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# On Judicial Appointments and Constitutional Adjudication: A Reply to Fernando Muñoz

*By Aida Torres Pérez*[*]

What do public debates on the appointment of constitutional judges tell us about the view of the law and judicial adjudication? Fernando Muñoz's article focuses on the debates regarding the appointments of Justice Sotomayor to the U.S. Supreme Court and Minister Bertelsen to the Constitutional Court in Chile. According to the author, these debates reflect the tension between two views of the law and judicial adjudication—autonomy and responsiveness—as to how judges should deal with extra-legal considerations in performing their functions. While the *autonomy* position tries to "defend the substantive values of the law by policing the distinction between the legal and the extra-legal," the *responsiveness* position claims that "the law ought to extract its substance from social expectations, needs, and priorities, serving them as a means to an end."[1] In the author's view, Sotomayor's supporters and Bertelsen's opponents would uphold responsiveness and defend the need of the judiciary to respond to social expectations and needs, whereas Sotomayor's opponents and Bertelsen's supporters would uphold autonomy. The participants on these debates seek to gain *hegemony* regarding their views on what the law is and how constitutional adjudication should be conducted.

Focusing on debates over judicial appointments is a unique and engaging way to look into the concept of judicial adjudication. The alignment of the participants in these debates along the autonomy/responsiveness divide, however, might be contested and, in my opinion, should be further refined. First, I will reflect on the U.S. debate, next on the Chilean one, and finally I will put both of them together.

With regard to the U.S. Supreme Court, the author builds the discussion by reference to the so-called "prehistory" of Sotomayor's nomination. This prehistory captures the ongoing debate opposing *originalism* and *living constitutionalism* as theories of constitutional adjudication.[2] In other words, the debate about whether the Constitution

[*] Aida Torres Pérez is a Constitutional Law Professor at Pompeu Fabra University (Barcelona), aida.torres@upf.edu.

[1] Fernando Muñoz, *Not Only 'Who Decides': The Rhetoric of Conflicts over Judicial Appointments*, 14 GERMAN L.J. 1195 (2013).

[2] William H. Rehnquist, *The Notion of a Living Constitution*, 29 HARV. J.L. & PUB. POL'Y 401, 401 (2006) (noting that the Senate Judiciary Committee commonly asks Supreme Court candidates at the confirmation hearing whether they believe in a living constitution).

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should be interpreted according to its original understanding, or whether the interpretation should take into account the values and principles prevailing at the time of interpretation.

Nonetheless, those who oppose the idea of a living constitution do not necessarily do it on the basis of a belief on the autonomy of the law. For instance, Steven G. Calabresi is grouped among those who would support the autonomy position. His beliefs are certainly closer to originalism than to a living constitution,[3] but he would probably not uphold an autonomous view of the law. Indeed, in a text discussing Balkin's *Framework Originalism and the Living Constitution*,[4] Calabresi agrees that by using principles or standards the framers deliberately left details to be filled in by future generations. In order to interpret those constitutional standards, such as "cruel and unusual punishment," Calabresi contends that "one must look to practice, social understanding over many years, the direction in which legal change seems to be evolving, and what works at the state level."[5] He points out that the fact that these constitutional standards can acquire new meaning over time does not mean that "judges and Justices can just issue holdings based on what the word or clause in question means to them."[6] Constitutional standards are not "licenses for idiosyncratic personal judicial lawmaking or policymaking."[7] Therefore, what Calabresi clearly opposes are judges instilling their own values into the law. Indeed, this would also be opposed by the supporters of a living constitution. Eventually, the correspondence between autonomy/originalism and responsiveness/living constitution does not seem to be so clear-cut.

In the context of the debate between originalism and a living constitution, Sotomayor's statement that "a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male"[8] might be understood as calling the attention towards the lack of diversity in the judiciary, instead of supporting the view that judges should interpret the law according to their personal values.[9]

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[3] Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 636 (2006).

[4] Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009).

[5] Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663, 675 (2008).

[6] *Id.* at 674.

[7] *Id.* at 675.

[8] Muñoz, *supra* note 1.

[9] Kate Malleson, *Introduction*, *in* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER 3, 7 (Kate Malleson & Peter H. Russell eds., 2006) (stating that "[t]he lack of women and lawyers from minority ethnic backgrounds on the bench throughout different jurisdictions is one of the greatest challenges facing judiciaries today.").

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In the United States during the 1980s and 1990s, task forces investigating bias in the courts were launched in several state courts and later on in federal courts. These task forces looked into the relevance of gender, race, and/or ethnicity to court processes and outcomes.[10] Their findings showed, for instance, that women seeking redress for domestic violence were often blamed for provoking their assaults or disbelieved, or that blacks were less likely to be released on bail than whites for similar offences. At the same time, the analysis of the demography of the bench showed that the vast majority of judges were white males, particularly at the highest courts.[11] Thus, although justice is traditionally represented as "blind to distinctions among litigants,"[12] one should not be blind to the causes and consequences of the pervasive uniformity of the bench.

The claim for increasing the number of female judges might be made from the perspective of access or representation. First, the fact that roughly half of the population are women, and that the number of female law students is increasing over time, but that they are still reaching the highest judicial offices in lower percentages than men, indicates the existence of a structural disadvantage. Second, as Sally J. Kenney explains, "putting women on the bench was more than an end in itself, it was a means to change judicial behavior."[13] By incorporating women to the judicial decision-making process, the awareness of the kind of disadvantages suffered by women might have an impact upon outcomes. At the same time, on should bear in mind that female judges come from a variety of backgrounds and life experiences, and their attitudes toward gender issues might also vary. Actually, some might not even be sensitive to gender issues.

In sum, those who are closer to a responsiveness position might be also more open to the claims of diversity than those who believe in a perfect divide between the legal and the extra-legal, but the debate about the diversity of the bench is a distinct one.

In the Chilean case, the main point under discussion was the commitment of the judicial candidate to democratic values. Bertelsen's defenders shielded him behind academic and professional excellence and emphasized his commitment to the Constitution because he participated in the drafting process. However, as the author points out, since the 1980 Constitution was ratified under the Pinochet authoritarian regime, the commitment to the constitutional text as originally framed—and to its authoritarianism—is precisely the source of the problem. In this context, an originalist position, if understood as the

[10] Judith Resnik, *Asking About Gender in Courts*, 21 FEMINIST THEORY & PRAC. 952, 953 (1996).

[11] *Id.* at 957.

[12] *Id.* at 956.

[13] Sally J. Kenney, *Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice*, 10 FEMINIST LEGAL STUD. 257, 258 (2002).

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allegiance with the constitutional framers' values, is particularly troublesome. Throughout the appointment process, Bertelsen's opponents claimed that a constitutional judge ought to be responsive to current democratic values, as expressed by the 2005 constitutional amendment.

Although the insistence on academic excellence and prestige is very telling, rather than the opposition between autonomy and responsiveness, the debate might also be read as the contest between the values of the past and the present: Under what values should the Constitution be interpreted? Thus, time is relevant here, such as in the originalism versus living constitutionalism debate.

On another note, beyond the specificities of the Chilean case, the opposition to a candidate on the basis of his lack of commitment to democratic values does not necessarily align the opponents with a responsiveness position towards the law. One could be wary of a constitutional judge who was too close to an authoritarian regime in the past, without subscribing to the need to interpret the law according to social expectations and needs. In other words, those who defend the autonomy of the law could also oppose the nomination of a person with a dubious democratic past.

By the end of the article, the author points out a difference between the public debates in Chile and the United States on judicial appointments: Whereas in Chile the scholarly establishment was reluctant to engage on the discussion about values and democratic commitment, the discussion in the United States was much more open and reflected the "competing commitments of a legal profession that is aware of the multiple points of uncertainty in the law but that still remains dubious about how to replenish those spaces."[14]

The difference between, on the one hand, the lack of transparency over the process of judicial appointments in Chile, and the efforts to discredit and outcast Bertelsen's opponents, and on the other, public hearings and the flexible and open discussions over judicial appointments in the U.S., can be traced back to differences between the model for judicial adjudication in civil law and common law traditions. This is only partly captured by the distinction between autonomy and responsiveness.

By analyzing the French and the American model, Mitchell Lasser has argued that the difference between these models can be no longer understood around the formalism/realism divide. Rather, both judicial systems rely on textually formal and socially responsive modes of interpretation, although they might do it in different ways.[15] Lasser

[14] Muñoz, *supra* note 1.

[15] MITCHEL DE S.-O.-L'E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 299 (2009).

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explains the differences in judicial reasoning on the basis of a bifurcation/integration distinction: "[T]he French model bifurcates its argumentation into two distinct discursive spheres—only one of which is consistently made public—while the American model integrates its two modes of argument in one and the same public space, namely, in the judicial decision itself."[16] The bifurcation in the French model consists of the distinction between the published opinion (official formal syllogism) and the internal deliberations (the unofficial social responsiveness debates).[17] In contrast, the American discursive integration model combines the formalist and policy discourses in the judicial opinion. Adjudication involves the "public, argumentative demonstration of properly motivated and constrained judicial decision-making."[18] Discursive differences reflect different conceptions about the law and the judicial role, and ultimately respond to the search for the legitimacy of judicial decisions in each system.[19]

Similarly, the way the debates on judicial appointments are conducted might reflect differences regarding the sources of legitimacy in different legal systems and traditions. As argued by Fernando Muñoz, battles over judicial appointments may well show competing views as to the model of judicial adjudication and the proper role of a constitutional judge in a democracy. Nonetheless, the autonomy-responsiveness divide might not fully capture the terms of the debates discussed by Muñoz's article.

[16] *Id.* at 299.

[17] *Id.* at 300.

[18] *Id* at 274.

[19] *Id.* at vii ("Unlike the American system, which grounds the legitimacy of its judgments in their (public) argumentation, the French system grounds it in the expertise and quality of its judicial institutions."). Regarding the American system and the importance of judges engaging in public dialogue, see Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983).

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