the issue of gender. The appointments of Eugenio R. Zaffaroni and Carmen M. Argibay, the recently failed nominations of Roberto M. Carlés and Eugenio Sarrabayrouse, have distinctly signaled a trend to prioritize a substantial representation of "ciminal law specialists," or at least, a robust professional expertise in this area of the law.[88] At this point, we will analyze the soundness of and justification for this trend.

A widespread notion about the need for criminal law experts was put forward by former Supreme Court Justice, and actual member of the Inter-American Court of Justice, Eugenio R. Zaffaroni. He claimed that "there has always been a criminal law expert on the Supreme Court"[89] and that when there are no justices with this specific background, the Court does not work correctly.[90] However, a quick run-through of the history of the Supreme Court in Argentina proves this assertion is unwarranted.

As a matter of fact, from 1863 to the present, and including the appointments of Argibay and of Zaffaroni himself, a mere eleven out of the one hundred and seven jurists who have sat on the Supreme Court have been specialists in criminal law.[91] Four of them were appointed by *de facto* rulers, without the consent of the Senate.[92] Moreover, if we look at the time these eleven Justices held office, we notice that no criminal law expert served on the Supreme Court during ninety-four out of a total of one hundred fifty-two years,[93] confirming that there is no historical record to support the claim of a seat reserved for experts in criminal law.

From a more pragmatic angle, we should take into account the type and quantity of criminal cases disposed of by the Supreme Court at present.

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88 *Cf.* Jorge O. Bercholc, *Aportes Para una Selección Coherente y Congruente de los Jueces de un Tribunal Constitucional*, 2005 REVISTA DE DERECHO PÚBLICO 1 (2005).

89 *Id.* at 8.

90 Irina Hauser, *La Justicia va a Terminar con un Enorme Desprestigio*, PÁGINA (Jan. 3, 2015), https://www.pagina12.com.ar/diario/elpais/1-263151-2015-01-03.html (citing Eugenio R. Zaffaroni saying that current Supreme Court members are "afraid" of solving criminal cases, in particular "*the fear of the non-criminalist*").

91 Throughout history, the judges specializing in Criminal Law have been Octavio Bunge (1892–1902), Cornelio Moyano Gaciatúa (1905–1910), Lucas López Cabanillas (1910–1914), Luis C. Cabral (1966–1973), Ricardo E.G. Levene (1975–1976 and 1990–1995), Alejandro R. Caride (1976–1977), Emilio M.R. Daireaux (1977–1980), César E.N. Black (1980–1982), José S. Caballero (1983–1989), Eugenio R. Zaffaroni (2003–2014), and Carmen M. Argibay (2005–2014). *See* Santiago, *supra* note 82, at 84, 211, 213, 819, 895, 1059, 1067, 1071, 1194, 1692, 1693.

92 This is the case of Luis C. Cabral, appointed *de facto* by Juan C. Onganía, and Alejandro R. Caride, Emilio M. Daireaux and César Black, appointed *de facto* by Jorge R. Videla.

93 *See* HISTORIA DE LA CORTE SUPREMA ARGENTINA, *supra* note 82, at 2031–36.

What matters here is whether the Court handles a docket with a large number of criminal cases or whether, on the contrary, the number of cases of this type coming before it is relatively small.

To this end, we can review the number of cases and the number of rules in the area of criminal law where the Supreme Court has exercised its power of judicial review. This is the approach adopted by Jorge O. Bercholc, whose main conclusion is that "as shown by the statistical charts and considering both decisions and rules of law as the unit for analysis, the cases involving criminal issues are relatively few: only eight percent of the total."[94]

According to this scholar, between 1930 and 1983 the Supreme Court held national laws on criminal matters unconstitutional on only twenty-four occasions. By the same token, there was a much larger number of national legal provisions struck down as unconstitutional in the fields of labor and employment, civil, administrative, tax, and social security law. Bercholc thus concludes that the number of criminal cases coming before the Court is so small that "it does not seem to justify an appointment based on the Justice being a criminal law expert."[95]

In the few criminal cases that are brought before the Supreme Court, factual, evidentiary issues, or the application of substantive law are not at stake. These are issues to be disposed of by the lower courts, which include none other than the Federal Court of Criminal Cassation. Therefore, according to Law No. 48,[96] the only question that should make its way to the Supreme Court is the "federal question" that gives the right to file an extraordinary appeal, to the exclusion of, for example, issues involving the interpretation of the Penal Code by the lower courts. It should be recalled that if a "federal question" is to be satisfactorily resolved, substantial expertise is required in procedural and substantive Constitutional Law.

The issue under analysis here should be dealt with from a forward-looking perspective. Therefore, it is not possible to decide what a Justice's optimal background is without first defining the Supreme Court's desired political role.

Throughout the nineteenth century, it was clear that the core task of the Court was to vindicate federal law and secure the authority of national

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94 JORGE O. BERCHOLC, LA INDEPENDENCIA DE LA CORTE SUPREMA A TRAVÉS DEL CONTROL DE CONSTITUCIONALIDAD RESPECTO A LOS OTROS PODERES POLÍTICOS DEL ESTADO 8 (2004).

95 *Id.*

96 Law No. 48, Sept. 14, 1863, [1852–1880] A.D.L.A. 364, 366 (Arg.).

power.[97] Over time, due to political instability during the twentieth century and to heterodox positions like the doctrine of arbitrary and capricious review, the identity of the Argentine Supreme Court, gradually fell apart.

As it stands today, it is not clear in Argentina whether the Supreme Court is a general jurisdiction appellate court of last resort, or a branch of power specifically called upon to guard the democratic process and to ensure the protection of human rights. If this latter alternative embodies the true aspiration of the highest court, the justices who are to sit on its bench should be trained accordingly.

In this aspect, the U.S. institutional practice shows a well-defined model in which the Court acts as a guarantor of fundamental rights and an arbiter of the political process. However, without any constitutional constraint in the U.S. or Argentine Constitutions, this architectural responsibility is left entirely to the political interaction of the President and the Senate. The Argentine case, in turn, shows that it is relatively easy for partisan actors to lose their compass when it comes to adequately defining the Supreme Court's institutional role.

For this reason, seems wise to enact a textual regulation in which the Constitution explicitly defines the necessary expertise to sit on the Highest Court. In this sense, it would be both appealing and prudent to adopt a broad orientation, such as the one prescribed by the Constitution of the Plurinational State of Bolivia, which expressly provides that nominees to the Constitutional Court must show evidence of experience or specialization "in the areas of Constitutional Law, Administrative Law or Human Rights."[98]

3. Gender

In the second half of the twentieth century, with the advancement of the role of women in different social spheres, gender began to gain a place as a factor in selecting candidates for the Supreme Court in both countries. As the pool of female lawyers and judges grew larger,[99] empirical data from the U.S. began to show that the presence of female judges was actually affecting

97 1 NÉSTOR P. SAGÜÉS, RECURSO EXTRAORDINARIO 244 (1981).

98 CONSTITUCIÓN POLÍTICA DEL ESTADO [CPE] Feb. 7, 2009, art. 199 (Bol.)

99 *Cf.* Hannah Brenner & Renee Newman Knake, *Rethinking Gender Equality in The Legal Profession's Pipeline To Power: A Study On Media Coverage Of Supreme Court Nominees*, 84 TEMP. L. REV. 325, 327 (2012) (showing that in the U.S. women graduate from law school in approximately equal numbers to men, and have done so for over since 2002).

"collegial decision-making."[100] Although some studies have shown that female judges "do not decide cases in a distinctively feminist or feminine manner,"[101] there is a growing consensus around the idea that a change in the court's demographics introduces new perspectives, different dynamics in decision-making, and enhances the democratic legitimacy of the Supreme Court.[102]

As a result, several countries sought some kind of substantive or reflective representation in the judiciary, and so gender became in many cases a decisive selection criterion.[103] Comparative studies on the subject of gender indicate that in systems in which the appointment of members of the highest Courts are "politically exposed,"[104] the selection of women has been consistently higher. In these systems, political calculus "goes beyond the partisan association and qualifications of the potential justice and also includes significant consideration of the popular response and potential for electorate gain."[105] It is of interest to the study to review if the cases of the U.S. and Argentina confirm these findings.

3.1 U.S.

In the U.S., only five women have served as Supreme Court Justices. President Reagan nominated Sandra Day O'Connor in 1981, who was confirmed by unanimous vote in the Senate and became the first woman appointed to the Court.[106] Her case largely reflects the impact that public opinion had on the matter. Reagan had made a public commitment during

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100 Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005).

101 Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 79 IND. L.J. 891, 919 (1995); *see also* Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83 SOC. SCI. Q. 504, 504–18 (2002).

102 *See* Taunya Lovell Banks, *President Obama and the Supremes: Obama's Legacy—The Rise of Women's Voices on the Court*, 65 DRAKE L. REV. 911, 942 (2017) (stating that female Justices "bring with them a broader range of real life experiences that impact their understanding of the issues they face on the Court").

103 *See* Alice J. Kang, Miki Caul Kittilson, Valerie Hoekstra & Maria C. Escobar-Lemmon, *Diverse and Inclusive High Courts: A Global and Intersectional Perspective*, 8 POL. GRPS. & IDENTITIES 812 (2020).

104 *See* Melody E. Valdini & Christopher Shortell, *Women's Representation in the Highest Court: A Comparative Analysis of the Appointment of Female Justices*, 69 POL. RSCH. Q. 865, 872 (2016) (defining "exposed systems" as those where "electorally accountable selectors are able to claim credit for diversifying the Court, thereby achieving an electoral benefit a very low cost").

105 *Id.* at 866.

106 Hannah Brenner & Renee Newman Knake, *Shortlisted*, 24 UCLA WOMEN'S L.J. 67, 70 (2017) (explaining that before O'Connor's nomination in 1981, presidents formally considered at least nine women for that role).

his 1980 presidential campaign to appoint the first woman to the Court, a promise he kept when he replaced Potter Stewart.[107] The social impact of the event was reflected by the fact that it was the first televised confirmation hearing in history.[108]

O'Connor's performance was outstanding, and the advancement of women in politics did not stop. In 1993, President Clinton appointed Ruth Bader Ginsburg to replace Byron White.[109] Ginsburg was introduced to the mainstream media as a pioneer of women's rights litigation, a kind of "Thurgood Marshall of gender equality law,"[110] and signaled a presidential resolution to increase diversity among the Supreme Court members.

In 2006, in the face of O'Connor's retirement, there was a strong social mobilization to request that the replacement be a woman.[111] This did not happen, and instead Samuel Alito was nominated. This led to an increase in public pressure in 2009, demanding President Obama to appoint a woman to replace Justice Souter. The feminist movement indicated a clear "intention to continue this female-judge strategy until women reach a majority on the Court."[112] This approach paid-off in Obama's next nomination, when he selected Sonia Sotomayor. As in the case of Reagan, Sotomayor's candidacy came as no surprise since it was part of the presidential election agenda.[113]

Finally, there was the appointment of Elena Kagan, also at the behest of President Obama, in 2010. She was a candidate with outstanding academic credentials—a former Dean of Harvard Law School—but found some resistance due her previous work as an Associate White House Counsel during the Clinton Administration and as U.S. Solicitor General.[114] However, the Senate confirmed her nomination with a vote of 63 to 37.

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107 YALOF, *supra* note 12, at 179.

108 Olivia B. Waxman, *Supreme Court Confirmation Hearings Weren't Always Such a Spectacle. There's a Reason That Changed*, TIME (Sept. 6, 2018, 10:57 AM), https://time.com/5382104/brett-kavanaugh-supreme-court-confirmation-hearing-history/.

109 Henry J. Reske & Stephanie B. Goldberg, *Two Paths for Ginsburg: The Trailblazing Women's Rights Litigator Became a Moderate Judge*, 79 ABA J. 16 (1993).

110 YALOF, *supra* note 12, at 200.

111 Rosalind Dixon, *Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-Examination*, 21 YALE J.L. & FEMINISM 297, 298 (2010).

112 *Id.*

113 Terry Carter & Stephanie Francis Ward, *The Lawyers Who May Run America*, ABA J. (Nov. 2, 2008, 3:59 AM), https://www.abajournal.com/magazine/article/the_lawyers_who_may_run_america.

114 *Cf.* Carl Hulse, *Senate Confirms Kagan in Partisan Vote*, N.Y. TIMES (Aug. 5, 2010), https://www.nytimes.com/2010/08/06/us/politics/06kagan.html.

With the death of Ruth Bader Ginsburg, the issue of gender came once again to the fore of political debate.[115] Ginsburg was not only an icon of the women's movement, she was also a fundamental part of the progressive bloc at the Supreme Court.[116] In addition, the vacancy came just weeks before the presidential election. For these reasons, the prospect of her replacement sparked great controversy.

In this context, given the "exposed" nature of appointment procedure, it was not a surprise that the gender of the candidate became a determining factor in President Trump's selection. Media covering the issue underscored that Ginsburg's replacement would have substantial electoral impact, and that the candidate would be picked among a shortlist of women.[117]

Almost immediately, President Trump nominated Amy Coney Barrett. Despite the proximity to the presidential election, the Senate confirmed her nomination with a vote of 52 to 48. On October 27, 2020, Barrett was sworn in and began her term as the 115th Supreme Court Justice.[118] Therefore, as of 2020, three women sit in the U.S. Supreme Court, representing one-third of the nine-member total.

3.2 Argentina

In Argentina, the pattern has been similar, where only three women have ever sat on the Court. The first one was Margarita Argúas, appointed in 1970, becoming the first woman to hold a position on a Supreme Court in the Americas. Even though Argentina was not under a democratic regime at the time of her appointment, *de facto* President Levingston appointed Argúas with clear political intent. The military President sought to gain legitimacy in the eyes of public opinion, so he termed the appointment as an act of "deserved justice, but also a tribute to the already considerable human and professional development of Argentine women."[119]

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115 *See, e.g.*, John Wagner, Derek Hawkins & Hannah Knowles, *Trump Says He Will Nominate Woman to The Supreme Court Next Week*, WASH. POST, (Sept. 20, 2020, 11:20 AM), https://www.washingtonpost.com/politics/2020/09/19/ruth-bader-ginsburg-death/.

116 Banks, *supra* note 102.

117 *See, e.g.*, Kadhim Shubber, *Who is on Trump's List to Replace Ruth Bader Ginsburg?*, FIN. TIMES (Sept. 20, 2020), https://www.ft.com/content/b5e60471-f8f3-4d0b-98c9-ca34141b93e9; *accord* Peter Baker & Maggie Haberman, *Trump Presses for New Justice 'Without Delay' as Election-Season Battle Looms*, N.Y. TIMES (Sept. 19, 2020), https://www.nytimes.com/2020/09/19/us/politics/supreme-court-trump.html.

118 Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html.

119 *Cf.* Luciana B. Scotti, *Margarita Argúas: Precursora y Jurista Ejemplar*, *in* HOMBRES E IDEAS

With the return of democratic rule in 1983, it became necessary to reappoint all the members of the Supreme Court, but no woman was nominated. However, the presence of women in politics became a sustained trend by the end of the twentieth century, leading to the appointment of Carmen M. Argibay to the Supreme Court in 2004. She was, then, the first woman to be nominated by a democratic government.[120] In the same year, the Senate confirmed the nomination of Elena I. Highton, raising the number of women on the tribunal to two out of seven.[121]

Later, Congress reduced the size of the Supreme Court from seven to five members, which is the current number.[122] Justice Argibay died in 2014, and the two subsequent vacancies were filled by male candidates, bringing the current representation of women to a mere one out of five.

There was public outcry in response to the male dominated composition of the Court. In response, members of the governing coalition sent Congress a bill in 2020 which proposes to increase the number of judges to nine and to ensure gender diversity, requiring that the Court may not be composed of more than five judges of the same gender.[123] While the constitutional soundness of this bill has been criticized, the need for greater female representation was welcomed by public opinion.[124]

In summary, considering the experience in the U.S. and Argentina, we can conclude that the appointment procedure tends to follow and adequately reflect the electorate's views on the importance of gender diversity in both countries.

In these cases, it is clear that there is a political need for Presidents to appoint women to meet social demands for greater equality and diversity at the highest levels of government. This could be explained because having a growing percentage of women in leadership positions is perceived and accepted as adding significant value across the political spectrum.

DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD DE BUENOS AIRES 273, 274 (Tulio Ortiz ed., 2016).

120 *Argibay, a un Paso de la Corte*, LA NACIÓN (Feb. 1, 2005), https://www.lanacion.com.ar/politica/argibay-a-un-paso-de-la-corte-nid675752/.

121 *Id.*

122 Law No. 26.183, Dec. 18, 2006, B.O. 1 (Arg.).

123 *Senado: Oficialismo Lanza Idea de Aumentar Corte Suprema y Aplicar Género*, DIARIO AMBITO (Arg.) (June 2, 2020), https://www.ambito.com/politica/senado/oficialismo-lanza-idea-aumentar-corte-suprema-y-aplicar-genero-n5106771.

124 *See, e.g.*, Susana Medina, *Carmen Argibay: Una Jueza Que Honró a las Mujeres*, LA NACIÓN (May 11, 2020), https://www.lanacion.com.ar/politica/carmen-argibay-una-jueza-que-honro-a-las-mujeres-nid2363888.

Moreover, as the recent nomination of Amy Coney Barrett shows, a regression in female representation on the highest court is now unlikely, whether the appointment depends on either a liberal or conservative political majorities. As such, considering gender in the selection of candidates seems not only sound but indispensable to secure the Court's legitimacy in the context of politically exposed appointment systems, confirming the findings of existing academic research on the subject.[125]

III. RECESS APPOINTMENTS

The question of which constitutional body should appoint the federal judges initially divided the Framers at Philadelphia.[126] The compromise reached was aimed at seeking a balance between presidential initiative and political accountability, and the Senate's counterbalance.[127] This framework was complemented by the availability of "recess appointments," which allowed the President to make temporary appointments to the Supreme Court without the Senate's advice or consent.[128]

It is important to underscore the historical context in which this mechanism was adopted. In the eighteenth century, the Senate was in recess for six to nine months each year.[129] Therefore, the Framers feared that the balance of powers would have the undesirable effect of paralyzing the filling of vacancies and, consequently, disabling the action of the courts and other departments of the State.

The present-day situation is entirely different. Since the evolution and availability of means of transport make long recesses incredibly rare, public perception of the application of this exceptional appointment mechanism has been viewed lately as a shortcut and a chance for abuse of power. Therefore, the recess appointment power deserves a strict scrutiny.

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125 *See* Valdini & Shortell, *supra* note 104.

126 David Strauss & Cass Sunstein, *The Senate, the Constitution and the Confirmation Process*, 101 YALE L.J. 1491, 1495–1500 (1992).

127 *Id.*

128 *Id.*

129 Steven M. Pyser, *Recess Appointments to the Federal Judiciary: An Unconstitutional Transformation of Senate Advice and Consent*, 8 U. PA. J. CONST. L. 61, 63–64 (2006).

A. Recess Appointments in the U.S.

Article, II, Section 2, Clause 3 of the U.S. Constitution provides that "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

This rule has served over the years as the basis for a relatively frequent practice in the U.S., specifically for the temporary appointment of Justices to the Supreme Court.[130] There is a record of more than fifteen Justices appointed temporarily, including the noted cases of Earl Warren, William Brennan, and Potter Stewart.[131]

However, in the second half of the twentieth century, no President ever appointed a Supreme Court Justice through this interim procedure.[132] More recently, the power has been used with extreme restraint, and only to fill vacancies in the lower courts. In these few cases, the Senate pressed a wide array of vehement objections. The Senate has repeatedly expressed its dissatisfaction with this constitutional shortcut by introducing non-binding resolutions and attempts to set statutory limits on recess appointments.[133] These resolutions illustrate "the desire for a standard to limit the scope of the clause, but do little to provide constitutional justification for the limits the resolutions propose."[134]

The Supreme Court, in turn, had never defined the extent of the recess appointment power until its decision in *NLRB v. Noel Canning*.[135] The Court adopted a flexible view regarding the concept of when the Senate would be in a recess so that the President could make a temporary appointment, but it also gave the Senate more control over the timing and length of recesses. This hint to the Senate's prerogative was probably the most important result.

In any case, a modern approach underscores that the Recess Appointments Clause "today often serves a purpose quite different from that

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130 Henry B. Hogue, *"The Law": Recess Appointments to Article III Courts,* 34 PRESIDENTIAL STUD. Q. 656 (2004).

131 Michael A. Carrier, *When is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2231 (1994).

132 Steven M. Pyser, *supra* note 129, at 82.

133 Carrier, *supra* note 131, at 2231 n.42 (explaining that in the 1950s, after President Eisenhower made recess appointments to the Supreme Court, the Senate passed a sense-of-the-Senate resolution condemning such appointments, and that this resolution seems to have been successful in dissuading subsequent presidents from making recess appointments to the Supreme Court).

134 *Id.* at 2232.

135 573 U.S. 513 (2014).

of ensuring that the public service does not suffer due to a vacancy in office left unfilled while the Senate is dispersed and unavailable during its recess."[136]

This leads us to the question of whether modern Presidents, for example Presidents Obama or Trump, would have been able to use this power under present-day conditions. Based on *NLRB v. Noel Canning*, mentioned above, one would conclude that this would be constitutionally possible if the Senate enters into a recess of more than three days, during which time it takes no legislative action, even if minimal.[137] However, and leaving aside the formal constitutionality of the issue, there is consensus that this procedure has lost its democratic credentials, and therefore, the likelihood of a president using Recess Appointments "today seem to have diminished markedly."[138]

B. Recess Appointments in Argentina

The Argentine Constitution contains a rule that is almost the same as that in the U.S. Constitution,[139] spelled out in Article 99, Section 19. It states that within the presidential powers, the head of the Executive "may fill vacancies in offices that require the consent of the Senate, and that occur during its recess, through committee appointments that will expire at the end of the next Legislature."[140]

Constitutional practice shows that several Justices were appointed to the Supreme Court under the Recess Appointments Clause by different constitutional presidents. This includes: Luis Varela (1889), Abel Bazán (1890), Benjamín Paz, (1892), and Dámaso Palacio (1910).[141] To this list of judges, expressly appointed through the procedure of Article 99, Section 19, we can add another six Supreme Court judges appointed with some kind of exceptional situation that could also be considered as recess appointments: José Domínguez (1872), Onésimo Leguizamón (1877), Uladislao Frías (1878), Manuel Pizarro (1882), Luis Sáenz Peña (1890), and José Bidau

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136 William Ty Mayton, *Recess Appointments and an Independent Judiciary*, 20 CONST. COMMENT. 515, 516 (2004).

137 *Cf.* David A. Arkush, *The Original Meaning of Recess*, 17 U. PA. J. CONST. L. 161, 248–56 (2014).

138 Lyle Denniston, *Is a Recess Appointment to the Court an Option?*, SCOTUSBLOG (Feb. 14, 2016, 8:48 AM), https://www.scotusblog.com/2016/02/is-a-recess-appointment-to-the-court-an-option/; *see also* Ray M. Syrcle, *Recess is Over: Narrowing the Presidential Recess Appointment Power in NLRB v.* Noel Canning, 59 ST. LOUIS L.J. 1167 (2015).

139 Juan V. Sola, Opinion, *La Designación de Jueces en Comisión*, LA LEY, Dec. 17, 2015, at 1, 3.

140 Art. 99, § 19, CONST. NAC. (Arg.).

141 Jorge A. Diegues, Opinion, *El Nombramiento en Comision de los Jueces de la Corte Suprema*, LA LEY, Dec. 17, 2015, at 1, 6.

(1962).[142]

All of the Justices mentioned above came to sit on the Court at different points in history and under varying political circumstances. In all cases, the sitting members of the Court accepted the new members' swearing-in, thus endorsing the constitutionality of their appointment. Had they dissented, they could have refused to swear them into office.

This constitutional framework could have been modified in 1994, when a major constitutional amendment took place. Instead, the 1994 reform rewrote the rule indirectly, limiting the recess appointments to those of the Supreme Court. The rest of the federal judgeships shall not be filled by recess appointments, because in these cases the Constitution now requires a previous public evaluation of prospective candidates, based on records of service and an examination.

From another perspective, Argentina, as well as many other countries in the region, is a party to the American Convention on Human Rights, which was given constitutional hierarchy in 1994.[143] In keeping with the principle of due process, international human rights law allows for the appointment of provisional judges (on a restrictive exceptional basis), provided they enjoy a similar status of independence as regular judges.[144]

In summary, after the constitutional reform of 1994, recess appointments to the Supreme Court continue to be formally valid.[145] However, the Argentine case shows that current public opinion does not endorse nor would tolerate, as in other times, the use of this exceptional power. The centrality that the judiciary occupies nowadays as the guarantor of fundamental rights (as judges have acquired in the last thirty years all over the world)[146] makes the political viability of this appointment mechanism almost null.[147]

In other words, the device of Article 99, Section 19, of the Argentine Constitution appears to be now subject to a factual enabling consideration: "the political dimension, which may prudently advise, or not, and at what

142 Gregorio Badeni, *Un Decreto Válido y Constitucional*, LA NACIÓN (Dec. 17, 2015), http://www.lanacion.com.ar/1854871.

143 Art. 75, § 22, CONST. NAC.. (Arg.).

144 Reverón Trujillo v. Venezuela, Inter-Am. Ct. H.R. (ser. C) No. 197 (June 30, 2009).

145 *See* CAMPOS, *supra* note 34, at 248; GELLI, *supra* note 27, at 492; 5 MIGUEL A. EKMEKDJIÁN, TRATADO DE DERECHO CONSTITUCIONAL 148 (1999).

146 *See generally* C. NEAL TATE & TORBJÖRN VALLINDER, THE GLOBAL EXPANSION OF JUDICIAL POWER (1995).

147 Gonzalo G. Carranza, *Constitucionalidad y Oportunidad Política en el Nombramiento de los Miembros de la Corte Suprema en Argentina*, 22 ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 33–51 (2016).

moment, the use of the procedure."[148] This clause gives the President the power to make recess appointments, but the exercise—optional, not mandatory—of such authority may be practiced only under extremely exceptional circumstances.

C. A Comparative Inference

From comparing the constitutional frameworks as well as the recent historical experiences in both Argentina and the U.S., we can conclude that the presidential recourse to recess appointments has lost its historical justification and initial democratic legitimacy. Although constitutionally valid, the use of this provisional mechanism may prove unreasonable and would ordinarily be open to harsh criticism that may undermine the President and the candidate's ability to ultimately get the Senate's approval.

This explains why, aside from any formal or merely legal arguments, recent U.S. Presidents have refrained from using interim appointments. In Argentina, President Macri's initiative to appoint two justices to the Supreme Court by recess appointment at the end of 2015 failed to come to fruition.[149] The record or credentials of the two proposed nominees, Carlos F. Rosenkrantz and Horacio Rosatti, were not called into question. Still, there was marked disapproval from a large portion of the political spectrum and even within the government coalition.

It is, therefore, particularly noteworthy that there is, on the one hand, a converging trend towards recognizing the legality of recess appointment in the Constitution, while on the other hand, a reluctance to alter the makeup of the Supreme Court without a broad social consensus.

IV. THE SENATE

The appointment of Supreme Court Justices requires confirmation of the Senate. Legal scholars[150] and some judicial decisions[151] have pointed out that this mechanism was born in the U.S., and can be primarily traced down to Article II, Section 2 of the U.S. Constitution, which provides that the President has the power to appoint judges of the Supreme Court "by and

148 Néstor P. Sagüés, *La Designación en Comisión de los Jueces de la Corte Suprema*, EL DERECHO (2016-266-324).

149 *Vacantes en la Corte: Macri Envió los Pliegos de Rosatti y Rosenkrantz al Senado*, LA NACIÓN, (Feb. 1, 2016), https://www.lanacion.com.ar/politica/vacantes-en-la-corte-macri-envio-los-pliegos-de-rosatti-y-rosenkrantz-al-senado-nid1867267/.

150 *See* JOSÉ M. ESTRADA, CURSO DE DERECHO CONSTITUCIONAL 302 (1927).

151 Corte Suprema de Justicia [CSJN] [National Supreme Court of Justice], 23/11/1990, "Asunción de Funciones," Fallos (1990-313-1232) (Arg.); 23/5/2007, "Rosza, Carlos Alberto y otro s/ recurso de casación," Fallos (2007-330-2361) (Arg.).

with the advice and consent" of the Senate.

The Argentine Constitutions of 1819 and 1826 embraced this complex model, albeit by using a term slightly more favorable to the President, as they provided that judges of the Supreme Court would be appointed upon "notice and consent" of the Senate.[152] As shown by these predecessor constitutional texts, the U.S. notion of "advice" by the Senate to the President was minimized by being reduced to mere "notice." The requirement of "notice" was later entirely deleted from the constitutional draft written by Juan B. Alberdi in 1852[153] and from the text enacted in 1853. This is because U.S. history had already laid bare that the Senate's requirement of prior "advice" did not actually consist of any formal activity.[154] Therefore, the requirement of subsequent consent was sufficient for purposes of the checks and balances system. Furthermore, although the change from the English term "consent" to the Spanish "*acuerdo*" ("concurrence") seems to assign a more active role to the Senate, this is in fact inconsequential, as both notions are deemed equivalent from the legal point of view.[155]

As of 1994, Article 99, Section 4 of the Argentine Constitution provides that the President has the power to appoint Justices to the Supreme Court "with the consent of the Senate, stated by two-thirds of its members present at a public session called for such purpose." The new requirement of a supermajority of two-thirds of the Senators present, and of the publicity of the session, are highly valued additions created by the 1994 reform. However, the key notion is that of 'concurrence' ('*acuerdo*' in Spanish), which remained the same as that provided for in 1853.

We can, therefore, assert that the institutional practice followed by each country is of unique comparative value since the original American formula and its Argentine version are designed to establish a "deliberative"[156] process for the appointment of judges, in which the Senate should

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152 CONSTITUCIÓN DE LAS PROVINCIAS UNIDAS DE SUDAMÉRICA DE Apr. 22, 1819, art. 94 (Arg.); CONSTITUCIÓN ARGENTINA DE Dec. 24, 1826, art. 113 (Arg.).

153 JUAN B. ALBERDI, BASES Y PUNTOS DE PARTIDA PARA LA ORGANIZACIÓN POLÍTICA DE LA REPÚBLICA ARGENTINA 300 (1997).

154 GERHARDT, *supra* note 39, at 33.

155 In this regard, in the 1787 Philadelphia Convention debate, the terms "confirm," "concur," "approbation," and "consent" were used with identical and equivalent meanings. *See* THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1966).

156 Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, *in* HOW DEMOCRATIC IS THE CONSTITUTION? 102 (Robert A. Goldwin & William A. Schambra eds., 1980).

unquestionably "speak with its own voice."[157]

A. Evaluative Scope

We first must analyze the kind of evaluation or scrutiny that should be expected from the Senate. Throughout U.S. and Argentine history, several politicians and observers have argued for a somewhat limited Senate role in the judicial appointments process.[158] Is this pointing to a deferential stance by the Senate? Does the Constitution empower the Senate to play a significant role in terms of control? To answer these questions, we need to address the issue from different perspectives.

We begin with a historical approach, trying to determine the original intent of the U.S. Framers (and, correspondingly, that of their Argentine counterparts who transplanted the rule). We find that at the Philadelphia Convention of 1787, the system for appointment of Supreme Court justices was a last-minute compromise solution.

In the beginning, the plan devised by Mason, Gerry, and Ellsworth was to delegate the power of appointment exclusively to the Legislative Branch, but it was objected that this would be troublesome due to the difficulty in coming to an agreement within a body that was "too numerous."[159] On the other hand, placing the matter entirely in the hands of the President, as proposed by Hamilton and Madison, was considered dangerous.[160] An agreement was thus reached that the Executive and the Senate would share authority, in order to ensure accountability and neutralize any undue influence of the Executive over the Judiciary.[161] This compromise would then be explained by George Mason, one of the delegates of the Convention, saying that the words of the Constitution "give the Senate the power of interfering in every part of the Subject."[162] In summary, a historical review of the question indicates that the original intent was to establish a system supporting "a fully shared authority over the composition of the Court."[163]

Secondly, we can approach the issue from a structural point of view. If it is considered acceptable for the President to be able to select a candidate based on ideology, judicial philosophy or political slant, it should be

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157 Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185 (1988).

158 James E. Gauch, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337, 338 (1989).

159 Strauss & Sunstein, *supra* note 126, at 1497.

160 *Id.*

161 EPSTEIN & SEGAL, *supra* note 13, at 8.

162 Strauss & Sunstein, *supra* note 126, at 1495.

163 *Id.* at 1500.

reasonable for the Senate to be allowed the same kind of discretionary assessment. Along these lines, it has been argued that "nothing in the text or the structure of the Constitution suggests that the President may weigh ideology while the Senate may only weigh personal character and professional merit."[164] The logic inherent in the checks and balances system created by the Constitution is that of joint action, with the President moving first and the Senate moving second, but both may take into account the same factors in grounding their decision. If the Senate fails to play an autonomous role, one of substantial check on the Executive, then the Supreme Court's ability to act as an independent branch would become less likely.

Thirdly, institutional practice confirms the historical and structural conclusions set forth above. From inception, the U.S. Senate took the stance of evaluating nominees aggressively, with the understanding that the Constitution gives it authority to base its decision on "any grounds it deems appropriate"[165] and even to deny its consent on strictly ideological or political grounds.[166] This accounts for the fact that the U.S. Senate has explicitly rejected twelve candidates[167] and forced the formal withdrawal of nominations in another fifteen cases,[168] although the candidates possessed impeccable academic and professional credentials.[169]

Finally, we can apply these conclusions to Argentina, where the system itself has prompted the assertion that the appointment of Justices to the Supreme Court is a complex act entailing integration between the President and the Senate,[170] allowing for the most diverse political criteria to be taken into account "both for purposes of the appointment and of the provision of consent."[171]

From an axiological point of view, it is clear that the greater the breadth

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164 Akhil R. Amar & Vikram D. Amar, *The Ground Rules of the Appointments Game: Understanding the Structure Of Nominations And Confirmations*, FINDLAW.COM (Jan. 11, 2002), https://supreme.findlaw.com/legal-commentary/the-ground-rules-of-the-appointments-game.html; *see also* Monaghan, *supra* note 50.

165 GERHARDT, *supra* note 39, at 38.

166 Strauss & Sunstein, *supra* note 126, at 1500; Jeffrey Segal, *Senate Confirmation of Supreme Court Justices: Partisan and Institutional Politics*, 49 J. POL. 998–1015 (1987); Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146 (1988). For a historical study, see H. ABRAHAM, JUSTICES AND PRESIDENTS 71–153 (2d ed. 1985).

167 *Supreme Court Nominations (Present-1789)*, U.S. SENATE http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm (last visited June 22, 2021).

168 EPSTEIN & SEGAL, *supra* note 13, at 20.

169 *Cf.* Strauss & Sunstein, *supra* note 126, at 1500–01.

170 *Cf.* GELLI, *supra* note 27, at 462; CAMPOS, *supra* note 34, at 325.

171 GELLI, *supra* note 27, at 462.

of issues and qualities on which the Senate can inquire, deliberate, and finally pronounce itself, the better it can accomplish its balancing role. It is evident that, in both constitutional systems, the President has in this matter more procedural advantages and power than the Senate. Therefore, if one aspires to an actual check on the Executive, and not a mere formality to give the appearance of balance, it is necessary to maintain the rule according to which the Senate is not limited in its discretion to give its consent or reject a candidate.

B. Majorities

Regarding the majority required by the Constitution for the Senate to confirm a nomination, we mentioned above that in the U.S., as of 2017, a majority vote of the Senators present is enough to accord a confirmation. Before 2017, due to the application of traditional rules of procedure regarding filibusters, in practice, it was necessary to have 60 out of 100 votes.

In Argentina, the path has been precisely the opposite. While historically, the Constitution required an absolute majority of the members present, the constitutional reform of 1994 sanctioned a new rule that called for a supermajority of two-thirds of the Senators present.[172] At this point, it is pertinent to compare the effect of these divergent rules.

A first observation that we can make is that the recent partisan disputes over Supreme Court appointments in the U.S. show that it is not advisable to establish a supermajority rule based solely on the Senate's rules, senatorial courtesy, or mere tradition. Techniques such as filibustering judicial appointments may be rightly considered unconstitutional because they effectively alter the allocation of power among the branches of government. By increasing the number of Senators needed to confirm a nomination, Senate rules increase each Senator's relative power, and of the Senate as a whole, at the expense of the President. Following the principle of the separation of powers, the Senate cannot, especially not on its own accord, increase its power without offending the Constitution.[173]

Moreover, taking into account that a majority of Senators retains the constitutional right to adopt rules regulating the use of the filibuster,[174] it is

172 Art. 99, §4, CONST. NAC. (Arg.).

173 John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 201 (2003).

174 Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 245–52 (1997).

clear that establishing supermajorities by way of mere rules of procedure is far from being a reliable technique. It is impossible to create stable rules by these means since they can be dismantled at any time. This leads us to affirm that aggravated majorities should be entrenched into the Constitution.

Lastly, it is necessary to consider whether it is desirable to have a rule requiring a supermajority at all. In the U.S., it has been argued that this is objectionable, as the Framers would have required an express simple majority for these cases to efficiently fill vacancies. On this point, Michael Gerhardt underscored that "requiring a two-thirds supermajority for Supreme Court confirmations is problematic because it creates a presumption against confirmation, shifts the balance of power to the Senate, and increases the power of special interests."[175]

However, Amy Coney Barrett's recent nomination and confirmation exposes particularly negative aspects of a simple-majority system: conducted too quickly and completed with a slim majority made up exclusively of Republican senators.

It is clear, then, that with a simple majority rule in the Senate, it is very difficult to ensure that appointments in the judicial branch will be bipartisan and, to some extent, reflect a broad social consensus. It is possible that if this rule of procedure is not changed, the appointment of candidates with political affiliations or those at the ideological extremes will become increasingly frequent, which could significantly damage the legitimacy of the Supreme Court.

Against this backdrop, Argentina's recent experience shows that the adoption of a qualified majority rule has played a positive role in its institutional practice. This has forced the President to adopt a cooperative stance with the Senate. As an immediate and obvious consequence, the appointees gained democratic legitimacy.[176] Moreover, as the cases of Carlés, Sesín, and Sarrabayrouse prove, it was impossible for the President to obtain confirmation of her nominees within a few months of the presidential election, despite having a majority of more than half the votes in the Senate.[177]

In sum, the need for greater consensus among the leading political actors,

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175 Michael Gerhardt, *The Confirmation Mystery*, 83 GEO. L.J. 395, 398 (1994).

176 *Cf.* GELLI, *supra* note 27, at 464–65.

177 *A 42 Días de Dejar el Poder, el Kirchnerismo Intenta Nombrar dos Jueces en la Corte*, INFOBAE (Oct. 18, 2015), https://www.infobae.com/2015/10/28/1765720-a-42-dias-dejar-el-poder-el-kirchnerismo-intenta-nombrar-dos-jueces-la-corte/.

and the consequent greater acceptance of the candidates, has resulted in the growing prestige of the Judicial Branch. A supermajority may indeed delay the process; however, the eventual cost seems to be low compared to the greater benefits that become apparent with respect to the integration of the Highest Court.

C. Failed Nominations

So far, we have established that the Executive has wide discretion to select a candidate and, accordingly, the Senate has the prerogative to vote for or against the candidate based on a vast array of factors. Thus, one of the corollaries that derive from these premises is that the Senate is empowered to vote on purely political or even partisan grounds.

The case of a nomination being rejected by the Senate for entirely political reasons is not a bug, it is a feature. The founders themselves "created the possibility of failed Supreme Court nominations with the design of the appointment process."[178] In particular, both U.S. and Argentine recent history teach us that there is a very close link between the weakness of a President and the chances of his nominees for the Supreme Court being rejected by the Senate.[179]

This is especially prevalent when a President cannot run for re-election and is serving the last portion of his term of office (thus becoming a "lame duck," in political parlance).[180] It is at this point that a higher chance of candidate rejection can be anticipated, not only because the President's ability to exercise power is at its low, but also because the aspirations of the opposition in the Senate to make the appointment in the following term is at its peak.

This is why in the U.S., President Tyler's nominations were blocked by the opposition. Having manifested its will to turn down any nomination, the Senate rejected five nominees for the Court and only consented to fill the vacancy left by Justice Baldwin when a new President took office.[181] Also faced with resounding defeats were Presidents Cleveland, Johnson, Nixon, Reagan, G.W. Bush, and Obama who saw their nominations fail as they lost power. Statistics show that a "lame duck" President obtains senatorial consent to Supreme Court nominations in only forty-eight percent of the

178 Whittington, *supra* note 84, at 405.
179 *See generally* GERHARDT, *supra* note 39; Santiago, *supra* note 82.
180 GERHARDT, *supra* note 39, at 123.
181 Freund, *supra* note 166, at 1149.

cases.[182]

It is thus hardly surprising that the U.S. Supreme Court has remained incomplete for more than a year on seven different occasions[183] and that a new blockade ensued after the death of Scalia and the stalling of Merrick Garland's nomination.

In Argentina, a strikingly similar case occurred in 2015, during the last year of Cristina Fernández de Kirchner in office. A group of senators signed a joint statement announcing they would reject any nomination to the Supreme Court during that last year of the President's term, and so they did.[184] The President nominated three candidates, but none of them were voted in by the Senate. The seat was filled only after the election of a new President.[185]

Argentina's lack of institutional continuity could account for the absence of similar precedents. Nevertheless, in view of the current trend of democratic stability (along with the need, since 1994, to secure a two-thirds majority in the Senate), some degree of disagreement and dispute is almost inevitable. Most probably, it will be recurrent for the opposition in the Senate to take a stricter stance and to vote to turn away the candidates of weak or "lame duck" Executives.

This comparative review of both constitutional systems thus suggests that—ethical judgments aside—the existence of gridlock and a lack of coordination between the President and the Senate are inherent in the institutional design and possess a political logic to be evaluated by the electorate in each case.

D. Political Strategy and Game Theory

182 *Supreme Court Nominations (Present-1789)*, *supra* note 167.

183 This took place in the following periods: 1791–1792 (519 days); 1810–1812 (508 days); 1828–1830 (505 days); 1834–1836, (646 days); 1843–1846 (965 days); 1860–1862 (923 days); and 1969–1970 (391 days).

184 Gustavo Ybarra, *La Oposición Ratificó su Rechazo a Votar Candidatos a la Corte*, LA NACIÓN (Oct. 30, 2015), http://www.lanacion.com.ar/1841076.

185 Decree No. 83/2015, Dec. 15, 2015, B.O. 1 (Arg.).

The cases of recent failed Supreme Court nominations in the U.S. and Argentina show the relevance of discussing the role of the Senate in terms of Game Theory. Although the discussion calls for a certain level of abstraction and simplification, Game Theory helps us "to understand the behavior of all the players in a game, assuming they are all rational and intelligent individuals."[186]

The starting point here would have to assume a situation of a "two-person," "non-zero-sum" game with competitive elements,[187] where neither the Executive nor its political opposition in the Senate can define the result or outcome by themselves, independently of the other.

We add that, under this hypothesis, there is no independent third party who can enforce promises of either of the players to adopt or stick to one or another strategy. In other words, cooperation depends entirely on the will of each player.[188] If we consider the game as played in successive rounds, it allows both players to adopt staggered strategies, make threats, and take reprisals.

According to various theorists and depending on the specific circumstances that determine the pay-off matrix, the appointment of Supreme Court Justices can be studied under the representations of the "prisoner's dilemma"[189] or of the "game of chicken."[190] This latter variant seems to best fit the premises mentioned above and seems well suited to describe the specific situations in the U.S. and in Argentina in recent years, where the political scenario is sharply divided and the President is not able to control the Senate all by himself.

The "game of chicken" can be described as a classic movie scene: two drivers are driving their cars towards each other at full speed on a collision course; the driver who wins is the one who stays on course, while the loser is the coward (the "chicken"), who swerves at the last minute. If neither of them drives off the way, both players die. If both choose to avoid the damage, neither driver secures his best outcome.

In this game, there is no dominant strategy. Thus, when both players are set on securing their best outcome, the most effective maneuver is to convey

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186 ROGER B. MAYERSON, GAME THEORY: ANALYSIS OF CONFLICT 114 (1997).

187 MORTON D. DAVIS, GAME THEORY 81 (1997).

188 *Id.* at 75–172.

189 *Cf.* David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma,* 26 CARDOZO L. REV. 479 (2005).

190 *Cf.* DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, GAME THEORY AND THE LAW 44 (1998); GERHARDT, *supra* note 39, at 84.

a notion of extreme boldness, *i.e.*, the one who is ready to "double the bet" at all costs.

In the example given above, "player A must instill fear in player B, thus forcing B to give up his intention to go on driving in a straight line and not to drive off course."[191] According to this strategy, the player who holds himself out as irrational or as having made an irrevocable decision (*i.e.*, by pulling off or locking the steering wheel) has an obvious advantage.[192] This strategy is technically known as "Brinksmanship" and is aimed at "controlling the enemy through the semiotic display of an apparent lack of control."[193]

In light of these premises, we can have a deeper insight of the current dynamics and the striking similarities in senatorial strategies for the Supreme Court appointment process in the U.S. and Argentina, clearly shown in the latest cases in which presidential nominees were not confirmed (*i.e.*, Garland in the U.S.; Carlés, Sarrabayrouse, and Sesín, in Argentina).

Both players, the Executive and the opposition in the Senate, appear to be determined to secure their best outcome—appointing a Justice with a certain ideology or "judicial philosophy"—and at the same time, they appear to be indifferent to the political costs ensuing from a lack of coordination, such as an indefinite vacancy, a deadlocked Court, etc.

A rational starting point for the analysis would have to acknowledge that in both countries "the Senate and the President are not equal players in the appointment process. The President has intrinsic advantages over the Senate."[194] The Executive is able to make unitary decisions, has the prerogative to move first, decides when to start the process, and can pose threats such as picking successive nominees that may be less desirable for the Senate or even making a recess appointment. This is why the record shows that the vast majority of presidential nominations are successful.[195]

On the other hand, the opposing party has to deal with the coordination of a multitude of persons and interests,[196] and in the end, the Senate "only

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191 EDUARDO NIEVA, COMMUNICATION GAMES: THE SEMIOTIC FOUNDATION OF CULTURE 225 (2007).

192 ANDREW M. COLMAN, GAME THEORY AND EXPERIMENTAL GAMES: THE STUDY OF STRATEGIC INTERACTION 100 (1982).

193 NIEVA, *supra* note 191, at 222.

194 Whittington, *supra* note 84, at 406.

195 *Id.* at 408.

196 *See* Maria A. de Santa Cruz Oliveira Jardim & Nuno Garoupa, *Choosing Judges in Brazil: Reassessing Legal Transplants from the United States*, 59 AM. J. COMPAR. L. 529 (2011) (explaining

possess[es] a negative; it does not have the formal authority to dictate a particular selection."[197] Hence, the only way an opposing coalition at the Senate can influence the presidential decision is to move first and announce, in a convincing fashion, a drastic and irrevocable decision.

Consistent with Game Theory, at a certain point, the political opposition in the U.S. and Argentine Senate assumed that if it is not possible to influence the "opponent" (the Executive) before it makes its move (nominating), the only possible outcome would be to give up and yield the largest pay-off to the opponent, or to force a scenario in which both lose.[198]

Thus, the strategy adopted consists, at least on the communicational front, of appearing to have no control, based on the formulation of a compromise that necessarily brings about an advance rejection of any presidential proposal. As game theory explains, this is expected: "one of the paradoxes of non-zero-sum games is that a restriction of a player's choice may be turned to that player's advantage."[199]

At present, this is an undesirable situation, as the ideal conditions would be those favoring a deliberative process and an open dialogue leading to an informed selection of a suitable, independent candidate. However, given the currently intense polarization that characterizes modern politics, and in cases in which the end of the Executive's term of office is in sight, the only sensible "game strategy" that may yield cooperation is, paradoxically, to convey a message of irrational inflexibility.

The future will tell if these strategies, as bold as they are controversial, actually pay off. Likely, the adoption of an aggressive and confrontational strategy by a political party in the Senate will lead, in subsequent rounds, to reprisals from the opposing party, generating some crystallization of this negative dynamic. The apparent result, if that happens, will be more extended vacancies and greater ideological polarization within the Supreme Court itself. In both cases, the institutional outcome may be dangerously negative, damaging the normal functioning in which agreements should be encouraged to achieve a constitutional interpretation with stability over time. Future research may assess the extent to which these dynamics affect

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that in Brazil, a diffused, divided, and heterogeneous opposition in the Brazilian Senate has made it easy for the President to rally support for his Supreme Court nominees).

197 Whittington, *supra* note 84, at 408.

198 *See, e.g.*, Laura Serra, *Fuerte Rechazo de la Oposición a la Postulación de Carlés para la Corte*, LA NACIÓN (Jan. 30, 2015), http://www.lanacion.com.ar/1764224; David M. Herszenhorn, *G.O.P. Senators Say Obama Supreme Court Pick Will Be Rejected*, N.Y. TIMES (Jan. 23, 2016) https://www.nytimes.com/2016/02/24/us/politics/supreme-court-nomination-obama.html.

199 DAVIS, *supra* note 187, at 99.

the institutional performance of the Supreme Court.

CONCLUSIONS

As the discussion above indicates, we may draw relevant inferences and conclusions from our comparison of Supreme Court nominations in the U.S. and Argentina. It becomes possible to identify common patterns that may serve as valuable guidance to optimize the candidate selection phase by the Executive, to exert better control by the Senate, and to allow for stricter scrutiny by public opinion.

As a first inference, we can state that the discretion with which the Executive acts can be reasonably regulated to establish an adequate procedure to channel citizen participation from the outset of the selection process. The mechanism sanctioned in Decree 222/2005 in Argentina has proven to spark public scrutiny over the issue of Supreme Court nominations, but also provides the Executive with an additional instance that allows it to prevent unexpected events, to minimize the possibility of a scandal, and to avoid the political cost of suffering a defeat in the Senate.

An immediate consequence of establishing an open and participatory nomination procedure within the Executive is to increase the influence that public opinion has on the decisive selection criteria and to decrease the polarization in the confirmation stage before the Senate.

One of the most relevant criteria in present-day nominations is age. As we have demonstrated, there is a historical and regional trend, recorded throughout the twentieth century, towards raising the minimum age required for appointment to the Supreme Court. This is due, in part, to the general perception that it takes several years of life and professional experience to acquire the competency needed to hold a judgeship position in the Court. In turn, in countries such as the United States and Argentina, where federal judges hold office for an indefinite term, avoiding the appointment of judges who are young is an indirect way of ensuring a stable ideological balance.

As stated earlier, we believe that, in the current circumstances, it would be institutionally advantageous to build a consensus around the age at which it is appropriate to nominate a candidate. This consensus around age would then ensure a minimum level of experience and legitimacy of those in charge to expound the highest law of the land, and it will also prevent the Supreme Court's ideological manipulation through the selection of young candidates.

As for the expertise or professional background expected from the

Justices, we should bear in mind not only what historical records suggest added to the current workload demands, but also consider the establishment of an institutional model. The Argentine case shows that a tendency to select candidates with expertise not focused on federal law might lead to an undesirable expansion of the Supreme Courts' jurisdiction and workload. Conversely, if we seek to have a Supreme Court with a moderate workload and a clear focus on its role at vindicating the supremacy of the Constitution and the protection of fundamental rights, the U.S. model is the one to be followed.

With regard to gender as a selection criterion, we can state from the U.S. and Argentine cases that selection systems exposed to the electorate are effective in improving the balance between men and women in the Court. From the recent experience of both countries, we can see that, to a large extent, the Supreme Court is moving to a more diverse and gender-balanced composition. Full substantive representation may be impossible to achieve in a small body, but in both cases we can identify a positive and stable trend. It is to be hoped that in the future, once gender parity becomes a matter of course, the focus will be not merely on substantive representativeness, but on the position each candidate takes on equality and their views towards disadvantaged groups.

As far as recess appointments are concerned, the trend in Argentina and in the U.S. is almost identical: it is a procedure in line with the Constitution, but no longer in line with reasonable demands of modern democratic societies. Though we cannot rule out its future application, we distinctly perceive it has become an unwise option for a President confronted with political polarization.

Regarding the Senate's role in the appointment process, there is no doubt that it should actively function as a counterweight to the Executive. From the comparative analysis, we can infer that a constitutional amendment to create a supermajority is advisable to avoid the possibility of dismembering the process of appointment of judges that might be the result of the intense political division characteristic of our times. The aftermath can only be a loss of prestige and democratic legitimacy for the Supreme Court.

Finally, the comparative method allows us to conclude that the political dynamics may lead a majority in the Senate to adopt an aggressive political strategy, especially on the communicational front. However, Game Theory suggests that this stance may not necessarily be negative. In the long term, a tougher Senate may lead to greater cooperation between the different branches of government. In turn, it will fall upon the People to act responsibly, voting for those parties and candidates who demonstrate a

genuine commitment to preserving the rule of law, the harmonious functioning of our democratic institutions, and the effective vindication of fundamental rights.