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Judicial Independence in Unstable Environments, Argentina 1935–1998

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Argentina's constitution and electoral rules promote a fragmented polity. It is in those environments that independent judiciaries develop. Instead, most analysts do not consider the Argentina judiciary as independent. In this article we attempt to explain this contradiction by showing that this perception is inappropriate. We develop a test of the hypothesis that the judiciary is independent by empirically examining the political incentives faced by individual justices in their decision making. Our results show an often-defiant Court subject to constraints. Our measure of defiance is the probability of a nonaligned justice voting against the government. We find that judicial decision making was strategic. The probability of voting against the government falls the stronger the control of the president over the legislature, but increases the less aligned the justice is with the president. Thus, politics *and* process matter in understanding Argentina's Supreme Court decisions. Institutions matter in Argentina as well.

The U.S. Supreme Court's impact on policymaking is undisputed.[1] Such power, however, is less evident as we move towards other latitudes. In a recent series of papers, it has been shown that the power of the judiciary is limited in parliamentary systems like those in Japan or Europe,[2] where cabinet's control over the legislature limits the ability of the Court to innovate.[3] The central idea is that in environments where political fragmentation is the norm, the judiciary is able, over time, to create a doctrine of judicial independence without fear of political reprisals. Similar attempts in a more unified political environment would generate political clashes, eventually limiting the judiciary's power.[4] The evolution of the doctrine of judicial review in the United States seems to fit into this theory.[5]

Judicial independence, though, is an elusive concept. We refer to judicial independence as the extent to which justices can reflect their preferences in their decisions without facing retaliation measures by congress or the president. From this it follows rather directly that judicial independence cannot be measured simply by considering judicial reversals of governmental acts. The probability of observing a justice voting to reverse a governmental act is related to whether the justice *can* challenge the president, but also whether the justice *wants* to challenge the president. That is, it depends

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This article is dedicated to the memory of Guillermo Molinelli. Useful comments were received from Valeria Palanza, Juliana Bambasi, Gisela Sin, and Sebastian Saiegh, and seminar participants at Berkeley, Chicago, and at the American Law and Economics Association. Financial support from the Fundación Gobiernoy Sociedad, CEDI, and Center for Latin American Studies at Berkeley is gratefully acknowledged.

[1]See Marks (1989), Gely and Spiller (1990), Gely and Spiller (1992), Epstein and Walker (1994), Epstein and Knight (1997), Schubert (1965), Segal and Cover (1989), Segal and Spaeth (1993), and Segal (1997).

[2]See Ramseyer and Rasmusen (1997), and Salzberg (forthcoming).

[3]See Spiller (1996a) and Spiller (1996b). See also, Cooter and Ginsburg (1996).

[4]See Gely and Spiller (1992), and Epstein and Knight (2000). Spiller (1996a) calls this movement the Pavlovian evolution of the doctrine of judicial independence.

[5]See Spiller and Gely (1992), Epstein and Knight (2000), but see also Segal (1997) and references therein.

not only on the political constraints faced by the Court (i.e., how fragmented are its policy competitors) and the possible political repercussions (i.e., legislative reversal of the Court's decision, expansion of the Court, impeachment of a justice), but also on the justice's political alignment. Political alignment, in turn, depends on both the nomination process, which to some extent will map into preferences, and turnover in the Court. Courts whose tenure are very short will naturally tend to be aligned with the appointing powers, limiting the potential for conflict between the Court and the other political institutions. Courts whose tenure is indefinite or very long, may alternate between political alignment and political opposition to the sitting government. Indeed, in the limit, justices with policy preferences identical to those of the executive would face no political constraints, and their behavior would be, as a consequence, unaffected by the degree of political fragmentation.[6]

In this article we explore judicial decision making in Argentina, a presidential system characterized by a relatively high degree of power fragmentation[7] and, since the 30's, extreme political instability. While the former would imply a relatively independent judiciary according to the division of power theory, the latter fosters political manipulation of the Court. Indeed, both civilian and military presidents were able to govern with relatively sympathetic supreme courts. Hence, conflicting with the implications of political fragmentation, the nature of judicial appointments would suggest that Argentinean Supreme Court justices must have treated successive federal governments with velvet gloves. This is in fact the common wisdom, reflected both in public opinion polls,[8] and in most analysts' writings (see below). Nevertheless, the lonely voices of those who question the validity of the alleged lack of independence[9] had recently found support in the results of two studies, which, focusing on a recent period, show that the Argentine government loses cases in a proportion similar to that of the United States.[10] Hence, it is not obvious that the appointment powers are so important as to void the implications of the division of power theory. That is, that an "aligned" court will be indulgent with the president and unresponsive to changes in the political environment.

The purpose of this article is to develop a test of the independence hypothesis by empirically examining the political incentives faced by individual justices in their decision making. Our results show a complex story. They show often-defiant justices subject to constraints. Our measure of defiance is the probability of a justice not aligned with the government voting against the government. We find that in the middle of so much chaos and political upheaval, the Argentine Court has not been a simple "rubber stamp." The probability of voting against the government depends on the political alignment of the justice, but the appointment power is bounded and does not, by itself, lead to complete political control of courts. As Molinelli (1999) and Helmke (1998, 1999) have shown for the later period of our sample, the Court has over time reversed the government in a surprisingly large number of reasonably important cases, and the Court has reversed more often decisions by *de facto* governments than those taken by civilian governments. We also find support for the division of power theory of courts; judicial decision making was also strategic. The probability of voting against the government falls the stronger the control of the president over the legislature, and in particular, with his or her ability to increase court size or successfully start impeachment procedures against justices. Thus, politics matter in understanding Argentina's Supreme Court decisions. It is not just raw power. Institutions matter in Argentina as well.

A Simple Model of Judicial Decision Making Under Constraints

In this section we develop a simple but useful model which we empirically implement later in the article. The simplicity of the model is driven by the unavailability of roll calls in the Argentinean Congress which makes it almost impossible to attempt to develop independent measures of legislators' preferences, and hence of justices' ideology (see Bergara, Richman, and Spiller 1999). Thus, we do not present a spatial model based on the standard liberal/conservative dimension as that is not implementable for Argentina. We discuss below various dimensions in which the model could be extended.

Our model is composed of three building blocks: players, preferences, and sequence. There are three basic players: justices, the president, and Congress. Concerning justices' preferences, we assume that justices are both strategic and politically motivated (Gely and Spiller 1990). Thus they look ahead to the sequence of the game and make their individual choices strategically so as to maximize their policy benefit from the decision. The president and members of Congress also have policy-oriented preferences. Their policy objectives, however, may not be similar. The president may or not have full control over the Congress. Sequence is as follows: (a) nature draws a particular piece of legislation; (b) the Court reviews its constitutionality and may uphold it or declare it unconstitutional. If it upholds it, the game ends. If the Court declares it unconstitutional, (c) the president may punish the Court, either by expanding the Court or replacing justices via impeachment. For the president to be able to punish, it needs strong support in Congress. If the president punishes the Court, it can implement the piece of legislation the Court reversed. [11]

We solve the model backwards and look at the decision of a justice on how to vote. Assume the justice to be pivotal, so that, say, in a three member court, two justices have voted to uphold and one has voted to reverse. Assume that the justice's preferences are similar to that of the president. Thus, the decision is simple: uphold. Assume, now that his or her preferences are opposed to those of the president. When the president has strong control over Congress, if the justice votes to reverse, the justice knows that the president can indeed punish the Court, and thus implement the contested norm. Thus, the justices' dominant strategy is to uphold the contested norm. Now, if the president does not have strong control over Congress, then the dominant strategy for such justice is to vote against the constitutionality of the norm as the Court's reversal will go unpunished.[12]

Thus, our model has strong empirical implications: All else constant, the probability of a pivotal justice voting for upholding the constitutionality of a challenged norm increases with (a) the strength of presidential control over Congress, and (b) the political alignment of the justice with the president. We test this model in a later section.

Background on Argentina's Judiciary

The Beginnings

Argentina embraced the U.S. system of constitutional control, in which justices have the authority to challenge norms emanating from the political powers, having the protection of formal independence. As in the U.S., the Courts' power to review the constitutionality of norms enacted by Congress and the executive was not granted explicitly in the Constitution, but instead rose through Supreme Court's decisions. As in the U.S., the Argentine Supreme Court interpreted the Constitution to grant itself such authority,[13] and has continuously established doctrines defining the boundaries of this authority.[14] Hence, while the Court asserted its power of judicial review, it did so, as in the U.S., with restraint (Nino 1992). In Argentina, though, self-restraint emerged in the midst of political instability and military interruptions of the democratic order.

A Bumpy Road

While Argentina's constitutional structure is similar to that of the United States, its political history is extremely different. Since the first coup d'etat in 1930, Argentina suffered six interruptions of democratic governments. This instability had direct effects on the rotation of incumbent politicians, leading to extremely low tenure of presidents (2.6 years), national legislators (2.9 years), and provincial governors (1.9 years). The Supreme Court did not escape from the general instability. Although Supreme Court justices are appointed for life, since 1930, their average tenure has reached only 4.6 years. This tenure is low

[6]See Spiller (1996a). This, however, will not be the case when the executive loses its ability to veto legislation as would be the case if the opposition has a strong hold on the legislature.

[7]For a brief description of Argentina's constitution and electoral laws, see Spiller and Tommasi (2000).

[8]See La Nación, Colección Especial (1999).

[9]Among them, Molinelli (1999) is perhaps the most outspoken. He has argued that there are several indications that since the 1930 coup, the Court has increased its autonomy. Since then, the Court started to name its president, justices started to come from within; in the 1950s the Court introduced injunctions, which only thereafter were introduced by law; the same happened with the concept of arbitrariness; since the 1950 the Court started to reduce the discretion of the Presidents during *de facto* regimes; during the 1960s and 1970s the Court increased the ability of litigants to sue the State; it reduced the scope of the "political issues" doctrine; and so on and so forth. While several of these issues are contrasted by opposing arguments, this surely indicates that a more systematic approach to the study of the Court's decisions is needed.

[10]See Helmke (1999) and Molinelli (1999).

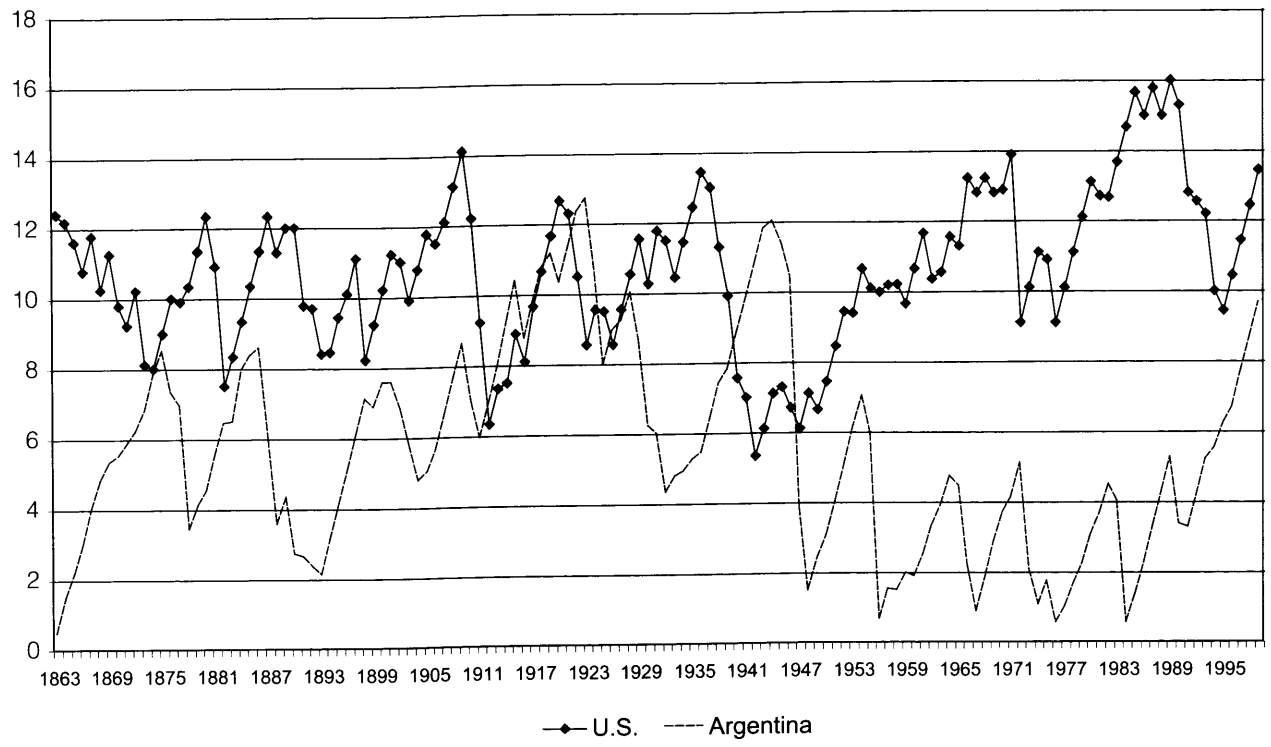
[11]The model could be extended in the various directions. Two are worth mentioning: First, the president could pay a cost would it punish the Court (such cost could take the form of a loss in legitimacy or public support). Since this type of costs may have potential punishments as credible strategies, cases may have to differ in terms of a dimension that affects the utility of the president, say saliency. Thus, a possible equilibrium could be that the Court can freely reverse low-saliency cases, but would it reverse high-saliency issues, a punishment would be forthcoming (for a model of this sort, see Schwartz, Spiller, and Urbiztondo 1994). Second, the nature of the bills that come out of Congress could be endogenized. This work is, however, left for future research.

[12]Observe that if the justice is not pivotal, his/her vote has no direct policy implication. Thus the justice will be indifferent between upholding and reversing.

[13]See Articles 31 and 116 of the Constitution. See also Ziulu (1998).

[14]As in the *Marbury v. Madison* decision, in the 1887 *Sojo* decision, the Argentine Supreme Court declared the power of courts to carry out the constitutional control over federal legislation (See CSJN, Fallos, 32:120). The following year, in *Municipalidad de la Capital c/Elortondo,* the Court expressly declared the unconstitutionality of a Congressional law (See CSJN, Fallos, 33:162.). It had already considered the constitutionality of a presidential decree. See, for example, the Court declaring, in its 1863 *Ríos* decision, the unconstitutionality of a presidential decree (CSJN, Fallos, 1:36).

FIGURE 1 Supreme Court Justices Tenure in Argentina and the U.S., 1863–1999



compared to most other countries (see Henisz 2000). As Figure 1 shows, in spite of the United States and Argentina having similar institutional beginnings, the instability reduced Argentine justices' tenure dramatically, and only recently, after three consecutive democratic periods—and in spite of President Menem's enlargement of the Court in 1990—the Court's average tenure is converging to its "normal" value.

These figures suggest that since the impeachment of four of the five sitting justices during the first Perón administration, the norm of judicial independence was lost.[15] The change in the norm can best be seen in figures. While until Perón's presidency, 82 percent of Supreme Court justices left the Court because of (natural) death or retirement, since then only 9 percent of the justices did so, while the other 91 percent left it either because of resignation, impeachment, or irregular removal (Molinelli, Palanza, and Sin 1999).

To these striking numbers, the effect of court enlargements should also be added, which at the very least have the potential to attain the same results as justices' removal, changing the Court's median voter position, and potentially, the Court's final decisions. These changes in the court composition—whether by removal or court enlargement—constitute our first direct concern. In an environment of alternating governments, the justices' appointment and dismissal procedure that arises from the Argentine's Constitution should naturally generate a balanced composition of the Court's members, with policy preferences being relatively independent from those of the sitting executive. Gradual replacement of departing justices by governments of different parties would rarely allow abrupt changes in the median justice preference. Furthermore, a balanced policy preference of the median justice would, in a divided government scenario, lessen the nomination power of the president.

Instead, the large maneúvering room enjoyed by each appointing president to name some or all Court members, and the corresponding extremely short tenure of Argentinean justices, breaks this natural balance. The result is that, since the first Perón administration, only occasionally had a sitting president faced a Court whose majority of members was appointed by presidents of opposite political tendencies. [16]

[15]For discussions on the break in the independence norm, see Molinelli (1999) and Helmke (1999).

[16]This politicized appointment process and its implication for the lack of judicial independence is argued by analysts to be behind the low level of public perception in Argentina. See Nino (1992), Ekmekdjian (1999), Morello (1996), and Masnatta (1997).

But irregular removals and appointments, the strategic alteration of the court's size, and forced resignations, are not the whole story. A second component is that judicial behavior will tend to be more lenient towards the executive—independently of the Court's political alignment—whenever the executive has the ability to punish the Court, whether by impeachment or altering its size.

In this framework, a unified government clearly signals a higher presidential political strength and consequently induces a larger adaptation of the Court's decisions. Specifically, the closer the president's support in Congress is to the majorities required for either court enlargement or impeachment (simple majority in either house or supermajorities in both houses, respectively), the more we expect to see a constrained court. We test this theory next.

Rubber Stamp OR Strategic Self-Restraint: An Empirical Investigation

Introduction

The strong conclusions of qualified analysts do not seem to leave much room for further arguments: Argentina's Supreme Court did not constitute, throughout the twentieth century, a reliable check to the political powers. Still, a quantitative, systematic assessment of the issue is lacking. Only two authors, Helmke (1998, 1999) and Molinelli (1999), have provided the initial steps in this direction.

Focusing on the reversal ratio in "important" Court decisions about the constitutionality of norms between 1983 and 1997, Molinelli (1999) finds that Argentina's Supreme Court found unconstitutional 26 percent of the 195 challenged national norms. Using a different sampling procedure,[17] and focusing on the period 1976–95, Helmke (1998) finds slightly higher levels of reversals. She finds that under both the military government of 1976–1983 and the Alfonsín presidency (1983–1989), the average percentage of cases decided against the government was 41 percent, while under the first Menem administration (1989–1995) the average percentage of cases decided against the government was 30 percent. Although this reversal ratio is not too distinct from the U.S. experience, it may be due to multiple underlying factors. This fact is partially addressed in Helmke's treatment, which studies the effect upon justices' decisions of the "expected" change in the political orientation of the government.[18] In this article we attempt to perform a fuller test of the strategic approach to the Supreme Court's constitutional control, using data from 1935 to 1998, which enables us to reflect the changing political environment more systematically.

[17]Helmke (1998) uses a variety of cases in which either the government was a litigant or an executive decree handed down by the sitting government was named in a case.

[18]Helmke (1998) uses "analytic narrative" to construct these expectations for President Alfonsin's democratic sucesion of the military regime in 1983, President Menem's election in 1989, and his reelection in 1995.

Data and Models

Argentina's Supreme Court decides several thousands of cases a year.[19] Besides the fact that many of these cases are the exact repetition of one another, although with different plaintiffs, their political significance is extremely diverse. Thus, the first issue to address is the scope of the sample. Both Helmke (1999) and Molinelli (1999) limit the pool of cases considered. Molinelli (1999) considers only the cases published *in extenso* in *La Ley*, the main judicial publication in Argentina. Helmke (1999) does not limit the sample to these cases, but introduces a dummy variable indicating whether they were fully published or not. Here we follow Molinelli (1999). Utilizing Molinelli's (1999) methodology, and under his supervision, we commissioned the extension of Molinelli's sample to include cases originating in 1935.[20] Thus, our data set encompasses cases from 1935 to 1997 and includes the original Molinelli's data set, as well as the Bercholc extension.

Following Molinelli (1999), to distinguish between important and unimportant cases, our data-set includes only those cases which fulfill three conditions: (1) the case involves the constitutionality of government norms,[21] (2)

[19]Since 1991, the Court has been handling between 5000 and 8000 cases annually. See Molinelli (1999). Differing from its U.S. counterpart, the Argentine Supreme Court does not have the ability to issue *certiorari* decisions, nor does the *stare decisis* doctrine formally exist. As a consequence, the Argentine Supreme Court sees a very large number of cases per year (Bidart Campos 1982). But the thousands of cases mask the fact that many are repetitive cases. Since until very recently the Court did not have the ability to determine a law as unconstitutional *per se*, but rather had to deal with the unconstitutionality of its application to a particular case (person), the Court has ruled multiple cases but essentially implemented a single decision multiple times.

[20]We are thankful to the CEDI for having funded this extension and to Prof. Jorge Bercholc from the Law School of the Universidad de Buenos Aires for having undertaken it.

[21]By norms, we mean laws, presidential decrees, administrative decisions and resolutions. Cases in which the constitutionality of a

the Court actually decided for or against the constitutionality of the challenged norm,[22] and (3) the case was published *in extenso* in *La Ley*.[23] This leaves us with 1646 cases, 1052 of which consider national norms.

Our purpose is to determine the behavioral factors that contribute to the probability of a Supreme Court justice voting for or against the constitutionality of national norms. We model that decision using a logit model, where the dependent variable is a justice's decision for or against the constitutionality of the challenged norm. The independent variables are indicators of the president's political strength, justices' preferences, and some case specific variables, including the solicitor general's opinion, described below.

We test strategic behavior in two ways. In the first approach, we look at the court as a whole. Assuming that the Median Voter Theorem holds, we use the court's final decision as the dependent variable and the imputed preference of the median justice as an explanatory variable. This approach raises the problem of multidimensionality inherent to the voting environment.[24] Thus, our second approach is to explore in detail justices' individual decisions rather than the court as a whole. In the first model, the dependent variable, CONSTITUTIONAL, takes the value 1 when the court considers a law, decree or resolution to be constitutional, and 0 when it considers it to be unconstitutional.[25] In the second model, the dependent variable, CONSTITUTIONAL_j, is built in the exact same way as CONSTITUTIONAL but for each case it is applied to each individual judge j.

We now turn to describe the independent variables, which are intended to measure the political strength of the president, justices' preferences, the solicitor general's opinion, and some of the specific characteristics of each case.

Political Environment

The theory presented above suggests that justices' votes adjust partially to reflect the president's ideal policy whenever he has the political strength to retaliate. Given an institutional structure like that of Argentina, this will in turn depend on the president's degree of control over Congress. The two "dangers" faced by justices in Argentina over our period of analysis, apart from constitutional reform, were court enlargement, which until the reform of 1994 could be achieved with a simple law, and impeachment, which requires a supermajority in both chambers.

To capture presidential control over Congress, we create a set of categorical variables that allow us to distinguish the various political scenarios. Democratic governments are classified at the time of each Supreme Court's decision as "Unified" or "Divided," generating two variables for democratic periods, UNIFGOV and DIVGOV. By "unified government" we understand the situation in which the presidential party has an absolute (more than 50 percent) or relative (plurality) majority in both chambers of Congress. Governments that are not "unified" are "divided."

To reflect the difference between the Court enlargement potential and the (tougher) impeachment, we distinguished two cases within the unified government case. UNIFGOV-SIMPLE indicates that while the government can be classified as a unified government, the president does not have the majority required to impeach Supreme Court justices. On the other hand, UNIFGOV-SUPER indicates that the president not only controls a unified government, but also has the supermajority required to

lower court decision was questioned (*arbitrariedad*) and cases in which the constitutionality of *the interpretation of a norm* by a lower court was questioned *but not the norm in itself*, were excluded.

[22]Cases in which the Supreme Court decided not to pronounce over the constitutionality of the challenged norm, alleging *formal* or *technical* reasons, were also excluded. This is in fact a very disparate category, including multiple types of issues, like lack of foundation, improper presentation, "political question," and so on and so forth. See Molinelli (1999). For this condition to substantially bias the sample, it has to be the case that the Court facing a government decisions it dislikes, but one which it cannot oppose because of the fear of reprisals, chooses to decline to review it based on "technical" reasons. To explore this potential bias we divided the sample in democratic and dictatorship periods. We find that the probability of the Court rejecting to consider a case for technical reasons is the same (around 22 percent) in both democratic and dictatorship periods. Thus, we do not believe that this sample selection biases our results.

[23]While these criteria may lose some relevant information, since we are focusing on the interaction of the court with federal political institutions, this risk is relatively small. The loss of information is mainly bounded to appear in cases that consider provincial norms and low level administrative resolutions—instead of laws or presidential decrees, both instances where the potential for political conflict is reduced. Additionally, there could be some loss of data in cases where the Court decided the constitutionality of the challenged norm, but for political reasons they were considered "less relevant" by *La Ley*. Such could be the case with highly politically charged cases during military regimes—although the data set includes several highly charged cases, like that of Jacobo Timmerman, a famous Jewish journalist and newspaper owner jailed for opposing the military regime.

[24]Ideology is not the only determinant of voting, but also politics. And without a proper modeling of ideology in the Congress (see more below), it becomes difficult to move the model to a single dimension.

[25]Whenever two or more norms were involved in the same case, CONSTITUTIONAL takes the value 1 when all of them were considered by the Court to be in agreement with the Constitution.

successfully impeaching Supreme Court justices. The complement to these three scenarios (DIVGOV, UNIFGOV-SIMPLE, and UNIFGOV-SUPER) is DICTATORSHIP, which takes the value 1 whenever the presidency is occupied by a dictator and 0 when the president is democratic.

Additionally, we also want to capture the fact that the political strength of the government depends on the foreseeable horizon in office. For this reason, we introduce the variable TIMETOPOLCH, which measures—at each point in time—the expected time remaining for a change in the political tendency of the president (for a president to be replaced by a president of opposing political tendency). In building TIMETOPOLCH we assume perfect foresight, so that that the *expected* time of change of the political tendency of the president is indeed the *actual* time for such a change to occur.[26]

Justices' preferences. An important part of the empirical exercise is to account for justices' preferences over policies, and through it, to measure the importance of appointing "friendly" justices. "Measuring" preferences is obviously not an easy task. A first approximation would be to create an absolute index over time reflecting more or less liberal positions of Judges and Congress derived from voting behavior.[27] Nevertheless, the absence of strong national political parties with fairly stable positions in the policy spectrum, and the scarcity of roll-call data, makes this a very difficult task in Argentina.[28] Here, instead, we compute the extent of political alignment between the justice and the sitting president by examining the appointment process. The basic idea is to look whether the justice was appointed by the sitting president, a friendly (past) president or a (past) president from an opposition party, combining this with the appointing president's control over the senate.

To explain the way we compute our political opposition variable (POLOPOS), assume initially that Congress does not participate in appointing the justices. That is, the president can appoint whomever she wants. In this case, the president would appoint a justice with preferences identical to her own. During this president's tenure, the justice has a 100 percent political alignment. Thus, our political opposition variable, POLOPOS, will take a value of 0 for that particular justice, reflecting that the president and the justice have the same political tendency. Assume now that a new president is elected, and that the justice is still at the Court. Since we are assuming that the justice is a perfect clone of the nominating president, the value of POLOPOS assigned to the justice will depend on the comparison of the two presidents' political tendencies. If the new president has the "same political tendency" of the former president, the value of POLOPOS will still be 0. If the new president has an "opposing political tendency," POLOPOS will take the value 1.[29]

Prior to its reform in 1994, the Argentinean Constitution established that Supreme Court candidates must be nominated by the president and approved by the Senate by a simple majority. Since 1994, a two-thirds majority in the Senate is required. To get a more accurate description of the Argentinean appointment process, we modify the POLOPOS variable as follows: Whenever the president has the required majority in the Senate, we assume that the president can appoint her most preferred judicial type.[30] However, when the president doesn't have the required majority in the Senate, the equilibrium nomination will reflect a bargaining between the president and the opposition in the upper house.

We assume this bargaining game to take the following form. We give the value of 0 to the position of the president in the policy opposition spectrum. An opposed Senate, then, has a value of 1 in the policy opposition spectrum.[31] Whenever a vacancy appears, the president has to produce a nomination. If the Senate does not accept this particular candidate, the position remains vacant. In this case, the position of the median voter of the incomplete court (call this MVI) becomes the status quo, and the payoff that this situation provides to the players becomes their outside value in the bargaining game. The president would like, as in the previous exercise, to nominate a "clone," but anticipates that this would not be accepted by an opposing Senate, as it would not accept a justice of a type located further away from its policy ideal

[26]See Helmke (1999) was coded as a dummy variable taking the value 1 whenever the time remaining until change was less than 24 months.

[27]See Bergara, Richman, and Spiller (1999) and Segal (1997).

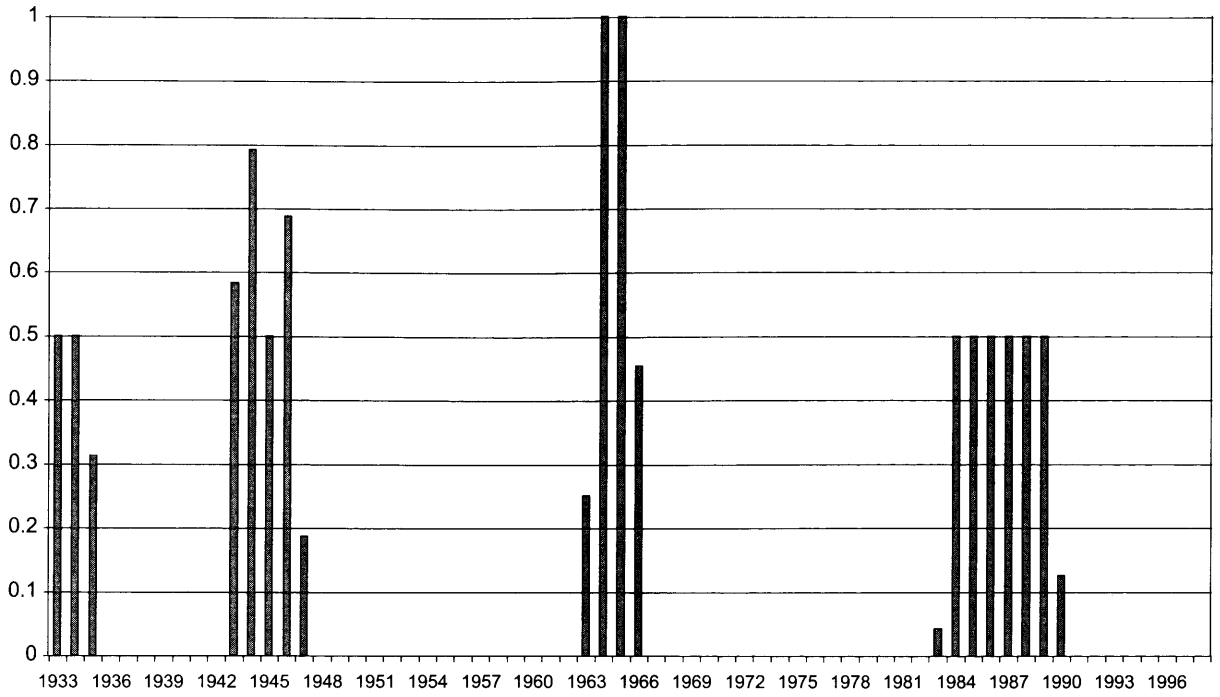
[28]See Spiller and Tommasi (2000).

[29]This method allows us to classify justices' and presidents' preferences along the complete sample (1935–1998) without having to use a common measure for presidents "located" far in time and political environments. This would be a daunting task given the absence of strong national political parties with fairly stable positions in the policy spectrum. Instead, we only need to compare presidents who "share" justices, which given the volatility in the court, substantially simplifies the task. A similar method is what gives continuity to the "nominate" approach. See Poole and Rosenthal (1991).

[30]We assume that loyal legislators will accept the president's nomination without imposing a cost.

[31]Since the president lacks a sufficient majority, the president must bargain with the opposition. As mentioned before, given the scarcity of roll calls, it is almost impossible to quantify the "degree" of political opposition of the opposition. Thus, we give it a value of 1 to its political opposition.

FIGURE 2 Median Justice Degree of Political Opposition, 1935–1998



Source: Author's own computation based on data in Molinelli, Palanza, Sin.

than the MVI. Since the president, in turn, will not nominate a justice of a type that is more distant than the MVI, in this simple game an equilibrium appointment is a person of type identical to the MVI.[32]

This procedure is used to calculate our political opposition variable for the entire sample, POLOPOS. Figure 2 shows the value of POLOPOS for the median judge across the entire sample (1935–1997). Only seldom did a president have to deal with a median justice named by the opposition.[33]

[32]Our method may be inaccurate when multiple appointments are considered at the same time. In this case appointments away from the MVI are feasible, as long as they are balanced (i.e., one to each side of the MVI). Snyder and Weingast (2000) develop a slightly similar model of appointment for NLRB commissioners.

[33]Since prior political experience may reflect a more politically attuned justice, we also collected, from Molinelli, Palanza, and Sin (1999), the complete employment history of the 69 justices in our sample (three at different times). In particular, we are interested in whether justices have political positions prior to and/or following their tenure in the Court. We define two variables: POLCARPREV taking the value 1 if the judge held a political position (Chief Executive, Minister or Legislator, either in the National or Provincial levels of government) prior to his or her tenure at the Court; POLCARPOST taking the value 1 if the judge held a political position after the Court.

Not all justices' votes, however, will matter in determining a case. While a justice who cannot influence the outcome may vote in a nonstrategic fashion, as his or her vote will bring no credible political response, such behavior by a pivotal justice may be politically costly. Since the final decision of the Court is the aggregation of these decisions by majority rule voting, we expect a different behavior of a judge when he or she can or cannot influence the final outcome. Thus, we introduce a categorical variable (PIVOTAL) indicating whether, for a given decision, a given judge is or is not—individually, and taking all the other justices' votes as given—a pivotal voter.[34]

Information for each case. Each case raises specific issues. We attempt partially to capture these by considering variables that describe, in different dimensions, some basic characteristics of the norms that are being challenged. The first of these variables is LAW, which takes the value

[34]We construct PIVOTAL as follows: For each decision we look at whether each justice changing his or her vote will change the decisions. Thus, for decisions which are not narrow, i.e., seven to two in a nine-member court, no justice is PIVOTAL. For narrow decisions (say, five to four), all justices in the majority are PIVOTAL and none in the minority are PIVOTAL. We assume away the forming of stable logrolling coalitions within the court.

1 when the challenge is to a federal law, and 0 when the case challenges executive decrees or resolutions. We expect the coefficient of this variable to be positive. First, the enactment of a law requires the agreement of a larger number of actors with (potentially) diverse preferences, which makes it more likely that these norms will be in a less extreme location in the policy preference spectrum than presidential decrees. Additionally, to retaliate against a challenge to a presidential decree requires the president to garner support in Congress, a support that must already exist if the challenge is to a law.

While so far we have assumed that the president's coalition is interested in maintaining all existing norms, it is quite possible that the president is less interested in maintaining norms that were enacted by previous governments. To explore this possibility, we introduce, for a subset of the sample, a categorical variable (CURRENTNORM), that indicates whether the norm is contemporary (CURRENTNORM=1) or not (CURRENTNORM=0) to the sitting president. Unfortunately, the database only allowed to collect this information for a subset of the sample (862 cases).

Additionally, since it could be argued that democratic administrations may want to repeal norms introduced by military governments (and vice versa), we classified norms according to the nature of the government that made the original norm and of the ruling government when the Court made its determination on the norm's constitutionality. This creates six categorical variables reflecting these combinations (dictatorships only issue one type of norm, the "decree-law").[35] We were also able to classify, for a different subset of the sample, the challenged norms according to their subject (administrative, constitutional, labor, social security, fiscal, civil, commercial, contraventional, and penal).

The Solicitor General. The Solicitor General (*Procurador General de la Nación*—SG) is the head of the Public Ministry, which houses all the prosecutors who perform in front of national courts, including the Supreme Court.

In spite of the importance of this body, its role and institutional characterization were not clear until the 1994 reform, which established it as an independent body, having both functional and financial autonomy. Several authors highlight the division in the doctrine among those who regarded the Public Ministry (and the SG) as part of the judiciary and those who considered it to be a "simple administrative body, and hence dependent of the executive."[36] This division is found both in Court's jurisprudence and the legal system regulating the Public Ministry.[37] In fact, even the prosecutors' appointment procedure was unclear.[38]

This confusion hides an important difference. Were the SG dependent on the executive, the SG's opinion could be taken to represent a mixture of the executive's will and the abstract quality of the case. The SG would in this case act as a noisy signal of the president's interest. If the SG was independent, however, his opinion could be taken to represent a good signal of the specific legal quality of the case. In this case, the residual (and not the direct) effects would represent "politics."[39]

We introduce two variables that indicate the opinion of the Solicitor General. SGCONST equals 1 if the SG supports the constitutionality of the norm and zero otherwise, and SGFORMAL equals 1 when the SG supports dismissal based purely on formal reasons ("*Defecto formal*").[40] We have information on the Solicitor General only for the earlier period (1935–1982), as Molinelli

[35]These include (a) laws passed during democracy being reviewed during a democratic administration, and (b) its equivalent for a presidential decree; (c) laws issued during democratic periods, but reviewed during *de-facto* administrations, and (d) its equivalent for a presidential decree; (e) *decree-laws* passed during *de-facto* administrations and reviewed under democratic administrations, and (f) *decree-laws* passed during *de facto* administrations and reviewed under *de-facto* administrations.

[36]See Ekmekdjian (1999), Ziulu (1998), and Molinelli, Palanza, and Sin (1999).

[37]See Ziulu (1998) and Ekmekdjian (1999) for examples of contradictory jurisprudence.

[38]Molinelli, Palanza, and Sin report that "the Solicitor General was appointed with the agreement of the Senate, which according to some experts opinion was unconstitutional" (1999, 651).

[39]It could be argued that our measures of unified government are a proxy for legislative quality and that facing no checks and balances, dictatorships produce legislation of the lowest quality, while divided governments, because of the need to produce consensus among competing political parties, would produce norms of the highest quality. Thus, dictatorships should be reversed more often than unified governments, and these should be reversed more often than divided governments. This latter prediction is the opposite to that predicted by strategic considerations. An exactly opposite argument can be made, though. The bargaining process surrounding the drafting of laws takes place in an iterative manner, where in later rounds paragraphs and then words are bargained over, oftentimes leading to pieces of legislation of dubious logical integrity; and this event is more likely the more "divided" the government.

[40]While we do not consider the cases in which the Court decides based on the "Defecto Formal" reason, we have cases considered by the Court but where the SG recommended "Defecto Formal." It must also be noted that introducing the SG's opinion entails a large loss of data, since information on the SG opinion is available only for a fraction of the 1935–1982 sample.

Table 1 Sample Information and Variable Definition

Variable	Definition	Obs	Mean	Std.Dev	Min	Max
Aggregate Court						
CONSTITUTIONAL	1 if norm is found constitutional	1051	0.71	0.46	0	1
UNIFIEDSUPER	1 if government holds sufficient majorities to impeach a judge	1052	0.14	0.34	0	1
UNIFIEDSIMPLE	1 if government controls both houses but not enough to impeach a judge	1053	0.31	0.46	0	1
DIVGOV	1 if government does not control congress	1053	0.15	0.35	0	1
POLOPOS-Median	median judge value of political opposition	1048	0.15	0.29	0	1
LAW	1 if norm is a law	1053	0.56	0.50	0	1
PERCENTPOLOP	percentage of justices appointed by politically opposed presidents	1048	0.20	0.29	0	1
DICTATORSHIP	1 if government was not elected	1052	0.41	0.49	0	1
CURRENTNORM	1 if norm issued during current government	862	0.24	0.43	0	1
SGCONST	1 if solicitor general opines court should find norm to be constitutional	576	0.63	0.48	0	1
SGFORMAL	1 if solicitor general opines court should not take case because of a formal defect	576	0.15	0.35	0	1
Individual Justices						
CONSTITUTIONALj	1 if judge voted norm to be constitutional	5318	0.640	0.480	0	1
UNIFIEDSUPER	1 if government holds sufficient majorities to impeach a judge	5781	0.123	0.328	0	1
UNIFIEDSIMPLE	1 if government controls both houses but not enough to impeach a judge	5786	0.382	0.486	0	1
DIVGOV	1 if government does not control congress	5786	0.134	0.340	0	1
POLOPOS	judge's value of political opposition	5781	0.198	0.333	0	1
POLPIV	POLOPOS times PIVOTAL	5513	0.054	0.205	0	1
LAW	1 if norm is a law	5786	0.568	0.495	0	1
TIMETOPOLCH	Months to change in political tendency of president	5781	48.683	33.974	1	146
PREVCARP	1 if justice held a political position prior to appointment	5781	0.270	0.444	0	1
POSCARP	1 if justice held a political position after tenure at the Court	5781	0.028	0.166	0	1
SGCONST	1 if solicitor general opines court should find norm to be constitutional	2984	0.624	0.484	0	1
SGFORMAL	1 if solicitor general opines court should not take case because of a formal defect	2984	0.149	0.357	0	1
CURRENTNORM	1 if norm issued during current government	4756	0.256	0.437	0	1
DICTATORSHIP	1 if government was not elected	5781	0.361	0.480	0	1

(1999) did not collect that information in his original study. Thus, from the 1052 national cases, we have SG information only for 576. Table 1 provides sample statistics and variable definitions.

Empirical Results

As in Molinelli (1999) and Helmke (1998,1999), we find that roughly in 30 percent of all important cases considered between 1935 and 1997, the Supreme Court found the challenged norms to be unconstitutional (See Table 1). Whether this percentage is small or large, we cannot tell. Some nontrivial constitutional control is being practiced, however. Before presenting the results of our econometric analysis, it is interesting to compare Court rulings in relation to federal versus local norms. Since local governments' capacity to retaliate against the Court is null or very small we don't expect justices to feel constrained in these cases. While the Court ruled favorably in national norms 71 percent of the times, it did so only in 47 percent of the cases considering local norms. This result provides initial support to our strategic theory of judicial behavior. But we are not just concerned with reversals. We explore next the behavioral determinants of these events.

The Court's vote as the unit of analysis. Table 2 shows the results obtained from the estimation of five logit equations. The dependent variable is CONSTITUTIONAL, and the independent variables are measures of the political environment, justices' preferences, the opinion of the solicitor general, and case specific variables.

The table contains two different types of information. The first part of the table shows for each independent variable: the estimated raw coefficient, the value of the z-statistic, and the differential effect over the probability of a pro-constitutional outcome of a discrete change in the independent variable. This discrete change is computed, for categorical variables, as having that characteristic (as opposed to not having it), and as one standard deviation increase for the continuous variables (POLOPOS-Median, the degree of political opposition of the median justice, and PERCENTPOLOP, the percent of justices appointed by presidents of opposing political tendency). For these latter type variables, we also show the effect of changing them from the lowest to the highest possible value. The second part of the table shows sample information, the LR test, and different measures of the goodness of fit.

In Equation 1a (as in all the other equations) the political environment is captured through UNIFIEDSUPER, UNIFIEDSIMPLE, and DIVGOV (DICTATORSHIP is the default). In addition, justices' preferences are approximated by POLOPOS-Median. The value of the coefficient for the political environment variables has to be interpreted as the impact on the probability of a challenge under the given political environment over a military government. The first result to be noted, then, is that the Court treats military governments with as much deference as it treated democratic divided governments. The Court, however, gave much more deference to unified governments. Indeed, and according to the theory's prediction, the coefficients of UNIFIEDSIMPLE and UNIFIEDSUPER are highly significant and meaningful: the president having a sufficient majority to change court size produces a 13 percent increase in the probability of a favorable outcome; having a majority sufficient to impeach justices produces a 23 percent increase in the probability of a favorable outcome. Hence, both cases differ substantially from the divided government case (whose impact is not statistically significantly different from military governments). Additionally, the coefficient of LAW is also, as expected, significant and positive. When the challenged norm is a law, as opposed to a presidential decree or Resolution, the probability of a pro-constitutional decision rises by more than 14 percent.[41]

Finally, as predicted by the theory, the degree of political opposition of the median justice, POLOPOS-Median, is negative, but neither its significance nor its magnitude are high. A one standard deviation increase of POLOPOS-Median reduces the estimated probability by only 2 percent, and a change in its value from 0 to 1 ("clone" versus "totally opposed") by only 7 percent.[42]

Since this result could in part be caused by the (inadequate?) use of the Median Voter Theorem assumption, we estimate the same equation using PERCENTPOLOP (percent of Court justices appointed by presidents of opposing political tendency) as a measure of judicial preferences. While the other variables' coefficients remained practically unchanged, PERCENTPOLOP's coefficient is negative and statistically significant.

Equation 3a explores the sensitivity of these results to the difference between contemporary and "old" norms. Since we only have information on the origin of the norm for the earlier sample, the results are not directly comparable. Nevertheless, all other variables remain roughly unchanged to the results in Equation 1a. The coefficient of CURRENTNORM is, as expected, positive and important. The probability of approving the constitutionality of a norm enacted during the current administration is

[41] The results presented in Tables 2 and 3 use the standard maximum-likelihood variance estimator. While the robust variance estimator would be an adequate choice for a misspecified model, if this is not the case the ML variance estimator is theoretically more efficient. See, for example, Sribney (1998). In any case, the results remain essentially unchanged using the robust variance estimator.

[42] It should be noted that these results do not change when we restrict to consider only democratic periods. UNIFIEDSUPER, UNIFIEDSIMPLE, and LAW remain strongly statistically significant and meaningful in terms of magnitude: Comparing to a "Divided Government" situation, UNIFIEDSIMPLE increases the probability of a favorable outcome by 12.1 percent, and UNIFIEDSUPER by 22.3 percent. Additionally, changing POLOPOS-median from 0 to 1 produces a 1.2 percent decrease in the probability of a favorable outcome, while LAW increases it by 13.9 percent.

Table 2 Determinants of Supreme Court Pro-Constitutional Decisions: Court Level

		Eq.1a	Eq.2a	Eq.3a	Eq.4a	Eq.5a
	CONSTANT	0.20	0.28	0.14	–2.17	–2.11
		1.57	2.09	0.92	–6.68	–6.43
Political Environment	UNIFIEDSUPER	1.29	1.31	1.40	2.13	2.27
		(5.01)	*(5.08)*	*(4.81)*	*(4.59)*	*(4.82)*
		22.8%	**23.3%**	**24.4%**	**26.9%**	**29.1%**
	UNIFIEDSIMPLE	0.62	0.72	0.63	1.01	1.17
		(3.70)	*(4.18)*	*(3.43)*	*(3.22)*	*(3.64)*
		12.9%	**14.8%**	**13.3%**	**17.5%**	**20.3%**
	DIVGOV	0.06	0.02	0.22	–0.53	–0.04
		(0.31)	*(0.12)*	*(0.95)*	*–(1.52)*	*–(0.11)*
		1.4%	**0.5%**	**5.1%**	**–12.5%**	**–0.9%**
Justices' Preferences	POLOPOS-Median	–0.33		–0.25	–0.98	
		–(1.38)		*–(0.91)*	*–(2.30)*	
		–2.0%		**–1.5%**	**–5.1%**	
	PERCENTPOLOP		0.72			–1.53
			–(3.05)			*–(3.67)*
			–4.5%			**–8.6%**
	Discrete Change	**–7.0%**	**–15.7%**	**–5.3%**	**–20.2%**	**–31.6%**
SG	SGCONST				3.50	3.55
					(11.55)	*(11.55)*
					68.8%	**69.3%**
	SGFORMAL				2.55	2.55
					(7.09)	*(7.02)*
					56.3%	**56.2%**
Case	LAW	0.71	0.70	0.56	0.82	0.85
		(4.99)	*(4.94)*	*(3.50)*	*(3.35)*	*(3.44)*
		14.5%	**14.4%**	**11.4%**	**14.5%**	**14.9%**
	CURRENTNORM			0.34		
				(1.83)		
				6.7%		
Sample	Sample			C-NORM	SG	SG
	N obs.	1047	1047	858	571	571
	Prob > LR χ^2	0.000	0.000	0.000	0.000	0.000
Goodness of Fit	Prob > Pear. χ^2	0.340	0.015	0.000	0.000	0.000
	Area u/ROC curve	64%	65%	65%	85%	87%
	Sensitivity	61%	72%	51%	85%	85%
	Specificity	57%	50%	71%	75%	75%
	Pos. Pred. Value	77%	77%	81%	89%	89%
	Neg. Pred. Value	38%	42%	37%	68%	67%
	Correctly Classified	60%	65%	57%	82%	82%

higher by almost 7 percent than that of a norm enacted under a previous administration, further suggesting strategic thinking by the Court.[43]

We introduce the Solicitor General in Equations 4a and 5a. Again, information on the SG is available only for the earlier period, thus limiting the sample size. The coefficients of SGCONST and SGFORMAL are positive and highly significant and have a large impact on the probability of a pro-constitutional outcome. When the SG supports not considering the case alleging *"Defecto Formal"* the probability of a pro-constitutional outcome rises by 56 percent, and when the SG supports the constitutionality directly, by 69 percent (in both cases, as opposed to the situation in which the SG supports the unconstitutionality of the norm). Additionally, the effect of the political environment variables remains unchanged, and—different from Equation 1a—Court's preferences, measured by POLOPOS-Median, are also significant and relatively relevant (–5.1 percent and –20.2 percent). Equation 5a repeats this exercise, but introducing PERCENTPOLOP. Again, the SG's variables are highly significant and relevant, and the power of the other variables rises.

[43] This specification also includes, but not reported, a richer set of controls.

The second part of the table shows the global significance of the variables in the equations and their predictive potential. While the global significance (see the LR-χ^2 test) of the variables used is always good, the predictive potential of the specified models is mediocre,[44] with the exceptions of Equations 4 and 5, which use the information on the opinion of the Solicitor General. The results are robust to the inclusion of additional controls, such as repeated norms in different cases, litigants in each case, and case subject area.

Individual justices as the unit of analysis. Table 3 shows the results using the individual justice as the unit of analysis. In the four equations presented in this table, we use a fixed-effects logit model—grouping by individual justices—in which the dependent variable is CONSTITUTIONALj.[45]

Notwithstanding this basic difference, Eq.1b is similar to Eq.1a in Table 2, with two differences. First, in the preferences' side of the equation, Eq.1b introduces POLOPOSj (the extent of political opposition of justice j) and POLPIV, which interacts POLOPOSj with the PIVOTAL indicator. As the Table shows, POLOPOSj's coefficient is not statistically significant, which might be expected since this reflects the preferences of nonpivotal justices. POLPIV's coefficient, however, is significant and quantitatively important. Globally, these two variables combine to produce a 16.7 percent decrease in the probability of a favorable outcome when a pivotal justice is not "friendly."[46] Second, in the political environment side we continue using UNIFIEDSUPER, UNIFIEDSIMPLE and GOVDIV as measures of the political environment, but we now add TIMETOPOLCH, the time remaining for a change in the political tendency of the president. TIMETOPOLCH's coefficient is positive, indicating that the longer the time remaining for a change in the political tendency of the president, the higher the probability of a pro-constitutionality decision. As before, the different behavior towards unified and divided governments is reflected in the estimates, and the coefficient of LAW is positive and statistically significant.

Eq.2b introduces the SG. Again, the effect of the SG's opinion is strong (although not as quantitatively important as in Table 2), and the characteristics of both preferences and reaction to the political environment remain basically unchanged. The connection between the behavior of the SG and the political environment is further explored in Eq.3b. To test the "signaling device" hypothesis of the SG, we introduce a series of interaction terms between the opinion of the solicitor general and the political environment. If the SG views' reflected the opinion of the president, then the Court should pay more attention to the SG when the president has a stronger hold on the legislature. But we find that, if anything, the signaling power of the SG seems to be negatively associated with the extent of political control of the president over congress. In comparison with Eq.2b, the combined effect of a pro-constitutional decision of the SG and a divided

[44] The following measures of fit are presented: Sensitivity, Specificity, Positive Predictive Value, Negative Predictive Value. These are, respectively, the percent of hits when the dependent variable is 1; the percent of hits when the dependent variable is 0; the number of correctly classified as 1 as a proportion of the number of cases classified as 1; and the number of correctly classified as 0 as a proportion of the number of cases classified as 0. The table also shows the total percent of cases correctly classified. The percentage of correctly classified cases is heavily dependent upon the choice of cut-off point. Although there is not a unique criterion to choose this cut-off point, here we use the mean of the dependent variable. We also compute the area under the ROC curve, which overcomes the indeterminacy of the cut-off problem. In a ROC curve, the sensitivity and specificity (1-specificity) are plotted for the various cut-off points. An area under the curve close to one (which is the maximum value this area can attain) indicates a good prediction, while an area close to one-half indicates a poor prediction. See Afifi and Clark (1998).

[45] Comparable results for the random effects logit model are presented in Table 4. The main results of the article remain unchallenged employing this alternative methodology. In spite of its potential problems, we followed the fixed effects estimation because as Greene (2001) notes, "the pessimism suggested by examples which are doomed from the Stara—e.g., panel models with no regressors of substance and two periods, is surely overstated. There are many applications in which the group sizes are in the dozens or more (in our case, 69 groups with an average of 67 observations per group). In such cases, there might be room for more optimism. The point is that there is a compelling virtue of the fixed effects model as compared to the alternative, the random effects model. The assumption of zero correlation between latent heterogeneity and included, observed characteristics, seems particularly severe." We estimated these models including a set of dummy variables for individual justices.

[46] The results, again, do not change when we only consider democratic periods.

Table 3 Determinants of Supreme Court Pro-Constitutional Decisions: Individual Justice-Level Fixed-Effects Logit Model

		Eq.1b	Eq.2b	Eq.3b	Eq.4b
Political Environment	UNIFIEDSUPER	0.60	0.86	2.17	0.72
		(3.35)	*(3.45)*	*(6.15)*	*(3.40)*
		13.5%	**18.4%**	**34.3%**	**16.2%**
	UNIFIEDSIMPLE	0.48	0.49	1.36	0.51
		(2.71)	*(1.98)*	*(4.27)*	*(2.24)*
		11.0%	**11.3%**	**26.3%**	**12.0%**
	DIVGOV	0.45	0.07	1.45	0.39
		(2.22)	*(0.25)*	*(3.58)*	*(1.45)*
		10.3%	**1.6%**	**27.5%**	**9.1%**
	TIMETOPOLCH	0.004	0.002	0.001	0.003
		(2.84)	*(0.74)*	*(0.34)*	*(1.32)*
		3.1%	**1.3%**	**0.6%**	**2.1%**
Justices' Preferences	POLOPOS	0.02	0.06	0.00	0.10
		(0.11)	*(0.32)*	*(0.02)*	*(0.57)*
		0.1%	**0.5%**	**0.0%**	**0.8%**
	POLPIV	–0.71	–0.39	–0.36	–0.66
		–(4.33)	*–(1.62)*	*–(1.53)*	*–(3.22)*
		–3.3%	**–1.9%**	**–1.8%**	**–3.3%**
	DISCRETE	**–16.7%**	**–7.7%**	**–8.5%**	**–13.6%**
SG	SGCONST		1.94	2.65	
			(18.17)	*(15.52)*	
			44.9%	**55.7%**	
	SGFORM		1.57	2.39	
			(11.25)	*(10.85)*	
			37.4%	**52.2%**	
SG & Political Environment (Interactions)	UNIFIEDSUPER & SGCONST			–1.70	
				–(4.93)	
	Interaction Only		—	**–12.4%**	
	Combined Effect		**63.3%**	**65.1%**	
	UNIFIEDSIMPLE & SGCONST			–1.12	
				–(4.38)	
	Interaction Only		—	**–10.0%**	
	Combined Effect		**56.2%**	**61.2%**	
	DIVGOV & SGCONST			–1.55	
				–(4.19)	
	Interaction Only		—	**–11.9%**	
	Combined Effect		**46.5%**	**54.8%**	
	UNIFIEDSUPER & SGFORM			–2.05	
				–(4.25)	
	Interaction Only		—	**–13.4%**	
	Combined Effect		**55.8%**	**54.0%**	
	UNIFIEDSIMPLE & SGFORM			–0.87	
				–(2.62)	
	Interaction Only		—	**–8.5%**	
	Combined Effect		**48.7%**	**61.0%**	
	DIVGOV & SGFORM			–2.50	
				–(5.41)	
	Interaction Only		—	**–14.2%**	
	Combined Effect		**39.1%**	**25.9%**	

(continued)

Table 3 (*continued*)

		Eq.1b	Eq.2b	Eq.3b	Eq.4b
Case	LAW	0.51	0.29	0.22	0.20
		(8.06)	(3.17)	(2.35)	(2.28)
		11.6%	6.6%	5.1%	4.5%
	CURRENTNORM				0.28
					(2.77)
					6.4%
Control					Area
Sample	Sample		SG	SC	NORM & AREA
	N obs.	5307	2924	2924	3344
Goodness of Fit	Prob > Pear. χ^2	0.000	0.000	0.000	0.000
	Area u/ROC curve	67%	77%	78%	67%
	Specificity	63%	66%	65%	68%
	Pos. Pred. Value	75%	79%	79%	75%
	Neg. Pred. Value	48%	64%	65%	48%
	Correctly Classified	63%	73%	74%	61%

government is an extra 8.3 percentage points higher than under a military government (54.8 percent vs. 46.5 percent), but only an extra 5.1 percentage points higher with a just unified regime, and 1.8 percent higher with a strongly unified regime, thus rejecting the signaling hypothesis.[47] Finally, Equation 4b introduces, as in Table 2, the difference between contemporary and previous norms with CURRENTNORM, together with an additional control, by considering the area of the challenged legislation.[48] The results remain unchanged.

[47]We performed a strong test of the hypothesis that the Court treats the SG the same independently of presidential control over Congress during democracies. This hypothesis was tested by estimating the model assuming that the coefficients of the interation terms were equal (for SGCONST and SGFORMAL). The likelihood ratio test shows a value of 16.40 (logL(restricted model) = –1614.18, logL(unrestricted model) = –1605.98), which exceeds the critical value of $\kappa^2(4, .01) = 13.277$. Although we reject this strong test, the pattern of coefficients does not conform to what would be expected would the SG be perceived as reflecting the view of the administration. For views of the SG in the United States see, among others, Meinhold and Shull (1998), Segal (1990), and Office of the Solicitor General (1998).

[48]We also explored the role of the political career of the justices. We find that justices who in prior work were politicians are not significantly different from those who weren't. justices who after leaving the Court become politicians, however, tended to vote more in favor of the constitutionality of norms.This last result should not imply causality, though, as the causality should go the other way. That is, "politically attuned" justices get rewarded with ex-post political employment.

Conclusion

These results, then, show that the Argentinean Court has been throughout the last century more independent than it seems. Even with the repeated "abuse" of appointment powers, it is not that the Court lacked judicial doctrines or will. Courts have behaved strategically, and when political conditions were right, politically opposed justices have shown their independence. Although the Argentine public does not have a positive view of the courts, this article suggests that this may say less about the court itself than about the environment in which the court operated. Indeed, with democracy taking hold back in Argentina, there is now a higher probability of observing more divided forms of government, increasing, therefore, the chances that the court will exercise less restrain in reviewing legislative acts and presidential decrees. This virtuous cycle may increase the costs for Argentine politicians to threaten the court, further augmenting the ability of the court to exercise effective judicial review. This article also raises important issues about the concept of judicial independence. We show that judicial independence cannot be measured by the percentage of government decisions reversed. There is no absolute level that classifies a court as independent. Instead, judicial independence is a subtle concept. It relates to the extent by which a justice adjusts its decision because of the potential for political retaliation. We

Table 4 Determinants of Supreme Court Pro-Constitutional Decisions: Individual Justice-Level Random Effects Logit Model

		Eq.1c	Eq.2c	Eq.3c	Eq.4c
Political Environment	CONSTANT	−0.05 *−(0.43)*	−0.99 *−(5.05)*	−1.45 *−(7.06)*	0.50 *(1.85)*
	UNIFIEDSUPER	0.72 *(5.13)*	0.83 *(4.21)*	2.05 *(6.64)*	0.77 *(4.81)*
	UNIFIEDSIMPLE	0.48 *(4.31)*	0.20 *(1.11)*	0.99 *(3.99)*	0.39 *(2.63)*
	DIVGOV	0.36 *(2.59)*	−0.30 *−(1.40)*	1.04 *(2.91)*	0.16 *(0.75)*
	TIMETOPOLCH	0.004 *(3.18)*	−0.001 *−(0.29)*	−0.001 *−(0.66)*	0.002 *(0.95)*
Justices' Preferences	POLOPOS	−0.07 *−(0.53)*	−0.03 *−(0.14)*	−0.09 *−(0.47)*	0.01 *−(0.05)*
	POLPIV	−0.70 *−(4.29)*	−0.39 *−(1.64)*	−0.36 *−(1.54)*	−0.64 *−(3.17)*
SG	SGCONST		1.91 *(18.21)*	2.60 *(15.68)*	
	SGFORM		1.54 *(11.18)*	2.32 *(10.77)*	
SG & Political Environment	UNIFIEDSUPER & SGCONST			−1.62 *−(4.80)*	
	UNIFIEDSIMPLE & SGCONST			−1.11 *−(4.46)*	
	DIVGOV & SGCONST			−1.50 *−(4.08)*	
	UNIFIEDSUPER & SGFORMAL			−1.97 *−(4.16)*	
	UNIFIEDSIMPLE & SGFORMAL			−0.84 *−(2.57)*	
	DIVGOV & SGFORMAL			−2.43 *−(5.28)*	
Case	LAW	0.50 *(8.01)*	0.29 *(3.25)*	0.23 *(2.52)*	0.18 *(2.18)*
	CURRENTNORM				0.28 *(2.79)*
Sample	Sample		SG	SG	NORM & AREA
	N obs.	5313	2949	2949	3346
	Prob > Wald χ^2	0.000	0.000	0.000	0.000
	log σ_μ^2 std. err.	−1.476 0.228	−1.424 0.279	−1.428 0.260	−1.708 0.264
	σ_μ std. err.	0.478 0.055	0.491 0.068	0.490 0.064	0.426 0.056
	rho std. err.	0.186 0.035	0.194 0.044	0.193 0.041	0.153 0.034
	LR Test of Rho = 0	0.000	0.000	0.000	0.000

derive measures of potential political retaliation related to the extent of control of the executive over the legislature. We show that high degrees of political cohesiveness increase the degree of self restrain among Argentine Supreme Court justices.

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Spirals of Trust? The Effect of Descriptive Representation on the Relationship Between Citizens and Their Government

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Research on black representation in Congress emphasizes the material gains associated with black office holding over the intangible goods associated with citizens' ability to identify racially with their legislators. This article considers the effect of descriptive representation on the relationships among citizens, legislators, and the Congress. With data from the 1980–1998 ANES, I show that whites and blacks differ in the value they place on descriptive representation. White constituents more favorably assess and are more likely to contact representatives with whom they racially identify. This tendency is partially explained by racial differences in legislators' ideological profiles, but also reflects extrapolicy and explicit racial concerns. Black constituents place less significance on descriptive representation, although they are more likely to contact black representatives. Although the relationships between legislators and their constituents are influenced by race, perceptions of Congress as an institution are not affected by constituents' ability to identify racially with their representatives.

For more than a decade, social scientists have debated the substantive merits of black congressional representation. Although scholarly consensus remains elusive, empirical research has shed light on the links among race, legislative behavior, and policy outcomes favorable to minority communities. We know comparatively little, however, about how constituents, both black and white, value black representation. What, if any, significance do constituents attribute to the race of their representatives and to the growing racial diversity of a legislative body traditionally dominated by whites? Prior research on minority political leadership at the local level suggests that descriptive representation can favorably affect attitudes towards public officials and institutions, with broad implications for the political dynamics within American cities. As early as 1968, the Kerner Commission identified the lack of black representation in city government as a force exacerbating the political alienation and distrust that contributed to the urban unrest of the 1960s (National Advisory Commission on Civil Disorders 1968).

Here I address whether black representation in Congress affects citizens' political orientations. In particular, I ask: Does a constituent's ability to identify racially with her member of Congress (MC) affect her perceptions of that legislator and of Congress as an institution? To what extent does a constituent's response derive from nonracial considerations such as shared interests and policy priorities? Drawing on 18 years of survey data from the American National Election Study (ANES), I show that white and black constituents differ in the value they place on descriptive representation, in general, and black representation, in particular. White constituents more favorably assess and are more likely to contact representatives with whom they racially identify. This preference for white legislators is partially

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The author thanks Chris Afendulis, Jack Citrin, Simon Jackman, Jennifer Lawless, Kira Sanbonmatsu, Steve Voss, participants in the American Empirical Seminar at SIQSS and the anonymous reviewers for comments and assistance on earlier drafts. This research also benefited greatly from the comments of Fred Harris, Cathy Cohen, and the participants in the 2001 conference "Theorizing Black Communities: New Frontiers in the Study of African American Politics" at the University of Rochester.

American Journal of Political Science, Vol. 46, No. 4, October 2002, Pp. 717–733

 ISSN 0092-5853