BATTLE OF POWERS

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BRAZIL: FROM DEMOCRATIC TRANSITION TO CONSTITUTIONAL RESILIENCE

Oscar Vilhena Vieira

Translation: Bradley Hayes

Wilson Center | Brazil Institute

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PREFACE

For many Brazilians, 2013 stands as a watershed year in the nation's historical narrative. Starting in June of that year, Brazil underwent profound political and social turbulence, representing the outcry of citizens demanding the realization of promises made in the constitutional pact of 1988, which included enhanced welfare and social rights, a more accountable political system, and a legal system rooted in equality. There are significant institutional forces shaping Brazil's tumultuous period between 2013 and 2022. While it's easy to look for simple causes, the reality is more nuanced. A key factor seems to be the tension between a strong, independent judiciary and a strained political party system, further intensified by public protests. This period not only underscores the delicate balance between strengthening and weakening democracy but also prompts vital questions about Brazil's future direction.

After the 2013 protests, Brazil's political scene became even more turbulent following President Dilma Rousseff's 2014 reelection. This period was marked by growing public resentment and increasing clashes between the judiciary and political entities, culminating in an unprecedented tension between the legal establishment and political institutions. Economic downturns and rising unemployment further fueled discontent. The situation worsened when Operation Car Wash exposed widespread corruption, further straining Brazil's political atmosphere. This turmoil was amplified by a conservative wave characterized by nationalism, militarism, and resistance to progressive ideas, leading to a significant break from Brazil's political elite and its traditional conciliatory dynamic.

In *Battle of Powers*, Oscar Vilhena Vieira provides a narration of this tumultuous period, emphasizing the difficulty of pinpointing direct causes amidst such a web of intertwined events. Key moments include the impeachment of President Rousseff, the unexpected political survival of Vice President Michel Temer, and the corruption conviction of Luiz Inácio Lula da Silva, which drastically shifted the nation's political trajectory. Further complicating matters was Lula's disqualification from the 2018 presidential race. These institutional conflicts set the stage for a populist wave. Capitalizing on strong anticorruption and antiestablishment sentiments, this wave propelled Jair Bolsonaro into the presidential seat at Palácio do Planalto in 2018.

Following Bolsonaro's ascent to power and the subsequent events that culminated in Luiz Inácio Lula da Silva's return to leadership, Vilhena Vieira dissects the Bolsonaro era, introducing the term "authoritarian infra-legalism" as a form of democratic erosion, distinct from "authoritarian legalism" or "abusive constitutionalism," which characterized democratic erosion in countries such as Venezuela or Hungary. It explores the implications of this covert erosion strategy, accompanied by insidious calls for military intervention.

As we venture deeper into Brazil's efforts to safeguard its constitutional democracy from looming threats, Vilhena Vieira highlights the country's unique constitutional design. Emphasizing consensus and solid institutional checks, played a crucial role in preventing significant alterations to the progressive nature of the Constitution. The National Congress showed restraint, steering clear of damaging amendments, while the Supreme Federal Tribunal took proactive measures to defend democratic norms. This protective stance was evident in the Tribunal's collaboration with the Superior Electoral Tribunal, ensuring a fair and untainted electoral process. But a crucial takeaway is that a thriving democracy doesn't

just rely on institutions; it's a collective responsibility, needing the continuous commitment of its citizens.

While looking into Brazil's particularly "sharp-edged times," beginning with the 2013 protests, this period is marked by a form of constitutional discomfort that did not necessarily escalate into a full-blown constitutional crisis. The system, far from collapsing, showcased its resilience, adaptability, and fortitude in the face of upheaval. It's also essential to understand that the Car Wash operation and the subsequent corruption revelations were part of a bigger picture. Various social, economic, and institutional dynamics, including key aspects of the 1988 constitution, contributed to the cascade of protests, the impeachment saga, and the extended period of constitutional tension.

By examining the Brazilian experience and contextualizing it within a broader historical and theoretical framework, this book provides a stark reminder of the dangers posed by extremist political movements and their potential to undermine the democratic rule of law. Additionally, it underscores the imperative for democracies to not only safeguard their foundational principles but also to effectively deliver public goods. This necessitates a continuous reevaluation and redesign of governance structures to ensure that societies can address their needs more efficiently and expediently. Without this proactive approach to governance, democracies risk becoming stagnant or regressive, further opening the door to extremist influences.

Bruna Santos
Director, Wilson Center – Brazil Institute.

INTRODUCTION AND ACKNOWLEDGMENTS

Brazilian constitutional democracy survived a sequence of rigorous resilience tests in the last ten years. Starting from the massive demonstrations that occupied the main Brazilian cities in 2013, the country plunged into a period of political polarization and a vicious circle of institutional battles. After three decades of democratic stability, brought by the 1988 Constitution system that sealed the transition from the military regime to democracy, Brazilian institutions became more conflictual and unstable after 2013, leading to the controversial impeachment of former President Dilma Rousseff, in 2015; the conviction of former President Luiz Inácio Lula da Silva (Lula) and several business and political leaders after a disruptive electoral corruption investigation, in 2017; the election of Jair Bolsonaro, a far-right and anti-system president, in 2018; and the attempted coup d'état, incited by Bolsonaro, in January 8, 2023, after his electoral defeat in the 2022 elections. The chapters of this book aim to offer an institutional reading of the Brazilian constitutional experience in the context of the last turbulent decade.

Constitutions have been a predominant object of interest for jurists, and eventually political scientists, throughout history. At times of greater political and institutional tension, however, many realize that our destinies—not only political, economic, and social, but also our aspirations about who we are and how we want to lead our lives—are directly related to the vitality of the pact that constitutes us as a society. More than just a set of higher rules, constitutions can contribute to enabling democracy, regulate the exercise of power, and set basic principles of justice—through the language of rights—that should guide the relationship among

people and between citizens and the state. In this sense, functional democratic constitutions are mechanisms through which we commit ourselves to dealing with our problems and coordinating our conflicts peacefully and democratically.

The transition to democracy in Brazil required a major process of political coordination among different classes, political forces, and sectors of society, which resulted in an ambitious constitutional compromise, signed in 1988. The high degree of mistrust among these various forces present in the Constituent Assembly favored the drafting of a broad and detailed document. It also led to the adoption of a highly consensual model, distributing power among many instances, including judicial and quasi-judicial institutions, in order to ensure the respect for the constitutional pact.

Over the first 25 years of its enactment, the Constitution has not only contributed to the consolidation of democracy, the modernization of social relations, and the incremental implementation of its objectives, but it has also shown resilience, adapting its rules to various economic, political, and social imperatives through reforms, as well as by a responsive posture assumed by the Supreme Federal Tribunal (STF).

The vast demonstrations that took the streets of our major cities in 2013 called into question the consistence of the political system. Distributive conflicts and institutional collisions shacked a constitutional arrangement that seemed consolidated. On the one hand, there was a clash between legal institutions, which became more autonomous and ambitious over the years, and political institutions immersed in several corruption scandals. On the other hand, fiscal crises, economic recession and regressive policies threatened fundamental rights and a large set of public policies that had brought about countless positive transformations in Brazilian society over the last few decades, generating social distress.

These two factors provoked a severe crisis, with a strong impact on the behavior of political and institutional actors. Political and institutional disputes became more polarized and society more intolerant and conflictive. The election of an extreme right-wing populist president in 2018 subjected the Brazilian constitutional system to an even more rigorous test of resilience. For many, our constitutional system has entered a major crisis and even cracked, as a consequence of this sequence of turbulent events. The argument of this book, however, is that Brazilian constitutional democracy not only survived but also demonstrated reasonable resilience, even at the cost of severe injuries and dangerous erosion.

Besides describing how Brazilian institutions behaved during this period, the main objective of this book is to argue that the highly consensual model adopted by the 1988 Constitution not only contributed to overcoming the major political conflicts in this turbulent period but also provided effective mechanisms to defend the Brazilian democracy against authoritarian populist attacks. It is important to emphasize, however, that constitutions cannot save themselves. They can at best offer rules and procedures that help society and its leaders to bargain solutions for its conflicts. Overcoming visceral polarization and political turbulence, more than good constitutional design, requires an enormous effort of political coordination and concertation among distinct sectors.

The Brazilian edition of this book would not have been published without the support and collaboration of various people and institutions. I'd like to start by thanking Lilia Schwarcz and Ricardo Taperman, from Companhia das Letras, who encouraged me to write a book about the challenges facing Brazilian democracy in the light of the Constitution, in the aftermath of the 2013 demonstrations. A large part of this book was written at

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1. CONSTITUTIONAL MALAISE

The vast protests that filled the streets of Brazil's major cities in June 2013 were a vigorous expression of the dissatisfaction that large swathes of Brazilian society felt for the political elite. An original demand of the protesters was that several promises made in the 1988 constitutional pact, such as those related to the promotion of welfare and social rights, a more responsive political system and a deeper commitment of legal institutions to equality before the law, be fulfilled.[1] The protesters repudiated the behavior of political parties and leadership so broadly and vehemently that they destabilized what had seemed, until then, a secure equilibrium attained by the Brazilian political system after the enactment of the 1988 Constitution, which had marked Brazil's transition to democracy.

With the reelection of President Dilma Rousseff in November 2014, political confrontations grew more bitter and increasingly intolerant. A new flood of protesters filled the streets, focusing on corruption scandals exposed by *Operation Car Wash* (*Operação Lava Jato*), unleashing a conservative upsurge that incorporated patriotism, nationalism, militarism, and the rejection of progressive welfare and minority rights.[2] The rhetoric and tactics employed in the political battles became more radical. The standard of conciliation that had characterized relationships between political elites and branches of government in Brazil[3] gave way to a distinctly combative attitude. The law and its institutions also began to clash with the political branches to a degree never seen before, resulting in a sort of tug-of-war between the legal establishment[4] and political actors. As the economy entered an accentuated decline, unemployment rose and the fiscal deficit

expanded, the *Operation Car Wash* uncovered overwhelming electoral corruption schemes, implicating several parties that had exercised power in the last decades, creating a perfect political storm.

The most conspicuous results of the institutional battles of this period of time were the controversial impeachment of President Rousseff, followed by Vice President Michel Temer's equally controversial political survival, made possible by the High Electoral Court (hereinafter TSE), and the swift conviction of former President Luiz Inácio Lula da Silva ("Lula") on corruption charges by Judge Sergio Moro. The confirmation of this sentence by an appellate court prevented Lula from running in the 2018 presidential election, strengthening a far-right populist ticket that embraced an anticorruption and antisystem discourse. These events were permeated by an increased social and political polarization accompanied by a cycle of institutional and political retaliations.

The circumstances were so complex and the political polarization so pronounced that a battle among competing narratives ensued. On one side are those who believe that the Brazilian constitutional order was viciously attacked under the guise of combating corruption: a series of "coups" culminated in the illegitimate removal from office of President Rousseff and the "preemptive impeachment" of former President Lula. According to André Singer's version of the narrative, the institutional rupture had its roots in the class conflict that structures Brazilian society and politics. Singer argues that the center-right Party of the Brazilian Social Democracy (PSDB), which represents the middle class and the rich, knew that it would be unable to beat the center-left Workers' Party (PT), which represents the poorest Brazilians, in future presidential elections. This would explain why the prospect of circumventing the election altogether became

increasingly popular among PSDB supporters. The left generally calls this strategy a "coup," even though it was formally carried out through constitutional channels. Singer draws a parallel to the period between 1946 and 1964, when the right-wing National Democratic Union (UDN) —a party that represented the rich— abandoned self-restraint, after a series of defeats in presidential elections, and began to behave antidemocratically. Singer does not wholly disregard distinctive features of the contemporary context, such as serious macro-economic problems and corruption scandals, he treats them, however, as secondary. He emphasizes instead the structural element of the crisis, namely, class conflict, along with its constitutional dimension, the fact that the tactics employed ran against the spirit of the pact brokered by the Constituent Assembly and enshrined in the text of the 1988 Constitution.[5]

The opposing narrative maintains that Brazil's major political crisis, which occurred between 2013 and 2018, did not represent a breakdown in the constitutional order. On the contrary, the crisis was a product of the consolidation and maturation of Brazilian institutions, particularly those responsible for controlling the state and enforcing the law. To the extent that law enforcement agencies became more efficient and autonomous, the space for corrupt politics shrank. As Marcus André Melo maintains, the impeachment of President Dilma Rousseff largely derived from the conjunctures of the devastating corruption scandal uncovered by *Operation Car Wash* as well as from a harsh economic crisis with serious social consequences. Melo even rejects the suggestion that the crisis came from some deficiency in Brazil's system of coalition presidentialism,[6] despite fully recognizing the enormous drag that extreme party fragmentation and ideological heterogeneity of the coalition has had on the relationship between the Executive and the Parliament. In this sense, there

was no constitutional crisis. Rather, there was a political crisis that sprang from the clash between, on the one hand, autonomous accountability and law enforcement institutions and, on the other hand, political actors, coinciding with a major corruption scandal and economic debacle.

The nature and causes of the crisis Brazil experienced between 2013 and 2018 are the main topics in this chapter. Were we immersed in a traditional *constitutional crisis,*[7] or should this turmoil be considered an extended period of *constitutional hardball*[8] —a *constitutional malaise*[9]— characterized by a substantive alteration of the traditional pattern of behavior between political and institutional actors? Did those behavioral changes indicate *constitutional decay, rot, or retrogression?*[10] What are the distinctions among these unclear categories, and which of them provides the best description for the Brazilian case?

This work will also examine the main institutional forces that contributed to the turmoil Brazil experienced between 2013 and 2018. The impossibility of drawing causal relations in connection with a complex and multifaceted series of events is obvious. However, it is possible to hypothesize about how the clash between a more autonomous and effective legal apparatus and a fragmented political party system, under severe pressure from the streets, contributed to the crisis. Do large scale corruption investigations, such as *Operation Car Wash*, inevitably end up debilitating the democratic regime, as Tushnet seems to suggest?[11] Is it unavoidable that anticorruption and law enforcement agencies with sufficient strength to curb high level corruption will broaden their powers and end up threatening the democratic regime?

There is no doubt that, starting with the protests in 2013, the country entered "trenchant times" (*tempos bicudos*),[12] characterized by a cycle of institutional retaliations, in which political and institutional actors used and abused their mandates and prerogatives

in order to expand their power and serve their own interests. This extended period of constitutional hardball, amounted to a constitutional malaise. However, it was not a constitutional crisis in a strict sense since the constitutional system was not at risk of collapse. The Constitution survived and adapted. Moreover, the corruption scandal and *Operation Car Wash* were not the only factors that sparked the cycle of protests, the impeachment process, and the long period of constitutional malaise. Many other social, economic, and institutional factors, including important features of the 1988 Constitution, contributed to the situation.

CONSTITUTIONAL CRISES AND OTHER CHALLENGES

The word "crisis" is usually associated with difficult times and instability. The Greek word at its root also refers to a decision—specifically, a fundamental decision meant to regain balance, be it the balance of an organism or a political or social system, without which the organism or system is at a great risk of perishing.[13] The concept of a constitutional crisis should be defined in a correspondingly strong fashion.

Modern constitutions are higher norms that aspire to coordinate political competition, regulate the exercise and transfer of power, and ensure the rule of law together with the basic principles of justice that orient relationships among individuals and between them and the State.[14] The fundamental purpose of a constitution is to enable society to channel disputes and disagreements into nonviolent political competition and institutional processes.[15]

Constitutions establish various mechanisms to ensure that conflicts play out, however vigorously, within the bounds defined by the rule of law. The purpose of the electoral system

and the existence of rules for political parties is to transform disputes among opposing camps into a formal contest in which electors determine the ideological current that will prevail until the next election. Separation of powers, for its part, arranges the government's institutions in such a way that they are always in tension and often in conflict, as James Madison taught us, so that the ambition of one branch controls the ambition of the others. The notion that each branch of government is independent and works harmoniously with the others, a notion that seems to be implicit in constitutional texts, is actually a euphemism. In reality, what interconnects the institutions is tension. Similarly, the rights to exercise political opposition, freedom of expression, and the freedom of unarmed assembly permit malcontents to challenge, forcefully, the manner in which power is being exercised, or even to question the manner in which protestors are conducting themselves.

In a constitutional democracy, conflicts are part of daily life. They are not necessarily mere spats among friends; in fact, they are sometimes particularly bitter. Governmental institutions sometimes overstep their authority or carry out actions that are subsequently deemed unconstitutional. Even judges infringe upon the law or the constitution. This is not to say, however, that each such occurrence represents a constitutional crisis.

Constitutional democracies are self-correcting systems. When a referee calls a foul in a sports match, the game does not enter a crisis. Even when the referee misses a foul, crisis is usually avoided. Crises occur when the players abandon the rules altogether. In a constitutional democracy, there are daily clashes among government branches, usurpations of authority, virulent political attacks, even isolated violations or abuses of constitutional rights. Yet, these are not considered crises because the Constitution contains mechanisms for addressing and rectifying them, and when they

work, it is the vitality of the Constitution that is reaffirmed, not its failure. The judiciary is often called upon to annul political decisions taken with majority support or to fashion legal solutions that lack majority support. On other occasions, the judiciary has to punish abuse of authority or fraud upon the system. It is all part of the game. Constitutions even allow for their own modification under certain circumstances.[16] Here is where constitutional law goes beyond traditional "rules of the game," as the participants are given the opportunity to renegotiate the rules governing political conduct in the midst of a conflict, which is necessary, as the rules are often at the heart of the conflict.

Democratic constitutions also contain extraordinary mechanisms for dealing with exceptional situations. Modern constitutionalism learned from ancient Rome that exceptional circumstances—war, deep social unrest, or even natural disasters, phenomena that are often unavoidable—do occur and can jeopardize a regime's stability. The term the Romans used for extraordinary attribution and exercise of power meant to protect the republic was "dictatorship." Through conferring a broad margin of discretion to a single leader, the "dictator," Romans thought it would facilitate the determination and mobilization of the means necessary to combat crises and reestablish order.[17] In modern constitutional democracies, even though the need for extraordinary mechanisms under exceptional circumstances is recognized, the Roman notion of dictatorship has not been and cannot been accepted. Constitutional democracies only adopt extraordinary measures within procedural and substantive limits set by the constitutional text itself.[18] In this sense, they are extraordinary rules, but not rules that grant exceptional powers to anyone. The adoption of extraordinary mechanisms does not take place in a normative vacuum, and their implementation does not coincide with a state of constitutional crisis.

In addition to creating three levels of government (federal, state, municipal), Brazil's 1988 Constitution has an entire section on federal "intervention" in state affairs and state "intervention" in municipal affairs, intervention that is only justified in order to "maintain national integrity," "repel foreign invasion," end "serious compromise of the public order," impede "the free exercise of any of the branches," and so on. Similarly, the Constitution authorizes the decree of a "state of defense" in order to "preserve or promptly restore, in predefined, bounded locations, public order or social harmony," or a "state of emergency" in times of serious upheaval or war.

The Constitution lays out the design of all of these extraordinary mechanisms to address crises that cannot be rectified using ordinary procedures. The mechanisms are extraordinary in the sense that they should not be employed in day-to-day political activity, not because they are "extra-constitutional." The Constitution establishes procedures that must be followed in applying these measures and defines the authorities responsible for each action as well as the limits on their use. The mechanisms are also extraordinary because they confer a greater margin of political discretion upon those responsible for their deployment. In a state of emergency (or of defense), they are extraordinary because they can be used to restrict, albeit temporarily, certain rights, such as the right to assembly. In the case of impeachment, the result could be the termination of a political mandate conferred by popular vote.

Employing such extraordinary mechanisms to tackle social, economic, or political crises, which are not employed with frequency, obviously generates political tension and legal uncertainty, whether it be primarily due to the intensity of the underlying social and political conflict or because their activation leads to disputes over their timing, appropriateness, and proportionality.

However, resorting to exceptional constitutional mechanisms does not necessarily amount to a constitutional crisis. Rather, those mechanisms are designed to ensure that extraordinary events do *not* lead to a constitutional crisis.

Constitutional crises are those specific moments in the life of a political community when events threaten the capacity of its constitutional system to settle political disputes through its institutions. These moments create opportunities for political and institutional actors to make urgent decisions in order to restore the system's balance and operational effectiveness. Those decisions, however, must measure up to constitutional standards. If not, they will themselves be constitutive of the crisis.[19]

What is at stake in a constitutional crisis, therefore, is not only the serenity of institutional activity, but also the very perpetuation of the Constitution, which hinges on the validity of decisions meant to restore the capacity of political and institutional actors to coordinate their interests in accordance with established rules and procedures. The constitutional validity of the decisions made in the attempt to rectify a crisis is essential to any legal discussion of the nature of a constitutional crisis.

Sanford Levinson and Jack Balkin have proposed a typology of constitutional crises.[20] Even if this typology does not exhaust the possible forms of constitutional crises, it helps to distinguish grave political or social tensions and conflicts that are mediated by constitutional institutions, from those that extrapolate constitutional channels, threatening the very existence of the constitutional order. Levinson and Balkin highlight three types of constitutional crisis. In their analysis, the most common occurs when the constitutionally elected or appointed authorities decide or publicly express their view that the rules and procedures established by the Constitution do not provide a solution or inhibit the solution for a serious problem. For that reason, the authorities resort

to "exceptional means" with the expectation that the population will subsequently approve the measures once the crisis is defused. In such cases, obedience to certain constitutional norms is put aside in the name of a "higher purpose" that, when attained, exonerates the authorities' disobedience of those norms.

A second type of constitutional crisis occurs when fidelity to the constitutional text leads to institutional paralysis or aggravates a political, economic, or social crisis to the point of jeopardizing the reigning order. If no political actor can come up with a solution to the crisis through constitutional means, the system enters deadlock.

A third type derives from the escalation of a conflict among the branches of government where all (or at least more than one) of them claim their interpretation of the Constitution is the most faithful and thus predominates over the others. At any point where the conflict spills over the confines of political competition as set by the Constitution, becoming a social conflict involving violence, the Constitution loses its capacity to discipline political action.

While the debates over constitutional crises go back as far as constitutions do, the perception that we are currently experiencing a sort of "democratic recession" in many parts of the world, including countries whose democratic regimes were considered stable, has spurred new literature on the subject. Terms such as erosion, subversion, and decay are increasingly used to describe situations that do not seem to correspond either to a normally functioning constitutional democracy or to the classical notions of constitutional breakdowns.[21]

We should begin by distinguishing constitutional crises from constitutional breakdowns. Breakdowns are easy to identify and occur when a given constitutional order is overturned or collapses and a new one is established in its place. That is what happened in Brazil in 1889, 1930 and 1964. In each case, a constitutional regime

was overturned and was replaced by a new order, one of *de facto* government. Breakdowns can be caused by crises, but crises do not necessarily cause breakdowns. In the case of a *coup d'état*, the attack may come from outside the political system, like the army, or from within one of the branches of government, such as a president who oversteps his or her authority with the backing of forces powerful enough to subdue opposition. That is what occurred when President Vargas launched the Estado Novo ("New State") in 1937.[22] In the case of revolutions, society—or at least significant portions of it—rebel against the system of power in a more spontaneous fashion, as we recently witnessed during the Arab Spring, or through some catalyzing intermediary, such as a revolutionary party or force, like that which occurred in Russia in 1917 or in Cuba in 1959. The crucial aspect of breakdowns is the move away from the previous order and the imposition of a new order. In accordance with Carl Schmitt, the imposition of a new order is the mark of true sovereignty in that, by definition, sovereignty is the capacity first to determine a "state of exception," and then to establish this new order.[23] This line of reasoning involves no normative discussion of the validity of the process by which the new order is established. It is just an expression of factual power.

The replacement of a democratic constitutional order by an authoritarian system can follow yet another path, one that does not ensue from a sudden breakdown in the previous order, but instead involves gradual "erosion" of the procedures and rights that characterize constitutional democracy to the point of complete disfigurement. This type of situation occurs when political and institutional actors exploit mechanisms inscribed in the Constitution to alter, bit by bit, the pact at the heart of that Constitution.[24] Ways to do this include placing restrictions on certain rights, changing election rules, either packing the judiciary with partisan judges or restricting its independence, and using corruption and cooptation

as political methods to remain in power without the need to win transparent, competitive elections.

The most dramatic example of this type of constitutional erosion, and its tragic aftermath, was Hitler's use of procedures established by the 1919 German Constitution, such as those of referenda and constitutional amendments, to pass measures, like the Enabling Act of 1933, that undermined the organizing spirit of the Weimar Republic. As Hitler spelled out in 1930, "the constitution only maps out the arena of the battle… once we possess the constitutional power, we will mold the state into the shape we hold to be suitable."[25] It must be remembered that these majoritarian instruments were employed in a context of increasing political violence where democratic prerequisites were no longer respected. In recent decades, without ignoring the enormous differences that distinguish each case, we have witnessed another wave of constitutional erosion. Vladimir Putin in Russia,[26] Hugo Chávez then Nicolás Maduro in Venezuela,[27] Recep Erdogan in Turkey,[28] and Viktor Orbán in Hungary[29] have all worked persistently to weaken constitutional limits on executive power, dismantling the remnants of a democratic constitutional order.[30]

Constitutional crises, as a phenomenon, are subtler than constitutional erosion. On the surface, constitutional crisis may be difficult to distinguish from erosion. It can also be difficult to distinguish constitutional crises from instances of heightened tension and conflict among government branches, or from moments of extreme social dissatisfaction, all of which are common in democracies. All of these conditions are often present during constitutional crises. However, a constitutional crisis only becomes manifest when the conflicts are no longer settled through the relevant institutions, namely through votes in parliament, legally within the recognized confines of jurisdiction, or even through extraordinary mechanisms for the protection of the Constitution.

Moreover, a constitutional crisis only occurs when the regime's very survival is at risk.

Mark Tushnet describes another kind of behavior commonly exhibited by institutions in times of constitutional transformation—behavior he calls *constitutional hardball*—where actors adopt an all-or-nothing stance, the strategy being for one institutional actor to use its constitutionally-assigned competences to attack another and take its power or, defensively, to block or reduce the adversary's ability to challenge for power.[31] Such behavior can test the traditional model for the interpretation and application of the law. It can also alter unwritten rules of political conduct, such as self-restraint, tolerance, forbearance, and moderation, principles that Levitsky and Ziblatt identify as essential for democratic regimes to function properly.[32]

In *constitutional hardball*, the institutions act within their competences but make full use of their discretion to act boldly without shying away from controversy, butting up against established notions of validity in order to alter power relations. From a pragmatic perspective, when these strategies work, in addition to increasing the institution's power in the short-term, they lead to long-term changes in the constitutional standards themselves. When the strategy proves unsuccessful, on the other hand, it generally goes down in history as legally mistaken and those who pushed for it are viewed as guilty of violating the Constitution.

Constitutional malaise or constitutional stress can be qualified as longer periods of constitutional hardball, when those who possess political mandates or institutional prerogatives intensify their use of heavy-handed methods, creating incentives for the emergence of political and legal retaliation that further heighten tension and institutional instability. During times of constitutional malaise, people dispute the meaning and validity of political and institutional acts. These moments can often lead to "decay" or "rot"

in constitutional standards, as Balkin emphasizes, or their "retrogression," in the words of Huq and Ginsburg.[33] These terms are all somewhat imprecise and must be employed with a certain degree of care. Returning to our team sport metaphor, hardball and even serious fouls are part and parcel of many matches. Still, play continues as long as the match does not devolve to an uncontrollable level of such tactics. In some matches, however, after a certain point, it often becomes clear that the nature of the game has been altered, even though play goes on.[34] Similarly, constitutions can survive periods of malaise, but not without undergoing some degradation to how the constitutional game is played, or possibly, some form of adaptation.

With these categories in mind—clearly a simplistic approximation of very complex phenomena that often occur in conjunction, are interrelated, frequently confused and may overlap with each other—we may be better equipped to analyze the situation in Brazil.

It is my hypothesis that, starting with the long days of protest in 2013, the country entered trenchant times characterized by a cycle of institutional retaliations, where political and institutional actors used and abused their mandates and prerogatives in order to expand their powers and serve their own interests. This institutional unrest did not, however, generate an explicit decision by any political or institutional actor to disregard the constitution, nor did it degenerate into violent confrontation or serious disorder.[35] At the most, these battles led us into a period of constitutional malaise, but not a constitutional crisis.

The main political clashes waged in the last five years in Brazil, from *Operation Car Wash* and the imprisonment of Lula, to the impeachment of President Rousseff and Temer's Brazilian Democratic Movement (MDB) party takeover of the presidency, all took place within institutional channels, as I will discuss in

greater detail below. This is not to say, however, that the political and institutional system was functioning properly when the 2018 elections came around. It had been greatly discredited as a result of multidimensional crises, which certainly favored the rise of antisystem populist forces, a development that is posing a great challenge to our constitutional democracy.

INSTITUTIONAL ROOTS OF THE BRAZILIAN TURMOIL

Multiple economic, political, and social factors contributed to the eruption of demonstrations across the country after June 2013, and the crisis that they unleashed. Although it was not a constitutional crisis, it was without doubt an economic crisis with far-reaching social repercussions and which destabilized the government. It is also difficult to exaggerate the extent to which successive corruption scandals increased distrust in the political system. Regarding the conflict between rich and poor, exacerbated distributional disputes will necessarily cause political tension in a country as unequal as Brazil, and also contribute to populist and opportunistic behavior. The objective of this section, however, is to identify characteristics of our constitutional architecture that may bear some responsibility for the disturbances seen in the "engine room"[36] of our democracy, and to determine whether those characteristics jeopardize the very survival of the constitutional project launched in 1988.

The current Constitution resulted from the broadest and most democratic pact assembled by Brazilian society throughout its history. Reacting against the previous authoritarian regime, the Constituent Assembly embraced a generous charter of rights and limited government power by creating a highly "consensual political

system"[37] that required coordination among the various political branches and constituencies, in order to function properly. The Constitution was elaborated in a context of deep mistrust among the political groups and forces that participated in the transition process. This mistrust explains the strategic choice of each group to protect as many interests and aspirations as possible by including an ambitious set of rights, public policies and detailed rules that could be set into organic laws within the constitutional text, and, at the same time, reinforce the system of checks and balances. Accordingly, the Constituent Assembly strengthened the prerogatives and capacity of agencies responsible for enforcing the law in order to secure the commitments expressed by the constitutional text.

Immersed in a thick, highly corporatist and patrimonialist political culture,[38] the assembly also included in the Constitution several privileges for well-positioned groups, such as public servants, and select sectors of the economy. As a consequence of this "maximizing strategy,"[39] the 1988 Constitution became at once an ambitious, pervasive, and highly detailed compromise. In political terms, it created a federal presidential system with a robust scheme of separation of powers, reinforcing judicial review mechanisms and law enforcement agencies, and a fragmented party system, resulting in the establishment of multiple veto points for majoritarian decisions. With regards to the mediation of distributive disputes, the Constitution paired progressive social rights with regressive mechanisms favoring the concentration of wealth in certain sectors. This "maximizing compromise" operated as a sort of "insurance policy" as the transition toward and consolidation of democracy unfolded, enabling the coordination of economic, social, political, and ideological disputes through the constitutional pact.[40] Since each group stood to gain something at the constitutional assembly, pulling out of it meant a heightened political price, thus creating a strong incentive to stay on board.[41]

The maximizing compromise strategy has actually proven itself extremely effective in maintaining the loyalty, although a merely strategic one, of all significant segments of the political spectrum to the democratic process. For more than 25 years, all relevant political forces have actively taken part, without resistance, in the scheme of government set up by the 1988 Constitution. The schedule of elections has been respected, ensuring that different political orientations are given a chance to be in power. Public policies inserted into the Constitution have been incrementally implemented by successive governments. Moreover, the breadth of the Constitution has not turned out to be an impediment to its adaptation through constitutional interpretation or formal modification by successive administrations. The Constitution has been amended more than one hundred times in thirty years. The decision by the Constituent Assembly to establish a more flexible process for approving amendments, while at the same time to conferring greater rigidity to the core clauses of the Constitution, such as those related to separation of powers, federalism, democracy and rights, has resulted in a charter that is relatively open to modification without putting core principles at risk.[42] In sum, the Constitution has proven its resilience for more than two decades, defying many pessimistic assessments of its viability, voiced when the constitutional architecture was announced in 1988.

Despite the Constitution's contribution to the stabilization of the Brazilian political system, some of the institutional choices made in 1988 also contributed to the crisis that has overtaken the system since 2013. Two major conflicts, derived from constitutional choices in 1988, can be traced to fueling the crisis sparked by the 2013 demonstrations. The first relates to tensions that rose, over time, between the system of coalition presidentialism—especially as it was weakened by proliferation of political parties post-2005—and accountability and law enforcement institutions that

have been gaining autonomy over the past decade. A clear example of the growing autonomy of the accountability and law enforcement apparatus is the "*Mensalão*" case in which, after an independent investigation by Federal Police and federal prosecutors, the Supreme Federal Tribunal (STF) found prominent members of the party in power guilty of a congressional vote-buying scheme.[43] In a sense, what we have during the 2013-2018 turmoil is a growing tension between strengthened and autonomous accountability and law enforcement institutions—populated by judges, prosecutors, state attorneys, police, etc.—with an extremely fragmented political party system.

The set of distributive conflicts embedded in the core of the Constitution is the second institutional choice that contributed to the crises exposed by the 2013 demonstrations. In addition to the establishment of progressive social policies and rights, the 1988 Constitution also embedded regressive privileges and benefits for specific sectors of the Brazilian economy, a list that kept expanding over the years. In moments of economic recession and fiscal decline, conflict over public expenditures, rooted in the Constitution, has tended to increase, as witnessed after 2013.

Taking the conflict between the political and legal establishments into consideration first, several political scientists, including Giovanni Sartori, anticipated the problem of combining a presidential system with an open list of proportional representation for the Lower House, which leads to a multiparty system.[44] Sartori's prediction was that the president's dependence on multiparty and fragmented congressional coalitions necessarily leads to impasses and can even paralyze the decision-making process. The logic is simple: however great the margin of victory, the elected president will still rely on a splintered Congress to implement his or her agenda and the odds of the president's party obtaining an effective majority are extremely low. As a consequence, the executive must

exert continuous effort to maintain a congressional coalition that supports its agenda. Given the high degree of political fragmentation, coalitions are inevitably unstable and costly. In parliamentary regimes such as Italy, this instability manifests itself through short-lived governments. In a presidential regime, however, where the head of state is not replaced when the executive loses congressional support, the government becomes impotent or vulnerable to impeachment, which can be much more serious.

Against these pessimistic predictions, Argelina Cheibub and Fernando Limongi have shown that Presidents Itamar Franco, Fernando Henrique Cardoso, Luiz Inácio Lula da Silva, and even Dilma Rousseff during her first term, managed to govern with a high degree of stability and a certain level of effectiveness by availing themselves of executive prerogatives such as "provisory measures" (*medidas provisórias*) and control of the legislative agenda.[45] Cheibub and Limongi's analysis suggests that there is nothing inherently flawed in the coalition presidentialism system and, hence, the current impasse and crisis were not inevitable. Moreover, the system mitigates the danger of an authoritarian president who would disregard the wishes of minorities.

This reading, however, glosses over certain problems, especially when we consider two interrelated structural characteristics of Brazilian society. One is deep and persistent inequality; the other is parasitic corporatism and patrimonialism.

In the Brazilian system, both houses of Congress, but especially the Lower House (Câmara dos Deputados), are composed of a myriad of parties. The open-list proportional representation system for the Lower House, combined with a large quantity of electoral districts, makes the cost of campaigning very high.[46] The most effective campaign strategy involves embracing the interests of certain groups in order to attract resources and mark out territory within the governing coalition. Even if the party does obtain

only a few seats in the government coalition, its strategic position may enable it to extract privileges and benefits for its constituents, in addition to more opportunities for fundraising and indirect benefits from government contracts that may help bankroll the next campaign cycle.

The resulting political fragmentation and focus on specific interests that are predominantly corporative and patrimonial runs counter to the presidential mandate, which is conferred by the majority of the electorate, and theoretically obliges the president to defend the general interests of the entire population. On the one hand, parties and congressional leaders fight for their political survival by maintaining or expanding special favors for the economic sectors, employers' associations, civil servants, or labor unions that they represent. On the other hand, the president, whose political survival depends on the ability to obtain and maintain the support of a majority of voters, must tend to the well-being of the bulk of the population, which is largely poor and unorganized.[47]

Presidents Fernando Henrique Cardoso and Luiz Inácio Lula da Silva were largely successful in reconciling these opposing demands. Their success stemmed from their ability to push Congress to approve policies that expanded the economy, attended to specific corporative interests, and improved the welfare of the most disadvantaged sector of the population.[48] In Cardoso's case, it was by reining in high inflation, which had a perversely compounded effect on the incomes of the poor, and implementing the structures of social policies established by the Constitution, especially in the areas of health and education. In Lula's case, it was by virtue of hearty economic growth that boosted employment and average income, as well as policies that increased the real value of the minimum wage. The success of those policies, together with the distributive mechanisms established by the Constitution,

which defined mandatory expenditures in the areas of education and health, led to a genuine improvement in the living conditions of large swathes of the population.[49]

The equilibrium between general welfare and special interests began to wobble, however, in the mid-2000s. Two 2006 STF decisions combined to create an enormous incentive for the formation of new parties. The first decision overturned the performance clause, a provision meant to shield the Brazilian party system from hyperfragmentation, and the second decision imposed new rules for party loyalty, government funding for political parties, and the allocation of free radio and television time for campaigning.[50]

The institutional effect of those two decisions aggravated the burden of assembling and maintaining the necessary parliamentary coalition for effective governance. Lula, to escape dependence on the centrist MDB party, took advantage of the openings created by STF to make forming new parties easier. Hyperfragmentation of the party system ensued, such that the three largest parties, the MDB, PT, and PSDB soon held only a third of the seats in the Lower House. According to Marcus André Melo, Brazil became the country with the highest degree of party fragmentation among contemporary democracies during this period.[51] Just as problematic, governing coalitions became so heterogeneous that they could not come together around a common platform. The hyperfragmentation and utter disparity of political agendas made maintaining the necessary legislative base more difficult for the executive branch, both in terms of passing legislation and keeping the coalition together. This created fertile soil for electoral corruption.

A series of corruption scandals, of which the *Mensalão* case was the most notorious, signaled the difficulty of governing in the context of such heterogeneous and fragmented coalitions. *Mensalão* involved monthly payoffs to members of Congress and ended in the 2013 conviction of Lula's Chief of Staff, José Dirceu

(PT). A regional "*Mensalão*" in the state of Minas Gerais sent former Governor Eduardo Azeredo (PSDB) to prison in 2017,[52] and a string of convictions from *Operation Car Wash* investigations ensued, eventually including former President Lula himself. Despite important differences among these corruption cases, we should not view them as unrelated incidents. They were all related to the increased cost of building and maintaining coalitions in the hyperfragmented and heterogeneous political context that was not only the direct result of institutional choices, but also of distortions in the original institutional design.

As President Rousseff's second term neared its midpoint, the economic crisis worsened, and coalition members' appetites became even more difficult to satisfy. As a result of the fiscal crisis and the president's lack of political dexterity, the administration's ability to maintain its coalition was reduced, which had a decisive impact on the process that resulted in her impeachment. President Rousseff's inability to engage in productive dialogue with congressional and party leaders—even with many of those who were on her side—cannot be ignored.[53] With a steady stream of charges pouring out of *Operation Car Wash*, it became more and more apparent that the Brazilian party system was becoming increasingly compromised by the need for resources to cover the high costs of electoral campaigns. Parties had begun extracting the necessary resources directly from the private sector, whether in exchange for contracts, subsidies, fiscal exemptions, or other benefits, often provided illegally and to the detriment of public interest.

This model of coalition presidentialism, undermined by hyperfragmentation among parties in Congress and a high degree of heterogeneity across the coalition, coexisted with institutions of accountability and law enforcement that were growing increasingly independent and effective.[54] The coexistence of these two processes generated friction between the political and legal establishments.

The resourcefulness demonstrated, with the STF's backing, in the *Mensalão* corruption case by the Public Prosecutor's Office (MP) and Federal Police (PF), confirmed the increasing difficulty of maintaining harmony between a debilitated political system and an increasingly aggressive and independent accountability and law enforcement system. The defects of the political system were gradually exacerbated over the course of its twenty-five-year lifespan, while the law enforcement system had become steadily more effective and autonomous over the same period.

The institutional roots of the turmoil that started in 2013, however, are not solely located in this tension between the political and legal systems. While outside the scope of this essay, it is necessary to mention that the turmoil was also related to a conflict over resource distribution, and the way in which this conflict gradually crystallized after the return to democracy. As a consequence of the maximizing compromise, the Constitution enshrined a wide range of progressive, redistributive social rights and policies and a large number of privileges for specific sectors. Those privileges are highly regressive and tend to lead toward a concentration of wealth. Moreover, revenue collection and public lending systems opened up space for new activities of questionable legality involving the transfer of public resources to the most affluent sectors of society. As long as there was enough economic growth, the Brazilian government managed to meet the costs of both the special privileges and the social rights enshrined by the Constitution and thus, preserve political and social stability, however precariously.[55]

The conflicts over the Constitution's distributive clauses grew sharp, however, when the economy declined and efforts to address the problem by reforming the pension system hit an impasse. To maintain the support of business, President Rousseff increased incentives to stimulate manufacturing—tax breaks, exemptions,

interest rate cuts, and lowered electricity charges, for example.[56] Bowing to the pressure aggravated the government's fiscal burden, which had repercussions for social programs that implemented the rights established by the Constitution. Similarly, high interest rates on debt not only reduced the funds available for other government expenses, but they also had a severely regressive effect by diverting public funds to those who lent to the government (government debt is largely seen as the most reliable investment available to Brazilians who cannot invest savings abroad). Near the end of her first term, to balance its expenses and fiscal losses with some of the funds earmarked for the social obligations imposed by the Constitution and the government's own policies, President Rousseff's economic team took advantage of what was initially termed "creative accounting" and later became more widely known as "fiscal pedaling."[57] These maneuvers were of dubious legality—they were declared illegal by a unanimous decision of the Brazilian federal accountability office, which recommended rejection of the government's 2014 fiscal report.[58] What's more, the maneuvers did not free up sufficient resources to sustain several of the government's social obligations.

In short, the combined deterioration of social programs and the growing proportions of corruption scandals led millions of people to take to the streets in the largest series of protests that Brazil has ever witnessed,[59] destabilizing the country's political system. The deterioration of public programs was a result of the fiscal crisis, while the revelations and prosecutions involved in the corruption scandals were evidence of the degradation in the system of representative politics, coinciding with a strengthening and increase in autonomy of legal institutions. Following the 2013 demonstrations, the behavior of political and institutional actors grew much more vigorous and controversial, leading us to ask: "How should we characterize the crisis that began with the

vast protests of 2013 and culminated with the election of a far-right populist autocrat in 2018?" and "What was the impact of *Operation Car Wash* on the stability of Brazilian constitutional democracy?"

CYCLE OF INSTITUTIONAL RETALIATIONS

Operation Car Wash

The legal proceedings associated with the *Mensalão* and *Operation Car Wash* corruption scandals initiated an unprecedented battle between political actors and representatives of the legal establishment (judges, prosecutors, law enforcement agents, etc.). Throughout Brazil's long history, the relationship between the legal establishment and political leaders was predominantly symbiotic. In exchange for prestige, benefits, and corporative privileges, the legal establishment regularly removed obstacles for political leaders without threatening the powerful. This was true under both liberal and authoritarian regimes, and instances of insubordination were rare.[60]

Mensalão marked the beginning of a new phase in the power relationships within the Brazilian state—starting with a shift in position by the STF itself, which began making use of its Constitutional competence to try high-level government officials and members of Congress for crimes, a power it had only ever used on rare occasions.[61] The independence demonstrated by the Public Prosecutor's Office (MP) during the *Mensalão* investigation was also surprising. Although the 1988 Constitution had broadened the powers and already strengthened the independence of the MP, until the case of the *Mensalão*, this institution's behavior

had been marked by deference to those in the highest corridors of power. During the administration of President Fernando Henrique Cardoso, for example, the head of the MP, Public Prosecutor General Geraldo Brindeiro, was jokingly referred to as the "Republic's Filing-Drawer General" (*engavetador geral da República*), due to his passive stance toward allegations against governmental officials.

In the *Mensalão* case, however, Public Prosecutor General Antônio Fernando de Souza filed criminal charges against forty people—among whom were Lula's former Chief of Staff José Dirceu and the sitting president of the PT, José Genoino, both central, historic figures for the then-governing party. The charges alleged that the *Mensalão* scheme involved groups that fulfilled three functions (political, advertisement, and financing) whose objectives were ensuring that the PT would remain in power and obtaining the support of other parties in the National Congress in exchange for illegal transfers of funds to party leaders and political campaigns.

The long list of serious charges, brought by the MP against central political figures in government, took everyone, including the STF, by surprise. In the very first hearing, the Court rejected motions by the defense to have the cases tried separately and in secret. The Court also made it clear from the outset that it would not accept the argument that the *Mensalão* monthly payment system boiled down to a violation of election law for improper accounting of campaign donations, which would result only in administrative, not in criminal sanctions. Yet this change of attitude by the Court, dropping its traditionally more muted and lenient approach in favor of more active control of political activity, was not its only unexpected move.

In face of the complexity of the *Mensalão* scheme, which involved many different types of criminal behavior traversing several levels of decision making, the STF loosened the criteria for

the application of a series of investigative and prosecutorial tools. Specifically, three interpretive innovations strongly affected the outcome of the trial that resulted in the conviction of the principal defendants. The first was the Court's majority decision to admit the doctrine of "command responsibility" (*domínio do fato*),[62] according to which an infraction may be imputed to a person who did not directly participate in the criminal offense but who, because of their superior position or authority, knew of or should have been aware of the actions of their subordinates. This doctrine, as applied by the STF, ran counter to the principle of subjective criminal responsibility that the Court had traditionally adopted, and even clashed with the constitutionally protected principle of presumption of innocence, since a presumption of knowledge of the crime is necessary to determine criminal responsibility. The STF pulled another doctrinal innovation during the *Mensalão* trial by ignoring the need to demonstrate that a specific "official act" (*ato de ofício*) was performed in exchange for the improper advantage obtained—that is, it did not require the prosecution to identify particular official acts as evidence that improper advantages had been offered by the corrupting agent. The third innovation was accepting the imposition of distinct criminal charges to the same act. The defendants could thus be charged in more than one crime—for example, corruption and money laundering—based on a single act. If the accused failed to declare gains acquired through corruption to tax authorities or election officials and deposited them into a bank account, they were charged with money laundering in addition to corruption. This shift in the traditional interpretation of several legal norms and doctrines was crucial for the success of the *Mensalão* trial, which transformed the balance of power among the branches of government.

The judges and prosecutors of *Operation Car Wash*, following in the wake of the *Mensalão* case, not only adopted the aggressive

use of prosecutorial prerogatives, but actually ramped them up. Even though the vast network of corruption was expertly teased out, following the apparently fortuitous apprehension of a money launderer named Alberto Youssef, the case cannot be considered in terms of happenstance or even as masterful investigation. *Operation Car Wash* was only made possible by changes in the legal culture, both in its normative framework and institutional ethos. To a large degree, *Car Wash* was the immediate beneficiary of the *Mensalão* trial and its repercussions. The *Mensalão* case had altered the template for interaction between law enforcement agencies and the Brazilian political establishment. The public support expressed for the investigation during the June 2013 demonstrations was overwhelming. In turn, following the first round of demonstrations, President Rousseff signed a new statute on Criminal Organizations, Law 12.850/13, which incorporated plea-bargaining into the Brazilian legal system. The introduction of this legal tool significantly increased the investigative power of the law enforcement institutions and made it possible to hold people responsible for participation in criminal schemes involving various illegal activities, including crimes against the public administration. Without the leverage that plea bargaining gave prosecutors, it is hard to imagine how *Operation Car Wash* could have penetrated the inner workings of the vast corrupt scheme for campaign finance that had irrigated the Brazilian political landscape for more than two decades.

The effectiveness of the operation also involved the use of investigative techniques that a new generation of judges, prosecutors, and federal police officers had brought to the job. These officials enjoy greater autonomy than their predecessors did, not to mention a higher degree of technical training and familiarity with anticorruption experiences in other countries. The *Car Wash* agents used new methods of investigation and also made systematic use

of wiretaps, search warrants, infiltrated operations, court orders to obtain bank and tax records, and international cooperation. Much has been said of the inspiration they drew from *Mani Pulite*, the anti-Mafia campaign carried out in 1990s Italy. The judge at the center of *Car Wash*, Sergio Moro, wrote a law review article proposing an analysis of what he considered "an extraordinary moment in the history of the Judiciary."[63] The article clearly reveals the author's conviction that the struggle against systemic corruption, such as that which existed in Italy, hinged on changing the attitude of the magistrates. That change did not only mean "going on the attack;" it also meant making full use of incentives and menaces to obtain testimony to corroborate charges. Without extensive use of those heavy-handed measures, and abusive actions in some circumstances, it is difficult to believe the investigators could have broken through all the protective layers and folds of the elaborate scheme. The actions of the Judiciary and MP were also designed to obtain the support of public opinion, which requires a strategic relationship with communications media.[64] The academic experience that other central figures in the operation, such as prosecutor Deltan Dallagnol, had acquired in the United States imbued them with greater knowledge of investigative tools and procedural mechanisms to combat organized crime.[65] Brazilian law enforcement agencies had rarely used these tools and procedures in the past, especially with regard to white-collar crime.

Taking as a starting point the innovations introduced into criminal law by the *Mensalão* investigation and the new statute on Criminal Organizations passed in 2013, *Car Wash* proceeded to make systematic use of "coercive questioning" (*conduções coercitivas*), where the target of the investigation was coercively brought before the judge, without previous subpoena—which was later suspended by the STF.[66] The courts also liberally and abusively employed preventive detention. The use of preventive detention

does not represent an innovation, as this form of detention is unlawfully used on a daily basis in the Brazilian criminal justice system.[67] The novelty lay in applying it to white-collar criminals. These tools—normally to be used solely under exceptional circumstances, such as when the accused refuses to respond to a summons, or when they pose demonstrable risks to the integrity of the investigation or public peace—became standard operating procedure in *Operation Car Wash*.

In 2016 the STF decided that defendants who had their convictions upheld by an appeals court could serve their sentences provisionally while waiting for a higher court decision on their appeals. Combined with the new procedural and investigative tactics, especially plea-bargaining agreements, this STF decision caused another change in the legal landscape of Brazilian criminal law—and, as a consequence, in the defendants' strategies, often leading them to implicate accomplices.[68] The prospect of being able to serve a sentence while waiting for a long series of appeals to reach the STF, changed the behavior of many defendants, who began a practice of negotiating agreements with prosecutors as early as possible.

The decision to authorize imprisonment pending a final decision cannot be seen as unforeseeable or innovative, for it followed STF jurisprudence that had been settled by 2009.[69] Neither did the decision run afoul of international human rights standards, which only require two-tiered jurisdiction, nor with the most common practice in contemporary constitutional democracies. Its controversial aspect derives from the Brazilian Constitution's explicit guarantee that "no one shall be considered guilty before the issuing of a final and unappealable criminal sentence."[70] While this clause is by no means peculiar to the Brazilian legal system, the specificity is the existence of an express provision for two constitutional appeals in the text of the 1988 Constitutional: a

special appeal (*recurso especial*) against appellate court decisions that violate federal law, and an extraordinary appeal (*recurso extraordinário*) against final decisions that violate constitutional law. In a 2009 STF decision, this provision was interpreted to mean that the legal recourses of defendants accused of certain crimes were not exhausted until a third, and sometimes even a fourth, appeal had been denied by the higher courts.

To Justice Teori Zavascki in the 2016 decision to allow defendants to serve sentences while waiting for appeals to reach the STF, the 2009 interpretation was mistaken, because according to the rules governing special and extraordinary appeals, the facts of the case, and thus the merit of the conviction, could not be reconsidered after the first appeal had been decided. Therefore, once a verdict was upheld by an appeals court, the determination of guilt was final and legitimated the provisional execution of the sentence while any subsequent special or extraordinary appeals were pending. For these, only the validity of the legal and/or constitutional facets of the conviction would be analyzed.

Without alignment among the several levels of the Brazilian Judiciary, from the trial judge to the STF, *Operation Car Wash* would not have been nearly as successful, especially given the level of impunity that those with power and resources have historically enjoyed in Brazil. Even former President Lula, who himself was caught up in the operation, ironically expressed his "support" for overturning Brazil's history of impunity. In a speech he gave on April 7, 2018, just before going to prison, Lula roundly criticized the way his trial had been handled by the MP, Judge Sergio Moro, and the Fourth District Federal Court. Yet, he insisted that he was not against *Operation Car Wash*, affirming that if the operation was after "bandits," it was its duty to "nab" them, that it had to "pinch those who steal and put them in the can," and that he wanted *Car Wash* to "keep catching rich crooks."[71]

The success of *Operation Car Wash* stemmed not only from the aggressive prosecutorial methods, such as coercive questioning, that higher echelons of the judiciary had endorsed, but also from the employment of an array of unauthorized methods. To begin with, the operation was associated with an abusive collaboration between the prosecutors leading the case and judge Moro, confirmed by the STF in 2022,[72] after InterceptBrasil exposed private conversations between the judge and prosecutors.[73] The success of *Operation Car Wash* was also related, in no small degree, to its intensive use of a public communications strategy to consolidate a broad base of support for its investigations. The communication strategy included information and recordings leaks, the selectiveness of which led many to believe that the investigation lacked impartiality. Judge Moro's decision to release the audio recording of a telephone conversation between President Rousseff and Lula in March 2016, an act subsequently declared illegal by STF Justice Teori Zavascki, exemplifies the strategy.[74] The move clearly resembled an act of institutional "lawfare" in that Moro used a prerogative, afforded by his position, in order to weaken Lula's position, who was at the time about to be named to President Rousseff's cabinet, an appointment that would have transferred jurisdiction over the case from Judge Moro's court to the STF.

A good number of the anticorruption measures undertaken in Curitiba, where the anticorruption operation was based, were initially upheld by higher courts, including by the more liberal-leaning Justices of the STF, which was, for the most part, composed of justices nominated by Presidents Lula and Rousseff. A majority of the Court upheld the doctrine of "effective criminal law," to use the expression coined by Justice Luís Roberto Barroso, as long as the primary targets of the operation were affiliated or associated with the governing party—which was the PT, at the time. As the operation began closing in on central figures in the MDB and

PSDB, the Court's balance shifted. The formation of a new majority in the Court's Second Panel[75]—Justices Gilmar Mendes, Dias Toffoli, and Enrique Lewandowski—enabled them to challenge and overturn several of the strategies in the *Car Wash* repertoire, including that of coercive questioning, ratified by the plenary,[76] and that of provisional execution of a sentence after confirmation by an appellate court.[77]

Notwithstanding these changes in the legal framework, former state governors from the MDB and PSDB parties were convicted or detained as a result of anticorruption investigations. In addition, Senators José Serra and Aécio Neves, who had successively represented the PSDB in the 2010 and 2014 presidential races, were also accused of taking part in corruption scandals, with Serra under investigation and Neves indicted by *Operation Car Wash*. The MP charged President Temer himself, who had assumed the presidency after President Rousseff's impeachment and served as leader of the MDB, on two occasions for obstruction of justice and corruption, but his case did not make it to trial because the Lower House, whose authorization is required to prosecute a president for ordinary crimes, voted to suspend the charges.[78] Later on, Temer was acquitted of these charges. It is also worth mentioning the investigation's remarkable beleaguering of business leaders in the powerful construction and infrastructure sectors, breaking a long tradition of impunity for the wealthy and powerful in Brazil. All the same, even if *Operation Car Wash* broadened its focus to a wider swathe of the political spectrum—including the indictment of three former PSDB presidential candidates—, it cannot be denied that the PT, with the imprisonment of former President Lula, was the most harmed.

Operation Car Wash, in which judges, prosecutors and law enforcement officials used their institutional prerogatives in a much more aggressive and strategic fashion than was conventional,

provides several examples of unorthodox employment of institutional prerogatives with the aim of harming adversaries or, as Mark Tushnet called it, "hardball." Although the ultimate legality of some tactics was seriously questionable, the fact that they were carried out by an authority then-considered competent and subjected to review and control processes established by the Constitution, including having passed through the STF (a majority of whose justices had been appointed by PT presidents), made it difficult to qualify them as outright extra-constitutional at the moment they were carried out.[79] The effect of this unconventional and, in some circumstances, illegal behavior was the destabilization of relations among branches of government. The principal actors in *Operation Car Wash*, namely federal judge Sergio Moro, STF Justice Teori Zavascki, and Public Prosecutor General Rodrigo Janot, did not hesitate to use their powers to move the investigations forward and hold those involved, in what they understood to be a scheme of rampant corruption, responsible. In this respect, *Operation Car Wash* opened up a new chapter in the fight against corruption in Brazil, one in which innumerable weaknesses of the Brazilian political and legal systems became widely exposed. From a criminal trial perspective, the operation confirmed and expanded legal doctrines and traditions created by *Mensalão*, laying the foundation for more stringent and effective criminal prosecution of corruption. However, members of the operation made, in several circumstances, abusive use of their powers, as became clear in former President Lula's trial. In the political sphere, *Operation Car Wash* contributed to the destabilization of the party system by exposing the promiscuous relationships between political coalitions and certain business sectors. It thus played an important role in the impeachment of President Rousseff, and in preventing Lula from participating in the 2018 presidential election. The operation triggered some incremental

legislative reforms related to campaign finance and other electoral rules. It also provoked an increased distrust of the political elite, opening a path for antiestablishment voices.

Several lessons can be extracted from *Operation Car Wash*. Here, I will focus on two problems of institutional design and one operational issue. The dominant role played by judge Moro and other judges in *Operation Car Wash* highlights a major defect of the Brazilian criminal justice system. In our inquisitorial model, criminal judges perform conflicting functions: they oversee the investigation, conduct the preliminary hearings, and preside over the trial. In complex and politicized processes, such as operation Car Wash, judges not only follow or monitor the investigation, securing the rights of the investigated, but also participate directly in all phases of the trial, including the sentencing. Judges' central role in the investigation makes it difficult for them to be impartial when trying a case. In several European and Latin American countries that also adopt the inquisitorial model, the functions of the judiciary are divided between "instruction judges" and "trial judges." In 2019, the Brazilian National Congress approved new legislation that created the role of "judge of guaranties," who will be responsible for controlling the legality of an investigation and the admissibility of evidence.[80]

The second institutional design problem is related to the role of the STF in criminal cases affecting members of parliament and other high authorities. The Brazilian STF holds several functions that in most constitutional democracies are distributed among distinct levels and types of courts. Besides its function as a constitutional court, a court of last appeals, the Brazilian STF is responsible for conducting trials in criminal cases related to the mandate of the president, ministers, and members of the National Congress. Therefore, the involvement of any of these authorities in a corruption case will bring the case within the jurisdiction of the

STF. The *Mensalão* case which preceded and inspired *Operation Car Wash*, was almost entirely adjudicated by the STF, with enormous administrative and political costs to the institution. Since the STF's sessions are entirely televised, the Court became politically implicated in the anticorruption operation. *Operation Car Wash* was initiated in a federal court in Curitiba. Even after the involvement of former President Lula, the case remained in Judge Moro's hands. However, the STF had to deal with several members of parliament who were also under investigation by the operation. The Court had also to monitor Judge Moro's decisions to ensure that he was not overstepping his jurisdiction. Finally, the STF had to decide *habeas corpus* and other appeals brought from the lower courts. This daily management of the case by the STF also made it difficult for the court to maintain the distance necessary to focus upon the task of establishing the legal boundaries of the case.

In conclusion, there are some operational issues that contributed to the empowerment of Judge Moro and the absence of precise legal boundaries for the operation. The most relevant is associated with the introduction of plea-bargaining tools in the Brazilian legal system just after—and as a response to—the first wave of demonstrations in 2013. The issue is not the employment of plea bargaining itself, but the fact that it was poorly regulated and that there was no time to refine this potent instrument through a succession of judicial decisions. It was as if a new rule had been introduced in the World Cup finals, without previously being tested and polished in minor championships. Thus, crude plea-bargaining tools in the hands of autonomous and ambitious prosecutors and judges had a disruptive impact on the Brazilian political system.

President Rousseff's Impeachment

The impeachment of President Dilma Rousseff may well represent the most significant example of constitutional hardball or inter-institutional conflict; though, in this case it played out between the executive and legislative branches, with a cameo appearance by the STF. It was not the first impeachment under Brazil's recent democratic experience (1985-2019); President Fernando Collor de Mello had previously been found guilty of corruption by the Senate in 1992. Collor's impeachment, however, failed to alert Brazilian society to the risks of employing an extraordinary constitutional remedy to tackle political, legal, or economic crises that are able to be solved by ordinary means.[81]

Impeachment is a political instrument that originated in England during the 14th century to provide some form of parliamentary control over the reigning sovereign. The 1787 United States Constitution included the impeachment mechanism in its presidential model of government, from which the first Brazilian Constitution of 1891 imported it. Impeachment serves three main purposes in contemporary democracies. The first is to create an incentive for the president to abstain from abusing, for fear of removal, the powers conferred upon the executive. Impeachment thus represents a radical tool in the system of separation of powers that makes it clear to the executive that legitimate exercise of the office requires, in addition to winning the election, respect for certain basic principles of law and the constitution, as interpreted by a certain majority of the parliament.

A second purpose of impeachment, paradoxically, is to prevent a coup d'état or similar attack on the executive by opposition forces. In its medieval origins, impeachment serves to prevent regicide. The existence of a constitutional means for deposing a president who abuses executive power delegitimizes

violent or extraconstitutional attempts to interrupt the presidential mandate.

The third purpose of this mechanism is to bolster public debate and ensure that society, political parties, and the legislature all take some responsibility for the legal and ethical standards against which the exercise of presidential power is measured. The arduous impeachment process that must be followed to remove a democratically elected president means that accusations of wrongdoing, be they legitimate or frivolous, have little chance of success if their champions remain in the minority. By channeling accusations through the impeachment process, however, those who support the government will at least be obliged to address the charges, and either modify the government's behavior or assume political responsibility for the manner in which power is being exercised in that particular regard.

Impeachment is, therefore, a formidable mechanism for the control of power in constitutional democracies that adopt a presidentialist system, yet also a highly risky one, even when only used as a threat or warning. According to prominent North American constitutional scholars like Cass Sunstein and Laurence Tribe,[82] the mechanism should only be activated in extreme cases. If impeachment becomes trivial, if it is converted into a sort of no-confidence vote, for example, the balance of power will be altered, and the significance of winning a presidential election will be reduced, which in effect negates one of the main purposes of a democratic presidential system.

Although impeachment should not be confused with votes of no-confidence in parliamentary systems, the fact that impeachment requires "just cause" for initiation means that both are part of a system of checks and balances that affords the legislature and public opinion a degree of control over the executive. The difference is that, since under the presidentialist system, the president

is chosen by popular vote rather than by the legislature, the legislature's ability to remove the president must be more limited in order to be legally and politically justifiable.

In Brazil, "just cause" for impeachment must involve a "crime of responsibility."[83] Accusations must be assessed in various phases by the Lower House, which must vote by a two-thirds majority to authorize a trial by the Senate. The Senate carries out the ensuing trial, which is presided by the president of the STF. Finally, the Senate must approve impeachment by a two-thirds majority. This procedure clearly distinguishes impeachment from a parliamentary vote of no-confidence. Congress must determine if there is "just cause" (legal grounds) and if the "just cause" is sufficient to warrant removing the head of the executive from office (political grounds). In the cases of Presidents Collor and Rousseff, the Brazilian Congress, by majority greater than two-thirds in both houses, decided that there were both legal and political grounds for removal.[84]

The impeachment of President Collor was similar to that of President Rousseff in that it was preceded by major protests and demonstrations. It was dissimilar, however, in that Collor's impeachment did not worsen political polarization or provoke large legal and academic disputes over the constitutionality of his impeachment. There was not even a debate over the legality of Collor's impeachment, even after the STF later absolved him of corruption charges, the offense that had led to his removal from office in the first place. Collor belonged to an insignificant political party whose supporters seemed to realize that his administration amounted to no more than an unsuccessful adventure. The first use of impeachment under the current Constitution[85] thus proved itself, on that occasion, a suitable instrument for removing a clearly maverick president, charged with corruption, without resorting to revolution or a coup d'état.

The impeachment of Dilma Rousseff, in contrast to the removal of Fernando Collor de Mello, caused significant alarm, not just for her electorate and supporters. Although her approval rating was exceptionally low, her party was immersed in a corruption scandal, and the country was suffering from a major economic crisis with severe social repercussions, President Rousseff belonged to a well-established party with strong ties to the working class, civil society, and intellectuals. Even though Collor did enjoy a connection to the old oligarchic elites, he was not as closely associated with any well-organized party or sector of the political class. Unlike Collor's impeachment, Rousseff's removal transcended the figure of the president. An entire segment of the nation's political community felt sidelined by the impeachment. Despite PT's involvement, alongside other parties, in wide-ranging schemes of illegal campaign finance, corruption, and illicit ties to various business sectors, the party enjoyed, and still enjoys, tenacious loyalty from its affiliates and supporters. These groups did not meet the impeachment with violence, a fact that in itself signals a deep commitment to the institutional game and at the same time, a certain resignation regarding the outcome of the constitutional dispute.

Still, despite a relatively moderate degree to the protests, most PT supporters embraced the narrative that Rousseff's impeachment amounted to a coup d'état. This narrative, in addition to reflecting genuine beliefs, also served three political goals. First, it absolved Rousseff and her party of responsibility for the impeachment; second, it maintained cohesion within the party; and, lastly, it put the blame for the crisis on those who proposed and supported impeachment. Some critics of the impeachment process tried to provide a more nuanced definition, reframing it as a "congressional coup,"[86] a "constitutional expropriation,"[87] or even as a "brute" impeachment procedure, given the deplorable behavior of several political actors involved in the process.[88]

Legally speaking, those who criticized Rousseff's impeachment questioned the existence of a constitutional "just cause" for the charges. Did "fiscal pedaling" and the release of supplemental funding for social programs without congressional approval constitute crimes of responsibility? The question is fundamental. For Rousseff's supporters, the so-called "fiscal pedaling" charge did not constitute a crime of responsibility because it involved commonplace accounting practices that every president prior to Rousseff had utilized, and the necessary malice for attribution of criminal responsibility was absent. Regarding the supplemental funds, Rousseff's supporters argued that Congress subsequently authorized their release, which negated the original offense. Moreover, as the funds released by the government were never paid out, the crime was in fact never consummated. Absent the necessary legal grounding, the charges amounted to no more than a political move to remove President Rousseff from power. For those who brought the charges, however, President Rousseff's attempt to bypass budget rules, by borrowing from public banks and opening lines of credit that had not previously been approved by Congress, represented a blatant violation of sections VI and VII of Article 85 combined with violation of article 167, III, of the Federal Constitution. The opposition thus accused Dilma Rousseff of improperly using executive prerogative to circumvent budgetary regulations, while her supporters accused Congress of improperly using its powers to carry out the impeachment.

If we do not want to transform the traditional institution of impeachment into a parliamentary vote of no-confidence, the matter of "just cause" is crucial. That said, the Constitution defines crimes of responsibility broadly. According to Article 85, acts that harm or threaten the existence of the Union, of other branches of government (including the MP) and units of the federation, basic rights, national security, administrative probity, budgetary

law, or compliance with the law and court decisions, all constitute crimes of responsibility. Furthermore, Article 86 of the Constitution attributes to the two houses of Congress the extraordinary competence to interpret and apply these norms when the defendant accused of violating them is the president. That, in any case, was the conclusion of the STF when it was asked to intervene in President Collor's impeachment. For the majority of the Court, the competence to try an impeachment belongs exclusively to the Senate. Therefore, the STF is not supposed to second guess the congressional decision. The Constitution leaves enormous room for discretion within the political system to decide whether the president's action can or cannot be treated as a crime of responsibility under the seven general categories listed in Article 85. No fewer than 65 types of crimes specified in Law 1.079, a federal statute enacted in 1950, derive from those seven categories. However well-founded the criticism that a president should not be removed for minor offenses, the crimes of responsibility susceptible to impeachment under Brazilian law are loosely defined. And it is not up to strict judicial adjudication to define them. This means that, in practice, the National Congress enjoys broad discretion to judge the president. In these circumstances, the impeachment mechanism acquires a predominantly political character. Were it otherwise, we would have to conclude that the final word on interrupting a presidential mandate falls to the STF, not Congress.

In addition to the "just cause" debate, the lack of impartiality on the part of Eduardo Cunha, then-president of the Lower House, who allowed the impeachment process to proceed, came under scrutiny. This was partly because Cunha's decision was a retaliation against PT's withdrawal of support for him during an investigation by the Lower House's Ethics Committee in 2015. The STF removed Eduardo Cunha as president of the Lower House, a few days after the conclusion of the impeachment trial, for obstructing

Congress investigations against himself. Removing Cunha from office confirmed his unsuitability for the position, but did not reverse Cunha's most relevant action, which consisted in moving the impeachment through the Lower House of Congress so the Senate could initiate the impeachment trial.

Some observers considered the STF's unanimous decision to remove Cunha from the House presidency another example of strategic 'hardball.'[89] There is no explicit provision in the Constitution for the removal from office by injunction of the STF of a member of Congress. Other observers, who agreed with the decision, criticized the STF for waiting until Cunha had succeeded in obtaining the necessary two-thirds vote in the Lower House for impeachment to proceed. The timing suggests the STF strategically controlled its docket to make the impeachment more likely to succeed in the Lower House.[90] The STF defended the timing of its decision with the argument that it waited as long as possible for the Lower House to make its decision regarding the charges against Cunha, and only intervened when it became clear that Cunha's abusive interference was preventing the Ethics Committee from performing its function.[91] In judging the complaint against Cunha, the Court relied on the premise that people should not be allowed to benefit from their baseness.

In the end, however, it became clear that the sanitizing effect that Collor's impeachment had on the administration of his successor, Itamar Franco, was not going to repeat itself with Rousseff. The dismissal of consecutive charges against Michel Temer, Rousseff's vice president who became her successor after impeachment, as well as against members of his circle, plus maneuvers within the presidential palace, in the Lower House, and in the TSE to protect him, bolstered the narrative of a "congressional coup."[92] It is undeniable that the expression carries enormous rhetorical weight, with a distinctly pejorative connotation.

Given the predominantly political nature of the impeachment process, it seems improper to define Rousseff's impeachment, as malicious as it was, as a constitutional breakdown. It resulted from the strategic use of rules established by the Constitution to take down a political adversary. Considered together, the behavior of Eduardo Cunha, Michel Temer, her former vice president and ally in two elections, and numerous other leaders that took part in her coalition might suggest that President Rousseff was the victim of a political conspiracy. If true, this would indeed say something damning about the quality of Brazilian democracy. However, the facts do not support the narrative equating Rousseff's impeachment with a classical coup d'état. It is true that impeachment can be an imposing weapon—against administrations unable to count on the support of a third of the members in either house of Congress. This is because the Constitution confers to Congress the exclusive competence to carry it out, and the rules that govern the process are so broad that they open many paths to accuse a president of crimes of responsibility. Although irrelevant to the legal justifications, other factors (including the sharp economic crisis, the serious social repercussions which the Rousseff administration failed to overcome, President Rousseff's own political ineptitude, and the involvement of her party in a series of corruption scandals) definitely contributed to the outcome.

Based on the impeachments of Presidents Rousseff and Collor, it can be affirmed that the ordinary use of this extraordinary tool for checking executive action has affected Brazil's presidentialist system. The many mechanisms that allow the executive to concentrate its power—for example, the power to introduce legislation, set the legislative agenda, and determine the precise allocation of the federal budget—did not prevent Brazilian presidents from growing more and more captive to the hyperfragmented and heterogeneous congressional coalition upon which they depend. The

new reality, which approximates the system to a semi-presidentialist regime— in which the president cannot count on a stable majority in both houses— brings with it a series of problematic consequences from the perspective of the regime's stability. The system does not contain parliamentary system mechanisms to counterbalance legislative power, such as dissolving parliament and holding new elections. To put it figuratively, if the Brazilian political system is moving toward semi-presidentialism, like the systems found in France or Portugal, it is doing so without all the constitutive elements of the system.

President Temer's Entrenchment

The end result of President Rousseff's impeachment was the rise to power of the MDB with the support of parties such as the PSDB and the Democrats (DEM) but most of all, the consolidation of the so-called *Centrão*, a bloc composed of several smaller "patrimonialist" and pragmatic parties, as a major force in Congress. Many parties that had supported Rousseff migrated to the new governing congressional coalition in search of shelter from budget cuts or from the *Car Wash* investigation. The new government initiated a set of reforms for economic liberalization under the banner, "A bridge to the future."[93] On December 2016, Congress passed Constitutional Amendment no. 95,[94] establishing a new fiscal regime that put a limit on public spending, which is set to last until the year 2036. This amendment could very well end up clashing with constitutional provisions guaranteeing the rights to education and health. If the state, local, and federal governments are unable to reduce their spending and reform their welfare programs to make them less regressive (by eliminating privileges and exemptions), the amendment will have a substantial effect on the

basic notion of the welfare state that was crucial to the 1988 Constituent Assembly. For that reason alone, many see the measure as an attack by the Temer administration on the social rights established by the 1988 Constitution.

On May 2017, shortly after the public spending amendment was passed, Congress was about to begin debates on pension reform, when recordings of conversations between Michel Temer and Joesley Batista, one of the partners at the head of the JBS business group, were made public.[95] The compromising nature of these conversations strongly affected the administration's ability to keep its governing coalition in line. Mr. Batista had recorded the conversations for leverage in his plea bargain negotiations with the MP. The agreement reached by the Public Prosecutor General at the time, Rodrigo Janot, alongside the immediate leak of the recordings, reinforces the argument that institutional actors used their prerogatives in an extreme and controversial manner. These recordings were excluded from evidence by a federal judge in October 2019, and former President Temer was acquitted of all charges arising from the case.[96]

The crisis sparked by the release of the recordings did not prevent the government from obtaining, in July 2017, legislative approval for a far-reaching labor law reform that, similar to Constitutional Amendment no. 95, involved a number of constitutionally controversial provisions.[97] Faced with the enormous difficulty of passing a labor law reform that would limit or eliminate the labor rights established by the Constitution[98]—whether because of the supermajority required for a constitutional amendment or because of the high risk of judicial challenges—the government and its legislative coalition opted for a broad reform of the ordinary law instead. The reform, which partly addressed newly-emerged forms of labor relations characterized as "uberization of work", also made unions more fragile and created substantial

obstacles to workers' ability to defend their rights, reducing the practical effectiveness of many protections promised by the Constitution.[99] In a manner similar to that of the Collor administration, or even to the autocratic regimes of Vargas and the military dictatorship regarding other fundamental rights, the labor law reform sought to restrict rights by making it more difficult for workers to access to the judicial system. Considered in tandem with a public spending amendment, it appears that the Temer administration, through strategic use of mechanisms inscribed in the Constitution, successfully put in motion a process to modify the social protections of the 1988 pact.

It was at this point that efforts to reform Brazil's pension system—seen by many, both inside and outside the government, as essential to balancing the budget—were abandoned. President Temer successfully redirected all his energy, financial resources, and political capital to saving his presidency.[100] Temer twice obtained what Rousseff had not managed even once. In August 2017, the Lower House denied the STF the authority to open a criminal investigation against the president for passive corruption.[101] In October 2017, the Lower House again voted to deny authorization for the STF to begin a different criminal investigation, this time for obstruction of justice.[102] These two instances indicate that, on the one hand, the country's leaders had managed to restore some standard for cooperation between the executive and legislative branches and, on the other, the cost of legislative support for the executive branch's agenda had risen dramatically.

As for the judiciary, a 2017 TSE decision to acquit the Rousseff-Temer ticket of electoral campaign violations demonstrates the importance of its role in preserving presidential mandates. Following their election as president and vice president in 2014, a coalition led by Aécio Neves, the opposing presidential candidate, filed two petitions to investigate abuses of economic authority by

Rousseff carried out during the campaign, ending a long period during which candidates did not contest the results of presidential elections.[103] Two additional petitions were filed in January 2015, one of which demanded the annulment of the election's result.[104]

Several peculiar aspects distinguished the case. The TSE initially found the accusations insufficient to negate the results of a popular vote for lack of evidence. The original rapporteur for the case, Justice Maria Thereza de Assis Moura of the TSE, moved to archive the petitions because the evidence included only superficial media reports. Her proposal, however, was rejected in a plenary vote of the Tribunal after Justice Gilmar Mendes[105] argued that it was necessary to discover "the truth of the facts."[106] The TSE therefore postponed the trial to permit for the procurement of new evidence, including depositions. This opened up an opportunity to access evidence obtained by *Operation Car Wash* as well as to bring in the testimony of informants who had worked for the Rousseff-Temer campaign.

Another peculiarity was the manner in which, once Rousseff was impeached by the Senate, the petitioners lost interest in the case. This behavior indicated that they had had no real intention of preventing Temer from exercising the presidency, confirming the argument that the sole purpose of the petitions filed after the election was to weaken the adversary without concern for the significance of the popular vote. The petitioners could not simply withdraw their charges, however. If they did, the MP would have taken up the role of plaintiff in the motion for appeal and may have prosecuted the case more arduously, which would have endangered Temer's chances of remaining in the presidency. Fortune apparently favored President Temer, however, as it then fell to him to nominate two judges to the TSE in accordance with the rotation system for the periodic renewal of the Tribunal's composition. Appointing a judge to the bench does not necessarily

ensure that the judge will hand down friendly decisions—as demonstrated by many STF Justices in recent years, especially by Lula-appointed judges in the *Mensalão* case. Still, the timing of the appointments and the subsequent favorable TSE decision raised suspicions of partiality, not to mention doubts over the institutional design of Brazil's electoral courts.

TSE Justice Herman Benjamin, the second rapporteur for the case, issued a blunt and substantial report, drawing on the depositions and evidence obtained during *Operation Car Wash*, recognizing that the Rousseff-Temer ticket had received large quantities of illegal funds from businesses that had been parties to government contracts. Using procedural arguments, however, the new majority of TSE Justices decided to exclude that evidence, even though the court had previously decided to delay the trial in order to collect it. Justice Gilmar Mendes himself, who had voted in favor of gathering this evidence out of the compelling need to ascertain the "truth of the facts" when Dilma Rousseff was president, changed his opinion and now rejected the idea that the evidence could be admitted. In casting his vote, the Justice offered a long prelude, declaring that, "[…] exaggerations happen. Sometimes, because of minor issues, we interrupt mandates. It is time to temper the zeal because you are putting another value at risk, the significance of the mandate, the significance of the popular will as manifested, be it correct or mistaken." Now, Justice Mendes argued that the TSE should make its decision in consideration of its "ethics of responsibility," in a direct reference to Max Weber's very same expression. In other words, the justice system should now act with great prudence before overturning the result of a popular vote, taking into account the potential effects of its decisions on the stability of the nation's democracy. With the determining vote cast by Justice Mendes, the TSE decided not to annul the electoral victory of the Rousseff-Temer ticket, thus saving Temer's presidency.[107]

The TSE's decision provides yet another example of controversial use of institutional prerogatives, which brings with it substantial political consequences. In this case, however, the objective was not to weaken an adversary, but rather to protect someone in the executive power. The trend toward increasing judicial independence from the political system, independence exemplified by the anticorruption efforts unleashed by *Operation Car Wash*, suffered a major setback with this TSE decision.

CONSTITUTIONAL REFORMS

Two parallel processes of constitutional change were set in motion in Brazil by the series of institutional battles waged between 2013 and 2018. First, anticipating distributive conflicts, the new conservative coalition, led by President Temer, obtained the necessary majority to approve a constitutional amendment establishing a new fiscal regime, including a ceiling for public expenditures, with a clear impact on government obligations derived from social rights established by the Constitution.[108] Congress also passed a labor reform law, weakening unions and creating procedural barriers to discourage workers from claiming their rights in labor courts.[109] Finally, Congress approved in 2019 a major reform of the pension system, which had been initiated during the Temer administration.[110] These three reforms can be considered direct results of the political and distributional struggles that permeated this period of constitutional stress. With the accession of conservative forces to the center of the political arena, the social orientation of the 1988 Constitution began to wane.

A second line of institutional reforms gestated during this period of constitutional malaise addressed the problem of campaign finance

and the increased number of political parties within the Brazilian system, which in turn raised the political and financial costs to forming a stable coalition. As a direct response to the campaign financing scandal exposed by *Operation Car Wash*, the STF declared unconstitutional several rules that permitted corporate donations to political parties.[111] The majority of the Court based their decision on the equality clause: business donations allow companies to exert disproportionate influence over the political system. The STF, however, was responding to the anticorruption pressures coming from the streets and from *Operation Car Wash*. In the same vein, Congress approved an amendment to the Constitution that created a "performance clause," by which political parties that do not obtain a minimum percentage of votes will not have access to public funds, or free radio and television time during elections.[112] The logic behind these reforms was to provoke a reduction in the number of political parties, strengthening larger parties and making the political system more functional and stable.

The Brazilian democracy entered a period of constitutional stress, following June 2013, as a consequence of a perverse cycle of institutional and political retaliations. During this period, institutional prerogatives and political mandates were employed in a more confrontational, unorthodox, incisive, and abusive way. "Institutional stabs" or "constitutional hardball" became a pattern in the relationship among branches of government, under the justification that vigorous measures were indispensable to protecting the integrity of the democratic process against corruption and ensuring enforcement of the law against the rich and powerful.

This intense cycle of institutional and political retaliations did not lead, however, to a classic constitutional crisis, at least not in any of the senses proposed by Balkin and Levinson.[113] No institutional actor resorted to or expressed the need to employ extraconstitutional measures to save the Constitution, even though

constitutional rules were bent or violated in several instances; there was no institutional gridlock or paralysis as a consequence of political or institutional actors quarreling over their constitutional views; nor did the political and legal disputes spill over into generalized disorder or political violence.

Thus, Brazil did not enter a traditional constitutional crisis, but rather a phase of *constitutional malaise*, in which the standards by which the constitutional game was played deteriorated. The depth and duration of this cycle of political and institutional retaliations amplified distrust and resentment toward constitutional institutions, opening up space for institutional reforms and constitutional changes as well as the rise of forces hostile to the system. These changes did not transform the core structures of the 1988 Constitution. They, in fact, confirmed the resilient nature of the Brazilian Constitution, which has proven capable of absorbing immense pressure without rupturing. However, the fact that the constitution was not abandoned does not mean that a certain decline or erosion in constitutional standards—in how the game is played—did not occur. And in the aftermath of this period of stress, the democratic system became more vulnerable.

It is also important to understand that the corruption scandal and *Operation Car Wash* were not the only factors to have contributed to initiating the cycle of constitutional malaise analyzed here. The battle among branches of government was also a consequence of distributive conflicts rooted in the constitutional pact that established a sizable list of social rights but at the same time, protected privileges, and regressive schemes. During economic recessions, like the one Brazil's economy entered post-2014, distributive conflicts tend to grow acute. During this period of constitutional stress, political coordination appears to have given way to a more confrontational dynamic. Tools meant to anchor legal certainty and stabilize the democratic process, came to be

employed, on several occasions, as crude weapons in the struggle for power.

Until the most recent presidential election, none of the political or institutional actors, save certain military voices, had publicly asserted any necessity to take actions outside the constitutional framework in order to save democracy in Brazil. With the election of Jair Bolsonaro as president, in 2018, the consensual constitutional democracy established in 1988 faced the most stringent test of its resilience. As an extreme right populist, with a long history of hostility to democratic and constitutional values, elected on an antiestablishment platform, Bolsonaro poses a grave threat to the constitution and the progressive principles it recognizes. The integrity of the Brazilian constitutional democracy will depend on the commitment and disposition of a diverse range of social, political, and institutional actors,[114] and the ability of the system of checks and balances, to protect and defend the "rules of the game."[115]

2. THE IDEA OF CONSTITUTION

A democratic constitution is a superior norm, one that aspires to enable political competition, regulate the exercise of power, ensure the rule of law and protect the basic principles of justice that aim to govern relations among individuals and between them and the State.[116] The primary purpose of a democratic constitution is enabling society to channel disputes and divergences nonviolently through political coordination and institutional process. The democratic decision-making procedures and legal principles that safeguard them are the constitution's cornerstones.[117] A constitution is not, however, an ordinary instrument of political coordination. It is a special coordination device disciplined by the rules and values that empower and justify it.[118] Because constitutional systems do not possess an external agent capable of impartially enforcing the rules among the diverse actors that participate in the constitutional life of the community, the constitution's performance depends, above all, on adhesion and self-commitment of political and institutional actors to the constitutional pact. When the necessary commitment does not gain traction, the constitution loses its efficacy which, if not rectified, leads to crisis.

A written constitution is the primary invention of modernity, designed to provide a practical solution for the enduring problem of reconciling the need for effective government with its subjects' aspirations for autonomy and liberty. It is the fruit of the Enlightenment's belief in the capacity of humans to be the masters of their own history, to build their own institutions, and to control their own fates.

The Ancient Regime did not base its legitimacy on an act of reason. It did not base it on a deliberate and single political act

either. Its order was determined by tradition, religion, and a set of pacts among social sectors, such as the Magna Carta that consolidated an organic, hierarchical conception of society in the year 1215. The amalgam of these pacts, alongside the common law, religious commandments, and centuries-old privileges, configured the particular organizational scheme of each community. Each person's position in that community depended on the circumstances of their birth, origin, and trade or profession. This "natural order" also provided the justification for the exercise of power. At the top of the hierarchy were the monarchs, with enormous amounts of privileges and few obligations. At the base of the pyramid were the slaves, who had no privileges and held many obligations. Between these two extremes, various segments of the population, corporations, and social classes stood interrelated, in accordance with an asymmetrical arrangement of privileges and obligations that took root and developed over many centuries.

The French Revolution overturned this "natural" order. The French did not decapitate King Louis XVI so someone else could sit on his throne, following the practice of deposing kings repeated countless times throughout history. His decapitation symbolized the end of one order and the introduction of a new one, based on human agency. The War of Independence in North America had already opened a path for the French. The revolution in Britain's American colonies represented rupture not only with the metropolis, but also with England's political and social order.

As Hannah Arendt reminds us, the American Revolution took its inspiration from ideals such as liberty and equality. The overthrow of the former regime brought the need for a constitution, creating a new order based on revolutionary ideals. The rebels became founders. At their disposition was the repertoire of ideas generated during the Enlightenment and a clear sense that the

arc of history led toward emancipation and progress. The North American abundance of land and natural resources that had yet to be appropriated by any social class—with complete disregard for the Native Americans—made it possible to imagine a new type of society in which individuals sought satisfaction of their needs and pursued their happiness freely, an idea explicitly incorporated into the 1776 Declaration of Independence. It was an opportunity to build a new order, one that was to be embodied across the world by the writing of constitutions.[119]

Thomas Paine, the English revolutionary and writer active during both the American and French revolutions, offered the first modern definition of a constitution as "a thing antecedent to a government." For him, "a government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting a government. It is the body of elements, to which you can refer, and quote article by article; and which contains the principles on which the government shall be established […]."[120] In affirming that a constitution is "antecedent to a government," Paine is not speaking temporally. Rather, he is affirming that a government will only be legitimate—and thus only merits obedience—when it operates according to a constitution that has primacy over the government's authority because the constitution is the expression of the people's will, in the North American case, or of the nation's, in the case of the French. The authority of the government derives from the constitution that confers its competences and defines its limits.

According to Article 16 of the 1789 French Declaration of the Rights of Man, "[a] society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all."[121] These are the fundamental pillars of a constitutional order. Constitutions create on one side, a sphere of protection for individual rights and on the other, fragment government

power into separate branches. The tension among the branches limits their power, which ensures the greatest degree of individual freedom possible. For Thomas Paine, "[t]he American constitutions were to liberty, what a grammar is to language."[122] The constitution, in the sense that Paine established, must not be confused with any other type of political arrangement. It is a form of political coordination meant to ensure rights.

While true that the term "constitution" is very old, it did not always mean the same thing. Its meaning was quite distinct from the significance it took on after the American Revolution. In ancient Rome, *constitutio* merely designated an edict. Its plural, *constitutiones*, simply referred to a set of laws and edicts decreed by the sovereign. The term was also employed in the Middle Ages by the Church to designate rules established by the Pope. Never, however, did it possess the connotation that we attribute to the word nowadays, that of a superior norm that structures power and guarantees rights.[123]

The confusion surrounding the word "constitution" grew, according to Giovanni Sartori, following the decision of many authors to translate the Greek term *politeia* as "constitution." Aristotle used the word *politeia* to describe the way different Greek cities organized their governments. In this sense, *politeia* meant "form of government."[124] The term was utterly descriptive. When the power rested in the hands of a single person, we had a monarchy. If it was concentrated in the hands of a few good people, we would call it an aristocratic government. As for a democratic government, we use that term when the power rests in the hands of the citizens. Corrupted versions of these forms of government occur when the power of one, of a few, or of the many is not exercised in the name of the common good. When the collective power is usurped by the sovereign, the elite, or the masses, we refer to it, respectively, as tyranny, oligarchy, or demagogy.

The term constitution, taken from Latin, as Giovanni Sartori points out, was a "vacant" expression, already part of the political and legal vocabulary of the 18th century and easily worked to designate the "constitutive" acts of the new North American nation and the overhauled French one. The word could simultaneously designate the act of constituting and the object constituted. And so, the term gained traction in the political and legal vocabulary to designate a higher law that organizes political power and shelters fundamental rights. Ever since, few are the societies that have declined to name its fundamental laws as a Constitution. Even countries with no formal constitution, that is, one expressed in a unified legal document, such as in England or Israel, designate certain rules of political organization and dispositions toward fundamental rights as constitutional.

The ingenuity of the Founding Fathers, who participated in the elaboration of the 1787 United States Constitution, lay not only in their creation of a system of government that attempted to reconcile the need for authority with the aspiration for freedom. It also lay in their decision to do that through a superior law that could not be altered by the government it created, or at least not easily.[125] It therefore represented a law superior to the branches of government that it created and to the actions of those branches themselves. In political terms, this superiority stems from the constitution's origin, which lies in constituent power. Legally, this superiority is ensured by mechanisms, established by the constitution itself, that make its modification more difficult than the modification of ordinary laws. For Carl Schmitt, however, it is important to avoid the belief that the supremacy of the constitution derives only from the added difficulty of reforming it. On the contrary, this difficulty derives from its status as a law of superior nature, one borne of a fundamental political decision.[126]

In establishing that the constitution they were drafting could only be altered by a two-thirds majority in both houses of Congress and approval of three-quarters of the state legislative bodies, the members of the Philadelphia Convention bestowed upon the United States Constitution primacy over the other laws and institutions it created. This position of supremacy gave the Constitution the necessary power to function as a protection of the rules that disciplined government and ensured rights, placing it above potential attack from the constituted branches of government and allowing it to perform a fundamental role in the process of coordinating the political system.

This ingenious bit of institutional architecture was consolidated in 1803 with the decision of the United States Supreme Court in the landmark case of *Marbury v. Madison*. According to the opinion of Chief Justice John Marshall, since the Constitution represented a superior law—a "paramount law"—any law or government action contrary to it was invalid, and the judiciary was not obliged to enforce invalid acts. An act contrary to the constitution did not simply represent bad governance, as "the Ancients" would have understood, but rather an invalid act, one contrary to the law. With the addition of constitutional review that *Marbury v. Madison* brought to the constitutional framework, the notion of the constitution as superior law became even more robust.[127]

The concept of a constitution established by the Founding Fathers at the Philadelphia Convention in 1787 exerted enormous influence over all those who tackled the intractable problem of reconciling the need for effective exercise of power with the ambition to protect individual autonomy. The problem was not new, but it took on fresh contours with the Enlightenment. The notion that men enjoyed natural rights that precede political authority and therefore cannot be eliminated by the sovereign was foreign

to the ancient world. Although the ancients were familiar with and utilized the notion of privileges to designate a sphere of protection for the interests of a person or group, such *subjective rights* were associated with a notion of status that, with the exception of acts of resistance, did not contravene sovereign power. In any circumstance, these privileges or subjective rights were understood as a sphere of superior protection intrinsic to "all" people solely by virtue of being a person.

This imperative sense of natural rights, stemming from the political philosophy of authors such as John Locke and Immanuel Kant,[128] was written into the 1776 Declaration of Independence. In it, Thomas Jefferson affirmed as "self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." Shifting the individual to the center of political thought started during the Renaissance, and not only in political theory. The shift can be detected in the arts and literature of the time as well. If we take a moment to compare the differences between famous paintings prior to and after the Renaissance, we do not need special training to discern their distinctions. The earlier human productions resembled an ethereal projection of the divine. Those plump, translucent images of children and women in Heaven stand in sharp contrast to the realistic flesh and bones that Michelangelo gave to his subjects. His portrayal of Creation in the Sistine Chapel succinctly demonstrates the shift. Man no longer reflects the artist's imagining of God. Rather, God is depicted as a human being. Michelangelo portrays God with the hands and arms of a laborer whose muscles and veins convey movement. It is as if Man now moved to the center of the universe.

The same movement can be observed in political science. Machiavelli, in *The Prince*, deconstructs the medieval conception that the exercise of power is a consequence of God's will. Instead, the model for the universe of politics is the prince who, through a combination of reason and action, pursues his objectives with the means at his disposal. By relating sordid examples of various historical figures, including popes, who conquered and held onto power, Machiavelli sought to demonstrate that the exercise of power was not linked to any natural order. Rousseau, in support of Machiavelli, argued that the advice offered to the prince on how to obtain and maintain power was, in reality, meant to reveal to common people the strategies that leaders used to subjugate them.[129] Rousseau believed the author of *The Prince* was making a deeper argument that politics and its institutions were exclusively the product of human action, not the fruit of some divine will or immemorial tradition.

The notion that humans are endowed with reason and that it is, therefore, fair that they should decide for themselves what path to follow in life was carried to its furthest implications by Enlightenment thinkers over the centuries to come, not as a simple acknowledgement, but rather as a moral premise. Authors such as Thomas Hobbes, John Locke, and Jean-Jacques Rousseau start with this premise to conclude that the exercise of power is only legitimate when it derives from some sort of consent from the individuals subjected to it and that it is granted through a pact or social contract.[130] Despite their many divergences, these authors share a certain method of reasoning. From the premise that all people in the state of nature possess the capacity for rational thinking, they each seek to determine the conditions under which we are inclined to submit to civil power. To answer the question, they devise a completely abstract experiment in the attempt to demonstrate what form of government reason would

ordain. In other words, they seek a theory for the best form of government that would justify people's obedience. Imagining humankind in a state of nature, an environment bereft of civil authority and full of hardship, they wonder what we would be willing to do, or cede, in order to form a government capable of improving our lives. None of these authors actually conceived of the hypothetical aspects—the idealized state of nature or social contract that would have preceded the formation of civil government—as historical realities. Rather, the abstraction was part of a philosophical method that enabled them to claim that, had we the choice, we would opt for the most convenient form of government using our capacity for reason. What these thinkers are actually proposing, therefore, is simply a normative concept, one that provides a standard from which the legitimacy of any given government can be gauged.

This line of thinking drawn by the 'contractarians'—one which derives rights, moral obligations, and a certain form of political organization from an abstract reasoning—was harshly criticized by empiricist currents during the Enlightenment. In his essay, "Of the Origin of Government," David Hume, a contemporary and friend of Rousseau's, argues that the notions of natural rights and social contract had only a mystifying function. Force and violence would always determine who exercised power and how—as Machiavelli had shown. Hume does not deny that basing the exercise of power on consent would be more just, but the truth of the proposition does not necessarily carry over to reality. The skeptical Hume does not challenge the importance of values such as justice, rights, or goodness, but he believes that they take their strength not from mere abstractions but from actual conventions that are concretely entrenched within each society. He was the first to understand that a constitution would only be efficacious as far as it provided an instrument for political coordination. He

took the contract metaphor as a mystification meant to conceal its authentic nature.[131]

Hume's criticism, which is difficult to refute from a theoretical perspective, did not negate the influence of contractarian ideas on the bourgeois revolutions and the reconfiguration of the political order that these movements introduced. The question that remained was how such aspirations should be transformed into concrete political institutions; how the abstract idea of a social contract could be formulated as an effective political pact, or natural rights as legal ones. What the Enlightenment left the revolutionaries was the insight that they could look beyond history and tradition when conceiving of a new political order. Above all, they should look to reason and the future, and strive to shape their destinies based on the principles that had led them to overthrow the existing order.

THE CONSTITUENT POWER

After Hume's criticism, the problem of legitimacy found itself back to square one. The State still needed to impose standards of conduct upon citizens, but it could no longer justify this as based on tradition, divine authority (as it did under the *Ancien Régime*), or even the conveniently abstract notion of social contract. In the age of modern constitutionalism, political power needed to find its ultimate justification in human will as expressed in a written document, one that set forth the basic structures and mechanisms of government and their limits. The identification of this document with the will of those to be subjected to the government it established was indispensable. The "theory of constituent power" is precisely what made this identification possible.

The Founding Fathers inserted the myth of constituent power, with the intention to produce its symbolic effect, into the preamble of the 1787 Constitution with the words, "We the People." Similarly, Abbé Sieyès would later attempt to justify the legitimacy of the Third Estate as representing the "nation" in whose name a constitution for France would be elaborated following the revolution. The relevance of constituent power, in France as in the United States, became central to constitutional theory, for it conferred legitimacy upon the constitution's claim to supremacy.[132]

It was also necessary to resolve practical problems concerning the structure of power. The constituent assemblies in France and North American clearly saw that the type of participatory democracy imagined by Rousseau was infeasible in political communities as vast as theirs. The populations of France and the United States were dispersed across large territories. Democracy as it had been practiced directly in Athens, two thousand years earlier, by dropping pebbles in urns placed in the public square, was not workable. Perhaps it could be implemented at the local level, but never to manage the Union or the republic that the constituent assemblies were in the process of establishing. They needed to create a system for representation that would enable citizens to transfer to their leaders the responsibility to govern in the name of the people. The question was how to design the system so that the representatives would not usurp the sovereignty entrusted to them.

The theory of constituent power also helped solve this problem by introducing a distinction between a *constituent* political sphere that was superior to the *constituted* political sphere. The constituent sphere corresponded, by definition, to the will of the people. Constituent power was responsible for establishing the basic rules of political organization as well as the limits to be observed by the *constituted* powers. The distinction subordinated the elected representatives to the will of the people in performing

the offices of government following the rules of the constitution established by *constituent* power. The constitution was the expression of the people's sovereignty, setting both the authority and limits on the exercise of power by the representatives elected to govern in the people's name. This made the people both governors and governed at the same time. They were governed by their representatives through laws, policies, and court decisions. At the same time, they were governors through the rules and principles laid down by the constitution.

Yet the Founding Fathers were still concerned about the republican government they were putting in place. They worried that the association of legitimate power with the sovereign will of the people would jeopardize other values that were essential to them, such as individual rights. How could they ensure that a government responsive to the will of the majority would not put the rights and interests of the minority at risk? The myth of constituent power contributed also to the solution of this problem by making it possible to argue that the constitution, as an expression of the will of the people as a whole, would outweigh the acts of the constituted powers. The popular origin would confer supremacy to the constitution over the acts of the government, which should be understood as measures taken by the population's representatives, not by the sovereign people itself.[133]

The wariness of the Founding Fathers with regard to the representatives chosen to populate the government should not be underestimated. Many of the revolutionary leaders, although they feared the people, were also worried that their representatives might usurp power and act contrary to the common good. As would be made clear in the arguments formulated by James Madison, the revolution had been launched above all to rid the colonies of tyranny, no matter its form. If the inherent risk of a monarchy is the usurpation of a majority's rights perpetrated by a minority,

in a republican regime such as the one under conception in North America, the inherent risk was the usurpation of minority rights by a majority. This risk is the source of the need for a superior law that neutralizes the power of majorities when they intend to violate minority rights. The dilemma is inherent to republican government because natural rights are understood as the central element of the political structure.

This made it necessary to create a political structure that favors the effective protection of rights, so they do not exist as mere abstractions. The configuration that Madison felt would work involved checks and balances. These checks and balances would be arranged such that the ambition of those in one position of power would be controlled by the ambition of those in a different position of power. The proper operation of this scheme would also rely on some superior law. Once again, the foundational myth expressed in the phrase, "We the People," is at the center of the solution that facilitated a republican regime, albeit one limited by the law.

We all know that the "people" did not write the constitutions of the United States or France. At best, those constitutions were prepared by elected representatives and extensively debated by society before approval through some form of direct democracy, like that of a referendum. The theory of constituent power, by distinguishing between entitlement to this power and its exercise, preserved the myth of the supreme legislator, omnipotent and omniscient, from whom we receive a set of norms superior to all the rest, but who does not relinquish to the people the reins that control the constitution. Hence the idea of constitutional supremacy, which helps solve some of the problems associated with political coordination, political representation, and the risk of tyranny of the majority over the minority, is essentially linked to the theory or myth of the constituent power as maximum expression of the people's will.

The idea that it was possible to abandon the existing political and social order and create a new one—based on a political act of will founded on reason, as John Locke suggested—was not received without skepticism. Many even went so far as to mock it. Among its critics, Edmund Burke may have formulated the most compelling criticism of the idea that it was possible to create a new political and social order based on the faculty of abstract reason. For Burke, social organization and the political system were the products of centuries of experience that gradually settled and solidified. The wisdom of one man, or even of a generation of men, would never be able to overcome that which history had consolidated. To a certain degree, Burke's view suggests that the institutions existing at any given time and place are the result of a long "evolutive" process of selection, in which those that most contribute to orderliness are maintained while others are abandoned. It would be delusional, and irresponsible, to replace institutions formed, adapted, and consolidated intelligently through generations of experience with others conceived solely in terms of some deceptive conceit of reason and an abstract, mistaken notion of social contract.

No one better expressed this disdain for the new rationalist conception of the constitution than the English writer Arthur Young. In his writings about his trips to France between 1787 and 1789, Young comments that constitution "is a new term they have adopted; and which they use as if a constitution was a pudding to be made by a receipt." Although they do not scorn reason, as Charles Mcllwain emphasizes in his classic 1947 work, *Constitutionalism: Ancient and Modern*, for these writers, reason was above all associated with the test of time. For them, tradition and custom, over abstract reason, offered better criteria for discernment.[134] They saw history, custom, and tradition as filtered reason over time in a broader more comprehensive process, one

not limited to the faculties of a group of men physically gathered together in an assembly but mentally circumscribed within their own époque and its circumstances and passions.

Burke's criticism, however, did not stop at questioning the blind faith in the potential of abstract reasoning exhibited by Enlightenment thinkers. In his 1791 "Reflections on the Revolution in France," Burke also identified a second weakness of the constitutional undertaking carried out by the French. He finds enormously naïve the belief that the mere proclamation of rights or endorsement of a charter redefining the legitimate exercise of power could be sufficient to alter a reality composed of long-standing customs, traditions, and conventions rooted in the culture of a people. People will not change their self-identity because of a mere proclamation, just as the differences among individuals did not disappear when Article 1 of the Declaration of the Rights of Man professed that, "men are born and remain free and equal in rights." The situation would be worse if people actually convinced themselves that these rights were completely valid. It would open the door to utter disorder.[135] Burke's affirmation clearly reveals his conservativism,[136] but that aspect of his thinking does not invalidate the strength of his argument regarding the limited efficacy of a constitution as instrument of political and social change.

The left would cast a skeptical eye over the constitutional movement as well. For the young Karl Marx, the idea of a charter of rights establishing a separation between the public and private spheres, one that imposes an absolute limit on the State's ability to appropriate private property, was simply a maneuver to provide a legal shroud to the exploitation of those who held no control over the means of production. It is important to remember that the last article of the 1789 French Declaration of the Rights of Man qualified property as an "inviolable and sacred right"; hence one that cannot be restricted. Similarly, the consolidation of citizens'

right to contract freely allowed those without access to the means of production to sell their labor to meet their needs.[137] A charter of rights involving a principle of separation of powers that favors a liberal State merely represents a model, to conceal under a veil of legitimacy, a system for oppression of the proletariat by the bourgeoisie. Despite the criticism from both the revolutionary left and elitist conservatives, the constitution came out of the 19th century as a dominant legal and political concept, at least nominally.

CONSTITUTIONAL LINEAGES

According to Giovanni Sartori, "constitution is a 'good word.' It has favorable emotive properties, like freedom, justice, or democracy. Therefore, the word is retained, or adopted, even when the association between the utterance 'constitution' and the behavioral response that it elicits … becomes entirely baseless."[138] This quality favored its consolidation as a term to denote the great variety of forms of political organization that have emerged in the past two centuries, even those that reject the principles requiring the consent of the governed, the separation of powers, or fundamental rights. The term also came to be used by political systems that expanded the original role of the constitution, conferring to it responsibilities beyond organizing government institutions and establishing rights to be protected. Because of the positive connotation of the term "constitution," we have witnessed its appropriation, adaptation, and even falsification by a wide range of ideologies for more than two hundred years, which has led to diverse traditions or lineages of constitutionalism.

In Europe and other continents where constitutions were adopted to organize postcolonial regimes, the institution took a more torturous route than the one that unfolded in the United States. With the Restoration in France, the idea that a constitutional text was an expression of the people's or the nation's will was quickly replaced by the notion that it represented a pact between the sovereign monarch and the other classes of society. The figure of the king was maintained as the legitimate source of sovereignty even if his powers were limited.

The Swiss-French jurist and politician Benjamin Constant is perhaps the greatest representative of the conservative constitutionalism that spread across Europe in the 19th century. Constant proposed a scheme in which various attributes are concentrated in the figure of the monarch—in addition to the executive, legislative, and judicial functions, there was also a "neutral" power to mediate conflicts among the branches of government and protect the constitution from attack. The constitution was to focus on the guarantee of negative freedoms that limited state intervention rather than rights to active participation in the life of the community, which we now refer to as political or citizenship rights. Constant devised the classical distinction between "Liberty of the Ancients," referring to the right to active participation in political decision-making among ancient Greek democracies, and "Liberty of the Moderns," which originated with the English Revolution and sought to limit state power.[139]

The idea of a constitution that reestablished a monarchical government, albeit one subjected to certain limitations, had immediate repercussions in several countries where the monarchy was forced to cede prerogatives in order to stay in power. Through constitutions, these countries implemented a sort of

mixed government in the sense that Montesquieu contemplated. The branches of government were arranged to distribute power among the primary social classes, albeit under the control of the king who did not relinquish sovereignty. It was this conservative constitutional model that was adopted in Brazil in 1824 under Emperor Pedro I. Other examples are the 1812 Spanish Constitution, the French constitutions of 1814, 1830, and 1852, the 1831 Belgian Constitution, the 1848 constitutions of Italy and Austria, and the Prussian Constitution of 1850.

As capitalism progressed, class conflict sharpened, and the crisis of European imperialism coupled with this conflict to check the advance of conservative monarchist constitutions. The beginning of the 20th century was affected by a certain "disenchantment," in the terminology of Max Weber. He used it to describe the profound transformation he observed in people's thinking about countless aspects of social life, including law.[140] Concepts previously considered universal, such as justice and even constitutions, lost their original meaning as instruments that formalized arrangements established by the sovereign. In a diverse society undergoing deep transformation, one with many rival conceptions of truth, law gradually went from a system of protection for society's most substantial values to a formal or procedural mechanism primarily meant to stabilize expectations, to the point that it eventually became indistinguishable from its form—with the constitution as its supreme embodiment. For Hans Kelsen, the most esteemed representative of legal positivism, during this period, the term "constitution" meant no more than a positive norm, or set of positive norms, through which the production of other legal norms is regulated.[141]

Separated from its content, "constitution" was then employed to denote something else by designating regimes that were alien, if not averse, to the spirit of constitutionalism. Constitutions adopted by authoritarian regimes throughout the 20th century provide classic examples of corrupted use of the institution. Calling the 1937 charter implemented by Getúlio Vargas in Brazil a constitution—or continuing to use the word for the Weimar constitution after Hitler rose to power in Germany—represents an act of analytical and linguistic fraud, for it grants some degree of legitimacy to political acts that subverted and spurned the limits imposed by genuine constitutions. The Weimar Constitution offers the most dramatic example of a constitution that eroded through abuse of its very own procedures. Since its Article 76 only required an ordinary quorum for constitutional reforms, the National Socialist Party, once it obtained two-thirds of the seats in both houses of Parliament, encountered no obstacles in changing the constitution to concentrate all power in the hands of the Führer. It is surprising that one of the few voices that protested this legal subversion of the constitution was Carl Schmitt, a conservative jurist who would eventually join the Nazi regime.[142] Schmitt argued that the Parliament, because it did not possess sovereign powers—according to the democratic conception that situated constitutional sovereignty in the people—could not alter the basic structure for the exercise of power. He argued that the system for democratic suffrage could not be replaced, using Article 76, by a system of council. He felt the changes to the federal system that created the total State of the Third Reich through constitutional amendments amounted to an overthrow of the Weimar Constitution.[143] Because a constitution is the fruit of a sovereign act, Parliament cannot alter its fundamental structures.

Reform mechanisms allow for changes to the path charted by the constitution, but not for the erosion of the very text itself.

The German case, from a legal perspective, is quite distinct from the military takeover in Brazil. What occurred in Brazil was, simply, a constitutional breakdown. The decree of several unconstitutional acts submitted the 1946 Brazilian Constitution to the de facto rule of the military until a new constitution was promulgated in 1967. Institutional Act no.1 from April 9, 1964, days after the coup d'état, reveals the emotional strength and weight that the concept of the constitution retained:

> The victorious revolution is infused with the exercise of Constituent Power. Constituent Power is manifested by the people's choice or by revolution. This is the most expressive and radical form of Constituent Power. Hence, victorious revolution, as Constituent Power, is made legitimate by its victory. It overthrew the previous government and has the capacity to constitute a new one. […] This victorious revolution must be institutionalized and is urgently undertaking institutionalization in order to limit the full power of which it effectively disposes.

It is fascinating to observe how brute power, the fruit of violence and arbitrariness, seeks legitimation by appropriating the rhetoric and prestige of constitutional discourse. Initially, in presenting itself as revolutionary, it usurps the title of constituent power as the ultimate foundation of sovereignty. By the end of the

passage, however, it returns to constitutional grammar, affirming that even revolution must be institutionalized and, by consequence, must put limits on its own power, which presents a contradiction in terms. Little more than a year after the proclamation, when the military government issued Institutional Act no. 2 on October 27, 1965, it made clear that "the self-restraints that the revolution imposed on itself in the Institutional Act of April 9, 1964, do not mean that, possessing the power to limit itself, it had denied itself by virtue of this limitation, or that it stripped itself of the responsibility for the power that is inherent to it as a movement. […] The revolution lives on and never retreats."

I can think of no counterexample of the concept of constitution, which is directly linked to a democratic origin as a manifestation of the people's constituent power or to a constitutional ethos according to which those who exercise power are conditioned by laws, than this set of institutional acts. A synthesis of the above passages from Institutional Acts 1 and 2 negates the concept of constitution, despite the enormous effort made to appropriate constitutionalism's legitimating force. Ultimately, as Sartori appears to have correctly concluded, constitutions have "favorable emotional properties," meaning something good and positive like democracy, justice, freedom, or equality and, for that reason, those who attain power through fraudulent means insist on invoking them.

In this sense, I am sympathetic to the decision of many constitutional scholars to designate as "charter" rather than "constitution" those foundational texts that organize power for nondemocratic regimes and for regimes where power is not limited. If the "charter" confers all power to "il Duce," "der Führer," the Central Committee, a *caudillo*, or a dictator, then it will be impossible to distinguish between acts of law and acts of power, as Thomas Paine would say. This is true even if the charter does not explicitly confer

all power to the leader but fails to establish some form of limitation or control over the leader's actions. In these circumstances, the charter cannot be considered a constitution in the true sense of the word. It would be like calling a dictatorship democratic—a contradiction in terms.

Constitutional Regeneration

Beginning about halfway through the 20th century, constitutions started making a comeback as instruments for the implementation of democracy, organization and limitation of power, and guarantor of rights. This was after a long period during which the term was used abusively to camouflage the arbitrary exercise of power in many parts of the world: the totalitarian regimes in Germany and Italy in the first half of the 20th century; the authoritarian regimes of the Iberian peninsula and much of Latin America in the second half; the single party regimes of Eastern Europe that came to an end with the fall of the Berlin Wall; and even the brutal colonial regimes in Asia and Africa. With the fall of these autocratic regimes in successive waves of democratization that began after World War II, constitutions regained a central position in political terminology as signifying an organized form of power-sharing with democratic rule and fundamental rights, and in time, they would take on more connotations, ones that followed the evolution of society.

Starting with the 1949 Fundamental Law of Bonn, passed in Germany after the fall of Nazism, many constitutions elaborated in the second half of the 20th century and beginning of the twenty-first are clearly reacting against their preceding regimes.[144] They possess a weighty moral element that stands in contrast to early 20th century formalistic conceptions of constitutions. The

notion of human dignity becomes a central principle, articulating both the exercise of power and the interpretation of other guaranteed rights. Fundamental rights move to the center of the constitutional structure. The 1988 Brazilian Constitution is but one example, with its long charter, right at the outset, of established rights, making clear that the constituted powers are instruments for the realization of those rights.

Many of these constitutions will also take precautions to ensure greater protection of fundamental principles against possible infringement by authoritarian or simply majoritarian governments. This explains the proliferation of constitutional courts that are granted wide powers to invalidate measures and norms that conflict with the constitution. In the Brazilian case, even though the 1988 Constitution did not create a new constitutional court, the STF took on the attributes of an apex appeals and a constitutional court. A second protective technique employed was establishing as supraconstitutional (the "rock-hard" or *pétreas* clauses) essential elements of democracy and basic rights meant to be insulated from possible violation by the constituted powers. By consequence, oversight of constitutional reform to make sure the essence of the Constitution remains unaltered shifted to the judiciary. Perhaps the most resounding example of this power of constitutional control occurred when the South African Constitutional Court found that certain elements of the new South African constitution were themselves unconstitutional because of principles—such as equality and the rule of law—that had been agreed upon during the transition process.

Many of the constitutions of contemporary democracies, in addition to bolstering their moral dimension by including a robust charter of rights and strengthened judicial oversight, also incorporated other ambitions. That a country like India, which had only overcome colonialism at the end of the 1940s under the leadership

of Gandhi and Nehru, would adopt a constitution similar to the 1787 United States text and the 1848 Swiss version, was simply impossible to imagine. The same can be said of South Africa when it overthrew its racially segregated system and of Brazil after the military regime collapsed. These and many other recent constitutions went beyond establishing a liberal democratic order. The need to overcome structural problems—such as the division of society into castes in India, racial segregation in South Africa, and deep inequality in Brazil—led leaders to incorporate rules meant to transform society. For this reason, they are often called transformative constitutions. In addition to establishing a political system and negative rights, these constitutions recognize a broad range of social rights and protections for vulnerable groups and even enshrine public policies designed to ensure social transformation. The primary characteristic of this constitutional model is its attempt to reconcile demands for freedom with the ambition to reduce inequality within a democratic framework.[145]

CONSTITUTION MODELS

There are many possible criteria and methods for the classification of constitutional models. Some include rigidity, size, efficacy, the existence or lack of a system of constitutional control, government structure (e.g., parliamentarian or presidential), federative or unified government, or whether the rights enshrined are strictly liberal or include social rights. Constructing a complete taxonomy from so many criteria to categorize the immense number of constitutions on catalog might well prove to be a fruitless undertaking, not only because of these factors but also because each single constitution conjugates this wide variety of variables in different

ways. That is why I have chosen to analyze the different models of constitutions using a fairly simple criterion, despite my appreciation and respect for the pertinence and relevance of classical legal categorizations. The political scientist Arend Lijphart formulated the criterion in his book, *Models of Democracy,* in order to classify the institutional diversity of democratic regimes, but I believe it can be used to comprehend the diversity of constitutional models as well.[146]

Lijphart divides democratic regimes into ones that are more majoritarian and those that are more consensual. Majoritarian regimes transfer all the power to the representatives of the parties that form the government after winning an election, which enables them to carry out their political projects without having to overcome serious institutional obstacles. The contemporary democratic regime that comes closest to embodying this model is certainly that of England, which is based on the idea of Parliament's sovereignty, and, in fact, the arrangement has come to be known as the Westminster model.

Conversely, there are the consensual democracies whose institutional components act as a sort of filter between manifestation of the people's will as expressed by popular vote and implementation as public policy. These institutional filters have the practical effect of imposing a greater degree of consensus within the political system for any measure to be approved and implemented. Obtaining a majority in Congress or winning the presidency by direct election does not suffice for the resulting government to put its ambitions in practice. It must obtain the consent of various institutions and, in some cases, of minority groups, in order to proceed with its political project. A good number of contemporary democracies can be considered consensual, mainly because so many have adopted rigid constitutions that establish constraints on the free exercise of majority rule. In this sense, constitutional democracies

are essentially consensual too. They are democratic because they comply with the principle of popular sovereignty, but they are not simply consigned to governing by majority rule.

What distinguishes the different constitutional models is the degree of consensus required for a decision to be deemed valid. There are many factors that qualify a constitutional system as more or less consensual. I will only draw attention to three dimensions that are constitutive of the very definition of constitution: constitutional supremacy, which imposes a greater degree of consensus through its rigidity and mechanisms for constitutional control; the forms by which representation is organized and the functions of government distributed, which can also favor consensual decision making between the executive and legislative branches; and, lastly, the rank of fundamental rights that, by their very nature, impose procedural and substantive limits on majority rule, even though many of these rights are indispensable for democracy itself.

Constitutional Supremacy

The supremacy of the constitution is both political and legal. The constitution's claim to preeminence over the other norms in the legal system is political inasmuch as the constitution is the material representation of the will of the Constituent Assembly, while the other norms are the product of the constituted powers. Legally, the constitution's supremacy is a product of both rigid respect for the constitutional text and the mechanisms it establishes, such as judicial review, to protect its integrity.[147]

For jurists, the difficulty of changing the constitution or its degree of rigidity represents the central element for controlling majoritarian impulses. As we saw earlier, the constitution serves

as superior law because its origin resides in the expression of the constituent power. From a practical perspective, its superiority is ensured by the adoption of a set of procedures that make altering its norms more difficult than changing other rules in the legal ordering. The constitution's rigidity thus divides politics, as Bruce Ackerman argues, in two levels. The first level, that of constitutional politics, is insulated from interference by governments formed of shifting majorities. It is the second level of day-to-day politics where legislative and electoral majorities are determinant.[148]

At the extreme pole of rigidity are constitutions presumed immutable, such as the state constitutions of the Carolinas drafted by John Locke and adopted in 1669. At the other pole are extremely flexible constitutions that do not require any out of the ordinary procedure for modification. In between these extremes are an enormous variety of possibilities. The constitution of the United States is a very rigid example, since its Article 5 not only requires that both houses of Congress approve proposed amendments by a two-thirds majority, but also approval by three-quarters of the state legislative assemblies. Brazil's might be an example of a less rigid constitution, as it only requires the national Congress to approve amendments by a three-fifths majority on two votes. A government with a 60% majority in each house of Congress can therefore, at least in theory, pass amendments. This does not apply, however, to a certain set of clauses in the Brazilian constitution that we have already discussed. These "rock-hard" clauses cannot be altered or suffer infringement on the basis of the reasonably flexible three-fifths supermajority. These clauses give the Brazilian constitution two tiers of rigidity: fairly pliant in general but quite firm and in some cases even untouchable at its core. The idea of entrenching determined constitutional mechanisms, although far from new, took on an added dimension following the perversion to which Hitler subjected the 1919 Weimar constitution through the use of mechanisms established by the

constitution itself for amendment. That constitution contained no mechanism to impose limits on the alterations that could be made to it, not even to changes in its fundamental clauses.

From a sociological perspective, the question of rigidity is principally related to the level of trust between the various political actors and social sectors. In societies characterized by a high degree of trust, such as those that display a strong consensus regarding the proper manner to resolve political disputes and the values that structure social relationships, rigid and detailed constitutional rules are unnecessary. In more fragmented societies with a low degree of trust among the many sectors, ones where minorities fear their rights and values will be offended, constitutional rigidity works as a type of insurance against majoritarian decisions. Politically, therefore, rigidity is the consequence of a strategic decision made during the constituent process. The actors who hold the greatest power during constitutional negotiations use rigidity to anchor their interests more firmly than those of their adversaries. In situations where compromises must be made, such as during the Brazilian Constituent Assembly, rigidity is used to protect that which the majority understands to be indispensable for participation in the political life of the nation.

Greater constitutional flexibility does not necessarily imply a more democratic constitution. Constitutional flexibility can also be a useful tool for authoritarian governments that seek to assert control over the constitutional text. Brazil's history offers examples, for both the 1937 charter implemented by Getúlio Vargas and the 1969 charter imposed by the military dictatorship softened the text's rigidity by requiring only an absolute majority instead of a supermajority for amendments. This enabled those regimes to define the exact contours of the text's norms.

The effect of constitutional rigidity on majority rule cannot be ignored, especially with regards to a charter of rights strong

enough to block majority rule. The broader and stronger a constitution is, the more ambitious its charter of rights, the less space there is for unimpeded decision making through simple votes. A constitution as broad as Brazil's requires a great degree of consensus among the political forces for the adoption of any substantive change to the foundational text. In fact, there exists no ideal standard or formula for the proper amount of constitutional rigidity. Societies that are historically more democratic, ones in which respect for rights has been socially incorporated into institutional practice, may be able to afford the luxury of a flexible constitution. In more divided societies characterized by a low degree of trust among the groups rivaling for political power, more rigid constitutions may prove advantageous in that they reduce instability and make it harder for the administration in office to align the constitution with its interests.

Another element that makes democracies more or less consensual is a system for constitutional review that is independent from the representative branches of government. This element is extremely important because it confers credibility to constitutional rigidity. If, in the context of a society with a rigid constitution, the representative organs are not held accountable for or stopped from issuing measures and passing legislation that conflicts with the constitution, then its rigidity is merely symbolic. Constitutional systems that dispose of strong mechanisms for constitutional review also heighten the consensual character of their regimes, for the measures approved by majorities must also obtain the consent of the organ that reviews their validity.

There are two predominant models of constitutional review among contemporary constitutional democracies. One is the model of diffuse control that originated in the United States at the beginning of the 19th century. This model, adopted in Brazil with its 1891 Constitution, confers to judges in general the competence

of ensuring that the laws they are asked to enforce comply with the constitution, as well as the prerogative to deny application of any law they find violates a constitutional precept.[149] This model spreads the function of safeguarding the constitution across the entire judiciary, giving the institution itself a countermajoritarian function. To protect the system of majority rule from extreme vulnerability, this model requires a rigorous system of precedents that obliges judges in the lower courts to comply with higher court decisions and obliges judges in the higher courts to comply with their own previous decisions and with those of other superior courts. Without doubt, the enforcement of precedent is one of the Brazilian legal system's greatest weaknesses, one that constantly generates both legal and political uncertainty.

The second model for constitutional review was designed by the Austrian jurist Hans Kelsen and incorporated into Austria's 1920 Constitution. It spread across Europe following the Second World War and then across the rest of the world during the more recent waves of democratization. In this concentrated control model, as it is known, the responsibility to assess the compatibility of laws and government measures with constitutional norms is conferred to a single organ, usually called a Constitutional Tribunal or Supreme Court. Judges in general do not have the same competence to veto the application of a law duly passed by the parliament as they do in the diffuse control model. Where doubt over the constitutionality of a particular measure arises, the question is referred to resolution by the Constitutional Court, whose decision must be respected by all the other branches of the judiciary. In this model, the countermajoritarian function is concentrated in the Constitutional Court.[150]

Over the past few decades, however, the two models have been evolving toward each other, creating mixed systems. Many countries that had originally adopted diffuse control have created

mechanisms to concentrate more power in the hands of an apex court. In the Brazilian case, this process started with the creation of a type of legal motion called a "constitutionality action" (*ações de constitucionalidade*). The creation of these motions and additional competencies, designed to ensure that the STF's decisions are respective in other ambits of the judiciary, enable plaintiffs to refer questions directly to the STF, effectively bypassing the diffuse control model. The Brazilian model presents innumerable peculiarities and problems that will be addressed in Chapter 4. Many European countries, for their part, have been evolving in the opposite direction. They have been conferring more and more authority to lower courts and judges so they may, to a degree, pronounce any reservations they have about the constitutionality of the norms and measures that they are charged with enforcing.

Constitutional review and constitutional rigidity are intimately related, and both support the notion of the constitution as supreme law. By consequence, they each restrict the freedom of political actors to implement decisions reached through simple majorities, in that those decisions must conform to the constitution and successfully clear the system of constitutional review in order to be valid.

The Organization of Power and of Political Parties

Constitutions might also be categorized in terms of the governmental regime that they establish. Theoretically, each type of regime implies a greater or lesser reliance on consensual decision making. Governmental regimes that are determined by the distribution of seats in the parliament are known as parliamentarian. Hence, when there are parliamentary elections in England, Spain, or Canada, the electors know that they are indirectly choosing

those who will constitute their government. In a sense, then, it is possible to affirm a certain fusion of power in the parliamentary regime, because a solid majority in the parliament will result in an alignment of the executive and legislative branches, for the head of the executive will be the leader of the majority party or coalition in parliament.

In presidential regimes, the legislators and executive are elected independently. The two branches are therefore independent and, for them to execute their duties, they must engage the other to reach some degree of consensus. Mechanisms, such as the presidential veto and the need for legislative approval of the federal budget, make it difficult for the legislature to approve laws without the consent of the executive or for the executive to govern without the collaboration of the legislature.

Accordingly, parliamentarian regimes, which involve a fusion of the legislative and executive branches, should in theory be more majoritarian than consensual. Whoever wins the parliamentary election will not only lead the legislature but also the administration. Another advantage of this type of regime is the ability to call new elections in times of crisis. Calling new elections transfers the responsibility to the people, for the people will then decide who is to take on the crisis, based on majority rule. I say "should" be more majoritarian because of the central dimension that political parties have added to representative democracies. The propensity of a regime toward a more majoritarian or consensual system is also related to the number of active political parties.[151] The more parties in a regime, the greater the difficulty of obtaining the necessary consensus for both approving legislation and carrying out executive tasks. Although the force obtained by electoral victory in parliamentary regimes is still essential in determining who controls the administration, when many parties contest the election, forming a solid majority is not always simple. In these cases, the

regime, albeit parliamentarian, may require greater effort from the political actors to reach any consensus. This added difficulty notwithstanding, once a majority is formed, the legislative and executive branches follow the model of a parliamentary regime with a fused executive and legislature.

The party system is also a definitive factor for understanding the operation of presidential regimes. In the context of a stable, long-lasting two-party system such as that of the United States, Madison's original idea of using the ambition of the leaders of one branch as a counterweight to the ambition of the leaders of the other might be diluted if the same party controls the presidency and both houses of Congress. When the same party controls the legislature and executive, the necessary consensus to govern need only be achieved within the ruling party. It is only when the opposing party controls one or both houses of Congress that we can genuinely consider the regime one of separated powers, a scenario that makes the regime more consensual for, in this scenario, only bills or policies that have the support of both political blocs will pass.

In the Brazilian case, we are dealing with a presidential regime in a multiparty system in which the president must constantly manage a coalition to survive. If unable to engineer the support of parties with diverging interests, it will be more difficult for the president to move his or her agenda forward through all the obstacles present along the way. The same occurs when, in a two-party presidential regime, the president lacks control of Congress. In the United States, this occurs frequently. The legislature's refusal to approve the president's proposed budget is a concrete manifestation of this polarization, which can lead to government shutdowns. This form of veto power, which the legislative branch has over the executive, forces negotiations with other camps to bring the government back out of shutdown. It

all imposes the necessity of choosing between making compromises or expanding the president's powers, which can include recourse to decrees, executive orders, or provisory measures to perform the government's daily functions. When those strategies are unsuccessful, the government enters paralysis. In Latin America, the paralysis traditionally provokes some form of constitutional rupture. In the last decade, resorting to impeachment has intensified, utilizing it as both a mechanism to overcome impasse and as a way to take down administrations that have lost their parliamentary support, as demonstrated by Aníbal Pérez-Liñán.[152] One possible interpretation is that the presidential coalition regimes have started to behave more like multiparty parliamentary ones in which, consensus lacking, governments tend to lose all strength.

The coupling of the government regime with the party system may therefore comprise one of the most determinant criteria of its position on the majoritarian/consensual axis. If the number of parties is so important to the nature of the regime, understanding the dynamics involved is essential. The cornerstone of any representative regime is the manner by which popular votes are aggregated and converted into political mandates. There are two basic formulas but countless derivative forms of each.

The first, simpler formula involves dividing the territory into districts, each of which elects a single representative. If the representative assembly of a country that followed this formula had one hundred seats, we would know the country was divided into one hundred districts. Elections are held and the candidate who obtains the majority of the votes in each district is chosen. This system was used a very long time ago in England and the United States. Its great advantage was its simplicity. In the English case, in which significant constitutional obstacles to the exercise of power were inexistent, the result of the district elections determined which

party was able to form a parliamentary majority. Therefore, the result of the election determined who would govern.

While very simple and efficient, this system poses problems. The first involves the division of the territory into districts. If districts do not possess a similar number of electors, which often occurs, representation is unequal. The drawing of the districts can also hide other problems. If a minority represents 30% of the overall population, for example, and is scattered evenly across the districts, it will tend to be underrepresented in the assembly. As an absolute majority is necessary to win an election in a district, that minority might not be able to elect any representative in any of them. Gerrymandering, named after the early American politician Elbridge Gerry, who first began the practice in the United States, involves the intentional distortion of the shape of districts to distribute minorities this way. In the United States it was commonly but not exclusively used to deny African Americans access to representation.

Another consequence of this district voting system is its tendency to winnow down the number of political parties. Because districts elect only one representative, parties tend to compete for the average elector. Radical proposals tend to receive less support. Over time, this consolidates the parties that occupy the moderate center, eliminating identity-based, radical, and single-issue or interest parties. This remains, however, a tendency that must be interpreted alongside several historical factors. The number of parties, although closely related to the choice of electoral system, is also conditioned by historical and economic factors.

The proportional system currently employed in Brazil and most of Latin America and Europe, is somewhat more complicated. In this system, there are not districts where only one representative is elected. Instead, there are constituencies that elect many representatives. In the Brazilian case, each state comprises

a constituency for the election of representatives to the federal Chamber of Deputies. The political parties compete for votes based on candidate lists that they present. In Brazil, the lists are open, meaning the electors have the right to choose from the party list the candidate who receives their vote. In Argentina, where the lists are closed, the order in which the candidates are elected is set by the party. After all the votes have been cast and tallied, each party receives a number of seats that is proportional to its share of the overall votes. This allows for greater representation of minorities—provided that they concentrate their votes on the parties with which they identify. Parliaments formed by proportional elections tend to include more parties, for the electoral system itself creates incentives for the formation of parties that respond to minority interests. Hence, neither the proportional system nor the district system is without problems. The most common problem associated with the former is the fragmented party system that we find in Brazil. The sheer size of the constituencies alongside a lack of rules limiting the creation of very small parties, in addition to incentives such as public financing for political parties and free airtime on TV and radio during electoral campaigns, result in such a quantity of parties that forming coalitions becomes extremely difficult.

Basic Rights

A third element that has direct implications for a constitutional system's position along the majoritarian/consensual axis is the form, quantity, and nature of the fundamental rights enshrined by the constitution.[153] The notion of basic rights structures the concept of constitutional democracy. Since the beginnings of modern constitutionalism, rights have been established as either

a justification for limited government, as the United States Declaration of Independence of 1776 proposes, or as an inseparable element of a democracy, as Article 17 of the French Declaration of the Rights of Man posits.

The original function of rights in the liberal order was to establish limits on the constituted powers and thus ensure freedom, understood as an absence of restriction. Starting with the tradition of natural law, these rights are postulated as existing prior to political power, and thus are not subjected to it. Clearly, in any organized society, these rights must be regulated and harmonized. Their regulation, however, must be designed to protect, in as much as it is possible, rights like property and freedoms like those of thought, religion, expression, movement, and even contractual freedom. Rights designed to make sure individuals are assured the due process of law also fall into this category of liberal rights. They are called negative rights because their essential function is preventing the State from inappropriately interfering in the private sphere. When intervention is necessary to address tension among protected rights, a regulatory operation can only justifiably take place through the law. The greatest example of this type of legislation, one meant to ensure the coexistence of negative rights, might be the Civil Code of Napoleon, which was elaborated to give concrete and broad protection to the right to property and the actions that derive from the freedom to contract. When constitutions recognize these negative rights exclusively, they should be considered liberal, for they establish strong limitations on majority rule.

On the other hand, rights to democratic participation appear to serve a very different function than liberal rights. Rather than creating an area free of state intervention, these rights guarantee citizens access and participation in the processes that determine national priorities, which by consequence generates potential

tension with social rights. The purpose of democratic participation rights is to enhance autonomy, as understood by Rousseau's conception of the notion. Rousseau held that citizens were obliged to conform to the laws in whose elaboration they took part. Historically, the attainment of these rights has been slow and conflictual. At the outset of modern constitutionalism, they were only conceded to citizens of independent means—that is, property owners who paid taxes and did not rely on employment to survive. The justification was that material independence was a necessary condition for people to act freely in the political sphere. In practice, voting rights based on the collection of taxes served the purpose of excluding the majority of the populace from political citizenship. Workers, women, racial, ethnic, and religious minorities as well as illiterate people were gradually included in the political pact as they gained the capacity to exert political pressure. The rights related to democracy are not limited, however, to the right to vote. Without full freedom of expression, association, assembly, protest, opposition, and the right to form political parties, the right to vote could actually turn out to be inconsequential.

The fundamental question in this relation between liberal rights and political rights involves the maneuvering room that the constitution should grant for political rights to set limits for liberal ones. For majoritarian constitutionalist currents, political rights should prevail so that the citizens can, at each electoral cycle, recalibrate the protection of liberal rights as they deem necessary. Hence, the rights to property or to enter freely into contracts should not constitute obstacles to new regulations that aim to protect the environment, workers, or consumers, if such is the will of the majority. According to John Hart Ely's classic *Democracy and Distrust*, the constitution and the judiciary should protect from the will of the majority only those rights that are essential for the proper exercise of democracy, such as the freedom of

expression, the right to equal participation, and so forth. Ely also admits that protection of "discrete and insular" minorities, even when it contradicts majoritarian decisions, is compatible with the primacy of democratic inclusion.[154]

The class conflict that Marx and Engels argued as inherent to capitalism, in addition to introducing the idea that liberal rights are not more important than establishing satisfactory conditions for material well-being, forced reforms so that workers might get behind the project of constitutional democracy. Associated with enfranchisement, a set of rights related to labor, such as the forty-hour workweek, minimum wage, regulations for labor carried out by women or children, in addition to the rights to unionize and strike emerged. The so-called social rights directly affect the right to property and the freedom of contract. Some constitutions, such as the 1919 Weimar constitution and the 1834 Brazilian one, make explicit mention of this contraposition, qualifying the right to property, which then loses the absolute sanctity attributed to it by the Declaration of the Rights of Man and gains a social function. Performing this function involves, among other things, ceding space to new legislation that mediates relationships among classes as well as other social sectors.[155]

Social rights also include a second category of positive rights—that is, rights that impose obligations on the State. If, in a constitutional regime where negative rights are predominant, the size and reach of the State are limited, in a constitutional regime that recognizes the rights to education, health, pension, and welfare, the State will have to be extremely active to execute the duties imposed on it by the constitution. Not all constitutional democracies incorporate such rights or give them equal weight. In the case of the United States, the rise of the welfare state did not require any constitutional change, unless we count the shift in the STF's interpretation of the constitution regarding the degree of protection

it attributes to the right to property. This shift in interpretation allowed President Roosevelt, as part of his New Deal, to pass legislation that created a series of federal agencies and programs to give the State the capacity to intervene in the economy and implement social policies.

Contemporary constitutional democracies have, overall, gradually incorporated into their repertory qualifications on the right to property, along with a number of basic social rights. Furthermore, the constitutions of many countries marked by profound inequality and social injustice came to recognize a vast array of social rights—in this sense, the 1988 Brazilian Constitution is no by no means unique. As Amartya Sen emphasized, civil and political rights are utterly insufficient when people are dying of hunger. In this sense, the affirmation that material conditions for well-being and the full enjoyment of rights are interdependent is correct. One of the direct consequences of expanding the range of rights that must be protected is an expansion of the obligations the State must meet. If the State does not dispose of the necessary resources to guarantee these rights, clearly a problem of constitutional inefficacy arises.

The adoption of long rights charters, be they liberal, democratic, or social, undoubtedly imposes restrictions on majority rule. The more ambitious the inventory of rights laid out by a constitutional text, the less margin there is for a society to make decisions based on votes and the greater the need for political consensus to enact reforms.

How Do Constitutions Work?

Political theory, from Locke to John Rawls, offers an abundance of parameters to determine what makes constitutions good or just

(ones to which a rational person would be willing to submit), but has not explored extensively the mechanisms that might make constitutional systems more or less effective. Even those jurists who devote themselves to translating ideas, principles, and aspirations into specific norms that give constitutions their particular structure and who study the interpretation and implementation of constitutions on a daily basis have had trouble coming up with a convincing explanation for the mechanisms that allow constitutions to function effectively. Ultimately, what are the forces that can transform normative aspirations into a truly effective constitution? Words traced on paper have been approved, time and again over hundreds of years, by constituent assemblies, transforming them into rules and principles strong enough to condition not only the behavior of common citizens, but also of governments and powerful groups such as the military, political parties, legislators, judges, and corporations. How? How is a formal arrangement transformed into something with actual power?

Understanding how a constitution should work is not an easy task. There are many variables, both textual and external, that affect its performance. At the current level of social science, determining the causal relations that broadly explain the mechanics of constitutional performance is still beyond our grasp. This does not mean, however, that it is impossible to identify important correlations or even undertake narrowly tailored analyses.

Evaluating the effectiveness of constitutions becomes even more complex when we look at constitutions that are the product of disputes between democratically inspired movements seeking to transform unjust authoritarian societies and forces that seek to preserve spheres of arbitrary power and social hierarchy. Effectively enforcing the resulting compromises, which include not only emancipatory rules but also regressive mechanisms, poses significant obstacles. These constitutions, in practice, have enormous

trouble fulfilling all or some of their promises. The Brazilian constitution can be considered an example of such a set of partially effective compromises. Some parts of the Brazilian text are fully effective while others barely scratch at the realities they aim to address. This partial efficacy not only involves sections of the actual constitution, such as the protected rights charter, but also the success with which different groups are able to appeal to or leverage the Constitution, depending on the amount of political or economic power they hold. Affluent sectors often enjoy a given right fully, while that same right is effectively useless for disadvantaged groups.

This problem of partial effectiveness does not apply exclusively to a constitution born of compromises that are, in general, highly ambitious. Classically liberal constitutions in democracies considered stable, both in political and economic terms, also fail to achieve optimal effectiveness, albeit to a lesser degree. As modern constitutions invariably establish demanding aspirations—equality, dignity, liberty, plus notions such as rule of law, transparency, and democracy—there will always be areas of suboptimal performance. These may involve disadvantaged groups that do not enjoy full enjoyment of their rights, power centers that do not rigorously submit to the parameters of transparency or the law, or even democratic principles that are denatured through the abuse of economic power.

The image of constitutional efficacy portrayed by recent empirical surveys in the field of comparative constitutional law is anything but clear. In a seminal work, initiated in 2010 and titled "Sham Constitutions," David Law and Mila Versteeg analyze the performance of 167 constitutions.[156] For their analysis, they pulled normative information from several sources, giving special attention to certain directives and reports from institutions like the UN and watchdog NGOs. The constitutions were divided in two

categories: those that promise much and those that promise little. Subsequent to this classification, they cross referenced the normative content with the empirical data.

The authors' first conclusion was that the more constitutions promise, the more difficulty they have meeting their promises. Moreover, the study shows a relation among democratic maturity, living standards, and constitutional efficacy. At the other end, open and postconflict situations as well as low standards of economic development correspond to weaker efficacy. Clearly, these findings do not challenge conventional thinking regarding the varying degrees of effectiveness among constitutions. Ultimately, it is difficult to determine causal relationships from this type of quantitative analysis, and the authors do not seem to hold that objective. The study's merit lies in the path it opened for the measurement of constitutional performance, which is significant in itself.

Still, understanding the causes that make one constitution more effective than another remains important from both theoretical and practical perspectives. Practically speaking, jurists who devote themselves to the deliberate study of the constitutional text, while focused on the goal of refining interpretative methods to reduce the margin of discretion available to those responsible for applying it, could be disheartened or frustrated if a good part of constitutional norms remain ineffective regardless. This ineffectiveness does not derive from a lack of normative or doctrinal substance, but rather from political or economic factors that negatively affect constitutional performance. In the same way, defective implementation or enforcement of the constitution also generates anguish for the theoreticians charged with elaborating, defending, or reforming it. It may lead people to ask what, in the end, is so important about the constitution's design. Assuming that the best response is relative—"it depends"—the next question is clearly that of determining precisely what it depends on.

The constitution's performance is related to many factors placed along different orders—political, economic, social, and historical. It also depends on the government's institutional capacity and ability to collect taxes, the independence of law enforcement agencies, and so on. Obviously, the most ambitious constitutions—such as those of India, Colombia, and Brazil, for example—ones that go beyond merely establishing the rules, procedures, and competencies for the exercise of political power, have the most difficulty realizing their normative ambitions. The discussion of constitutional efficacy, as we have seen, is not new. Authors as diverse and distinct as Burke, Hume, Lassalle, and, closer to home, Oliveira Viana have all emphasized the challenges of analyzing the issue based on ideal theories of constitutionalism.[157]

CONSTITUTIONAL IDEALISM

Social contract theorists did not worry much over constitutional efficacy. Their enterprise was—and still is—establishing the normative parameters for the best form of government, understood as that to which all rational people would submit. An exception to this is certainly Hobbes, who was much more concerned with efficacy than justice and consent. While Hobbes cannot be considered as belonging to the constitutionalist tradition, it is interesting to note that he clearly saw that law is meaningless where unenforced by the State: "Covenants, without the Sword, are but Words, and of no strength to secure a man at all."[158] Hence, for Hobbes, the first function of the social pact was to constitute the authority to which all means necessary for establishing social order should be conceded. Hobbes thus forms part of the current that conceives the constitution in terms of establishing order, and

not as an instrument to protect freedom. His model, exclusively repressive, focuses on the efficacy that the law possesses when backed by fear between its subjects and the sovereign's capacity to impose authority.

The constitutional model proposed by Locke in his *Second Treatise of Civil Government* (1690) represents a reaction to Hobbes' form of organizing and justifying the exercise of power. Locke believed rational people would refuse to abandon the state of nature in which they enjoyed some rights, albeit ones without any external enforcement, in exchange for submission to an absolute sovereign to whom some, if not the totality, of their rights would be transferred. In Locke's account of the state of nature, people recognized rights but, because people are impartial, they were not always willing to respect the rights of others, especially when a conflict arose over a piece of property. Thus, the need to create an impartial arbiter charged with finding peaceful solutions and ensuring the efficacy of the right to property as well as other freedoms.[159] Concern for the efficacy of these rights is what leads people to cede a small portion of their freedom to the State. This way, the State is able to guarantee the rights, established by law, that would otherwise lack protection.

Locke also considers the possibility that the civil authority would abuse its power in violation of the rights that it was set up to protect. Locke believes the risk is minimized by only allowing the authority to act through law. Because law is, by definition, the product of society's consent as expressed by parliament, the risk would be reduced. Moreover, the parliament would be incapable of enacting a law contrary to natural rights, for these rights were not ceded to the authority through the social contract. His is clearly an abstract model in which constitutional efficacy is obtained through the establishment of the rule of law, which, for its part, would be limited by natural rights. Locke does not provide a more detailed

explanation of the procedures that would prevent a parliament from abusing its prerogatives or infringing upon the constitution. In his model, therefore, rights remain vulnerable. As we will see, this problem will only be addressed by the theory of separation of powers elaborated by Montesquieu and Madison.

Another response, also idealist, to the problem of the social pact's effectiveness, and thus to the constitution that derives from it, is that of Jean-Jacques Rousseau's *The Social Contract*, published in 1762. Unlike the theories of Hobbes and Locke, Rousseau's notion of the social contract does not involve the transfer of rights from the citizenry to an external entity. The pact is made among the citizens, who themselves constitute the sovereign. This enables Rousseau to resolve the problem of the practical necessity of creating a government and the moral imperative against subjecting citizens to an external entity. Similarly, to Locke, Rousseau placed the enormous responsibility of expressing the general will, which is not to be confused with the will of the majority, on the law. The general will, also by definition, is a representation of the public interest to which everyone is morally obliged to conform. Accordingly, the constitution's effectiveness would be a necessary derivative of the democratic nature of the pact. If only, as established by the constitution derived from the pact, the laws that expressed the general will were valid, and if no one can act against their own will, which includes the general will, then the problem of the law's ineffectiveness disappears. We would all obey the constitution and the laws because we would be the ones who wrote them, and it would be a contradiction to disobey the rules that are generated by our own will.[160]

Rousseau warns his readers, however, that the magistrates and those called upon in the government to apply the law will always band together and look out for their own interests, which often differ from the public interest. The citizens, meanwhile, remain

dispersed and isolated as each tends to their own affairs. By consequence, there will be nearly constant, concerted attempts by those who govern to superimpose their private interests over the general interest of all citizens. This would be the fundamental cause of the degeneration of democratic constitutions. To counter it, citizens must remain constantly alert and united.[161]

To summarize, Rousseau advances two propositions regarding constitutional efficacy: (1) the more democratic a constitution, the more likely that all involved in its confection will obey it; and (2) the private interests of those who hold public power are the principal obstacle blocking a democratic constitution from effectively serving the general interest. Only citizen participation and vigilance can defend the integrity of the general will.

As may seem apparent, the responses of Locke and Rousseau to the question of constitutional efficacy, while quite idealized, offer insights into conditions that favor or hinder robust constitutional performance. Hobbes also clearly offers a response focused on the total effectiveness of the social contract, only in his case, the pact is not constitutional or even democratic.

CONSTITUTIONAL REALISM

Montesquieu might have been the first author during the transition from the ancient to modern world to reflect directly on the problem of the constitution's performance and effectiveness, which he did via his 1784 analysis of English government institutions, *The Spirit of the Laws*. Montesquieu believed that the great virtue of English institutions lay in their capacity to confer to each "relevant" sector of society—the monarchy, aristocracy, and bourgeoisie—a sphere of power within the constitutional arrangement

established by the Commonwealth. Hence, the sectors of society that, at least at that moment in history, possessed the necessary resources to exert effective power split the executive, legislative, and judiciary among themselves. As any significant state action required coordination among all three branches of government, agreement among these powerful social groups was necessary to set the action in motion. In fact, Montesquieu's classic precept that only "power can stop power" does not actually refer to confrontation among different branches of government, but rather to conflicts among the classes that controlled them.

For Montesquieu, who advocated for a moderate government that's designed to preserve liberties, this system of class coordination through the institutionalization of separate powers ensured constitutional efficacy. Here Montesquieu opens a path for discussion of the causal factors related to a constitution's performance, factors involving the articulation of a society's institutions and genuine seats of power. A moderate government's political survival would depend on that government appropriately coordinating those elements, together with social and institutional ones.[162]

Edmund Burke, however, criticized Enlightenment thinkers for putting blind faith in the superiority of abstract reason over historical experience when conceptualizing ideal institutional arrangement. He also predicted that constitutions that derived from such abstract thinking would be unavoidably ineffective. In his 1791 work, *Reflections on the Revolution in France*, Burke cautions against the fragility of the constitutional enterprise among the French. He found the act of simply issuing a declaration of rights or adopting a charter redefining the organization and exercise of power very naïve. The new system would be incompatible with the actual structure of power in society, especially with regards to social hierarchy. Burke found it ingenuous to believe that such texts could truly change the reality produced

by centuries of custom, tradition, and conventions that had been deeply entrenched in the culture of the people, as was discussed earlier in this book.[163]

What's more, Ferdinand Lassalle, a contemporary of Marx and, for a time, a supporter before migrating to the social democratic camp, also emphasized the limits of an idealist approach to constitutionalism that did not take into account the existing power centers within a given society. In a speech given at the Liberal-Progressive Association of Berlin in 1862, "On the Essence of the Constitution," Lasalle argued, paradoxically, something very similar to Burke, at least as far as the efficacy of constitutions is concerned. Like Burke, Lasalle analyzes constitutions not from a formal or legal perspective, but rather through a sociological lens. This enables him to perceive why what jurists conventionally called "constitutions" were worth little more than the paper on which they were printed unless they reflected the "real class relations" that structured society. Lassalle provoked his audience by asking what would happen if they hung a sign on an apple tree reading, "this is a pear tree."[164] It certainly would not cause the tree to produce pears instead of apples, and the point is that the power of constitutions to change society's nature is similarly limited. If constitutions do not reflect the actual power dynamics in a society, especially those that control effective means of coercion, then they are mere formalities devoid of relevance. Unlike Burke, however, Lassalle was interested in progressive reform, only he did not see the point in imbuing constitutions with transformative expectations as if they were magic instruments capable of altering reality on their own.

A similar debate took place in Brazil at the outset of the 20th century. It began with Oliveira Viana's resounding criticism of the idealism Rui Barbosa wrote into Brazil's first republican Constitution in 1891. With sarcasm and even resentment, Oliveira

Viana starts by criticizing what he calls Rui Barbosa's marginal understanding of Brazil—that is, his inability to conceive of the country in terms of its genuine social structures. According to Oliveira Viana, Rui Barbosa was "a true Englishman, brought up in the spirit of Oxford, Cambridge, or Eaton. […] The images that stirred his spirit were not scenes of Dionysian euphoria in Bahía but rather ones from England."[165]

Blending ideas imported from English liberals together with others from North America and France, Oliveira Viana ridiculed Rui Barbosa for creating legislation that hoped to change the character and behavior of everyday Brazilians. For Oliveira Viana, the proposal of a republican and federal constitution conveyed Rui Barbosa's belief in the possibility of transforming the "lively agglomeration of paternalistic clans" that dominated rural areas into genuine political parties that would strive for the common good through self-government. Rui Barbosa's lifelong advocacy of civil rights, a career that included some heroic accomplishments, could never alter the destiny of "the masses [which] remained the same after him as had always been before him."[166] The reactionary realism of Oliveira Viana and Burke's conservative historicism are, in their own way, highly skeptical of the capacity of institutions to attain a minimal degree of efficacy in a foreign or even hostile environment. Burke's skepticism targeted abstract reasoning that was disconnected from reality while Oliveira Viana's disdain was for arrangements that came transplanted from other historical realities.

CONSTITUTIONAL COORDINATION

The skepticism generated by historicist and realist attitudes, however, seems to miss an important distinction. The function of modern

constitutions was not to stabilize political and social order. Rather, it was to establish a legal order structured around determined values like liberty, equality, and democracy. If the purpose was only to maintain or correct certain aspects of the previous order, revolution or rupture with the past regime would be unnecessary, as would establishing a new constitution. Constitutions conceived during times of rupture necessarily involve ambitions for change with regard to the past. Those ambitions are in fact what makes the new order legitimate. They might be more modest and constrained in their promises, to use the vocabulary of David Law and Mila Versteeg, but they must still aspire to something new. If the new constitutions are a product of relatively powerful consensus and the material conditions for realizing the project are available, the task will be easier. On the other hand, if a new constitution is overly ambitious, if it is adopted in a climate of fragmentation and bitter disputes, or if economic resources are generally scarce, it will be more difficult to ensure the efficacy of the new charter's normative ambitions.

The question is how to confront the contradiction between the real political and economic obstacles and the transformative objectives of a new constitution. The realist responds that no attempt to reconcile them should even be made. When the constitution does not conform to the interests of the most powerful segments of society, it simply can never be effective. A second response, even more realistic than the first, is that, if such powerful segments do actually control what happens in society, they would never approve a constitution that was contrary to their deepest interests—except when elaborating some kind of façade constitution actually furthered their goals. This may indeed be true but, as it is not always clear how much power each group can muster at a given moment, bargaining and concessions are an intrinsic part of the constitution-elaborating process. Moreover, as new constitutions inevitably

possess a legitimation effect and certain canonical aspects of what is considered a good constitution prevail, it is not impossible, and in fact very common, for constitutional texts to contain mechanisms that go far beyond what the dominant segments and elites are sincerely willing to implement.

When there is no overpowering force to push through a new constitution, the strategy that best suits elites is protecting their interests by introducing mechanisms that help them block threatening initiatives. Concessions to the least powerful sectors will only be made to the degree that they seal their commitment to the pact proposed by the elites. In most cases, these concessions take the form of explicit mention of grand principles, rhetorical objectives, and generous charters of rights whose efficacy is often subsequently frustrated by the more effective dynamics of political coordination. The difficulty of ensuring constitutional efficacy will therefore always exist. What is less certain is whether constitutions can be written in a way that bring it legitimacy and renders the ambitions that represent the concessions more easily attained.

Without a doubt, the starting point for this discussion is James Madison, the first great architect of a modern constitution that proposed an entirely new order distinct from what was previously known. His objective was creating the basis for a liberal regime. Madison was an avid and astute reader of history and classic political theory. He understood the preeminence of constituent power in the Hobbesian sense of the term and saw the urgent necessity of creating a Union of the former colonies for protection against common enemies. A Union was also necessary to reduce the chances of conflict among the new states. Furthermore, he sensed that the creation of a new State could prove to be economically advantageous for the agricultural, financial, and commercial sectors. Creating a common customs union would reduce the tax burden, which could provide an initial boost for a broader, more

robust internal economy to develop. The need was clear. The challenge was designing the Union in such a way as to minimize the risk of its degenerating into anarchy or tyranny.

Madison read Hume attentively and, therefore, was fully aware that merely expressing the existence of certain rights and liberties did not make them effective or permanent. To ensure their protection, it would be necessary to create solid barriers to prevent them from usurpation by the State or violation by other members of society. That is why, at that historical moment, a consensus was reached regarding the necessity of separation of powers to prevent the new regime from gradually converting into absolute power. The American revolutionaries had assimilated into their ideological repertoire Montesquieu's assertion that liberties could only be safeguarded by dividing power. Madison and his contemporaries, however, did not find themselves in the country England facing the relatively stable, long-standing estates of the British realm. Montesquieu's idea of a mixed government that distributed government functions among the classes, therefore, required modification. In No. 51 of Madison's *Federalist Papers*, we find the explanation:

> To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer […] [is] by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.

Accordingly, to each of the branches of government should be conferred:

> constitutional means and personal motives to resist encroachments of the others. […] Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[167]

This passage—which constitutes one of the primary if not the central principle of modern constitutionalism—clearly reveals Madison's intent to arrange institutions mechanically, such that

the interaction of the different elements facilitates adequate constitutional functionality. Instead of forces subject to the laws of physics, the energy that passes from one part to another derives from human activity. The aim is channeling it in a way that prevents people from usurping the freedoms of others. Madison thus acknowledges the vices most commonly associated with human nature in his institutional arrangement, which is meant to protect aspirations like freedom and republican governance.

Madison's constitutional architecture, clearly inspired by both Hume and Montesquieu, created real incentives through its institutional design that favor effective protection for the rational constitutional models developed by authors like Locke. By creating those incentives, Madison imbued the constitution with the power, if properly conceived, to contribute to its own efficacy by favoring political coordination without neglecting protection of freedom. This idea of using the constitution to favor political coordination, an idea already present in the work of Montesquieu and Madison, is at the center of contemporary realist constitutionalism. Russell Hardin, following Madison's thinking, resists the idea that people, organizations, political parties, and so on, will submit to the constitution out of respect for an abstract notion of consent, namely because a significant portion of them played no part at all in the elaboration and approval of the constitutional text itself. Submission to the authority of the constitution is achieved, in his view, through acquiescence, a parameter that is both more modest and concrete. As long as it remains in the interest of people, organizations, and social classes to participate in the process of coordinating their relations and conflicts in conformity with the rules and institutions established by the constitution, those rules and institutions will tend to be effective.

As Hardin reminds us, "establishing a constitution is a massive act of coordination that, if stable for a while, creates a convention

whose maintenance depends on its self-generating incentives and expectations."[168] Success is dependent on the capacity of the initial act of coordination to create incentives that make it so that following generations continue to find it in their interest to follow the rules of constitutional coordination in settling disputes and resolving differences. It would be an error to assume that a skeptical view of a constitution's capacity to effect social change is incompatible with a more ambitious vision of democratic constitutionalism that establishes objectives for the community to reach. What can be deduced from the theory of political coordination, however, is that a constitution's success and even, I would hazard, that of each of its mechanisms, depends on the acquiescence of the various sectors of society and its institutions. By acquiescence, I mean that the predominant majority of stakeholders continue to lend credence to the belief that coordinating conflicts and pursuing one's ambitions in accordance with the rules and procedures laid out by the constitution is worth the effort and costs that doing so requires. To the degree that these groups harmonize their disputes through the procedures established by the constitution, the constitution will have reaffirmed its status as an effective instrument of coordination.

Hardin's thesis does not define the constitution as an instrument of coordination, but it does argue that the effectiveness of a constitution is directly related to its capacity to operate efficiently enough to foster coordination. Unlike normative constitutional theories, the concern is not with what the constitution ordains. The content of any particular constitution may be deemed good or bad along several axes, but from the perspective of constitutional effectiveness, "quality" is gauged in terms of the constitution's retention of commitment and support from the vast majority of political actors. Where it fails to retain commitment, the constitution will be violated, or its procedures will be altered. In case of violation,

the constitution must be deemed unsuccessful. In case of alteration, the constitution will have proven its capacity for adaptation. As power dynamics are in constant flux, successful constitutions require mechanisms of coordination that enable the government to adapt to those changes by shifting economic and other policies, or going even further by altering rules of social organization and, in exceptional cases, the very norms of the constitution. Even if a constitution provides such adaptability, yet powerful actors arrive to the conclusion that the pact no longer represents a sure instrument for coordination, it becomes vulnerable.

Although the coordination thesis helps us better understand why constitutions meet with greater or lesser success in terms of realizing their normative aspirations in varying political circumstances, it does not offer any substantive parameter for gauging the normative "quality" of a constitution—that is, what makes one constitution more just and democratic than another. Judging which constitution is best in those terms is not its objective. The objective of the coordination thesis is attaining acquiescence, not consent, and possessing efficacy, not validity. Because a constitution is by nature normative, it will not be compatible with any type of political coordination. A legal order can only be constitutional if its structure for democratic governance derives from a superior norm, one that limits the arbitrary exercise of power and protects a defined set of rights. With this in mind, we might invert Harden's phrasing by affirming that, while a constitution's success will depend on its capacity to facilitate political coordination, not every effective system of political coordination can be considered constitutional. For a legal order to be considered constitutional, it must also provide for democratic process, restrict the arbitrary use of power, and protect rights.

PROVIDING THE MEANS FOR DEMOCRACY

When the commitment to democratic values recedes or populist and intransigent discourse arises, so do concerns for the constitution's capacity to coordinate political struggles, ensure rights, and enforce the separation of powers. The worry is that the democratic system itself may undergo severe erosion, which may lead to collapse. We might ask ourselves if there are mechanisms that enable democratic, pluralist constitutions to survive by fostering coordination among groups that have ceased to accept the rules established by the constitution or stopped respecting their limits. Clearly, constitutions cannot save themselves, as Steven Levitsky and Daniel Ziblatt emphasize in their book, *How Democracies Die*.[169] If no one stands up in their defense, their mechanisms for self-protection provide scant protection against abuse of their own clauses. There is a constant need, as Rousseau would remind us, to apply pressure to the system of political coordination so that the primary actors continue to comply with what they agreed to in the constitutional pact.

Stephen Holmes, another representative of the new realist current of constitutional thought, argued that constitutional efficacy is related to the effectiveness of self-commitment as a means of leveraging power. According to Holmes, placing voluntary limits on sovereign power is a highly effective strategy to obtain the trust and cooperation of the subjects meant to follow the rules. Holmes starts with Machiavelli's thesis that "governments are driven to make their own behavior predictable for the sake of cooperation," and "tend to behave as if they were 'bound' by law, rather than using law unpredictably as a stick to discipline subject populations, […] because they have specific goals […] that require a high degree of voluntary cooperation."[170]

Accordingly, governments strategically comply with constitutions and respect democratic procedures and concessions

formalized through the establishment of protected rights in order to obtain cooperation from certain groups necessary for them to hold on to and extend their power. Although governments do not always comprehend this, obtaining cooperation entails fewer costs than obtaining obedience through coercive methods. Because of the high cost of coercion and the constant threat of social instability that it generates, astute governments seek the support of specific social groups. They obtain their support by including them, to a greater or lesser degree, in the system of protections ordained by the constitution. In exchange for their cooperation, these groups benefit from the additional predictability the system provides, participation in the determination of the collective will, and a share of the wealth generated by society. Their inclusion in these advantages in exchange for their cooperation will always be asymmetrical and proportional to each group's power. The stronger they are, the more constitutional protection they will be able to extract from the sovereign.

The emancipatory project launched by the Enlightenment, of which democratic constitutionalism is the main institutional manifestation, requires continuous inclusion of social groups in the political system, both in terms of the rights protected and the distribution of resources and wealth that are made available by constructing an organized society. Tocqueville perceived this tendency as early as the mid-18th century when he spoke of the inexorability of the struggle for equality. The sovereign's need for cooperation from various sectors of society is ancient. In medieval times, the sovereign made pacts conferring privileges and guarantees to obtain the support of the most powerful groups, without which collecting taxes or raising an army, both indispensable for the maintenance of order, would be impossible. The Magna Carta is a symbolic example of the concession of privileges in exchange for cooperation.

T.H. Marshall offers a clear description of the evolution of citizenship in Western nations through the successive inclusion of new social classes into the constitutional pact in his classic 1949 essay, "Citizenship and Social Class." Obviously, the powerful did not extend citizenship rights to new classes out of sheer generosity. They were motivated by the need to consolidate authority and interests. War, economic growth, and the need for social harmony drove them to seek the cooperation of broader and broader segments of society. Violence, the arbitrary exercise of power, and threats can all be used to obtain submission, but they rarely lead to voluntary cooperation and integration. In addition to costly, such methods induce social instability. Self-constraint is more efficient: "If limited power never produced greater power, constitutions would never have played the important role that they have so obviously played and continue to play in political life."[171]

As societies become more democratic, cooperation requires a higher degree of inclusion in the constitutional pact, which does not involve merely extending rights and the vote to more people while creating additional requirements that make government action more predictable and subject to the rule of law. Implementing periodic, universal elections that allow for alternance of those in power enabled rulers to secure the adhesion of the working classes to the bourgeois democratic system and abandon the revolutionary strategy for social change. With the power obtained from entry into the political system, the disadvantaged classes were able to demand and extract other benefits, such as social rights, which would have been unimaginable in a liberal regime without universal suffrage.

Still, even in a considerably democratic regime, the government does not require the cooperation of every sector of society, or at least not to the same degree, which means it has no incentive to treat everyone as perfect equals. Different groups in every society

have disproportionate access to political and economic resources. The path to and form of inclusion in the constitutional pact will inevitably be asymmetrical. Furthermore, formal inclusion does not imply symmetrical compliance with the respective obligations, for the most powerful sectors of society will have more influence over the agencies responsible for enforcing the constitution.

Here we have the paradox faced by many democratic regimes in countries with high degrees of social inequality. Although the constitution may be generous, partially for symbolic reasons meant to obtain the cooperation of newly included classes, the government, and even the most powerful groups, often do not see themselves as compelled to respect their constitutional obligations. Because the cost of enforcing compliance with constitutional obligations is disproportionately higher for certain members of society than others, the constitutional pact will never be fully impartial, a situation that favors, in practice, those who possess enough power or resources to take advantage of the asymmetries. The real question is therefore not whether a given constitution is effective or not, but understanding for whom it is effective.

In arguing that constitutions "reflect and perpetuate power asymmetries in society," Holmes is not seeking to dissolve the distinction between "autocratic and democratic political systems."[172] Rather, he is calling attention to the fact that, like any other tool of power, constitutions are elaborated and implemented by the most influential sectors of society, and those sectors naturally employ them in their favor. Notwithstanding, Holmes does recognize that, at a specific moment in history, "the word 'constitution' shook off its association with the status quo" in the service of causes that were more progressive than the elites would normally be disposed to accept.

Constitutions that originate in emancipatory processes, ones that are obliged to make concessions reflecting the transformative

ambitions of disadvantaged groups in exchange for their cooperation and legitimacy, incorporate mechanisms that can be used to advance the realization of those ambitions. This can be observed clearly via the nearly constant attempts to frustrate such progress by the groups forced to make the concessions. For a constitution, however modest in its ambition, if it aspires to confer any legitimacy at all, it must incorporate basic notions of justice and democracy into its fold. Otherwise, the charter merely represents a collection of instruments for domination. Furthermore, because these principles are not neutral, there is always room to expand emancipation once the vulnerable sectors have learned to wield their new freedoms in the political sphere.[173]

By definition, constitutions represent superior law, and thus require higher barriers that protect them from modification, which creates an additional burden for those who seek to make changes. In fact, however, even the most robust constitutional norms require political pressure to influence the behavior of those in power. We must never forget that there is no higher authority outside society that can guarantee the constitution's effectiveness. The judiciary, although it performs the function of external authority in many cases, remains an internal part of the constitutional construction, just as the executive and legislative branches. The arrangement of incentives might, at certain times, incline the judiciary toward protecting rights, even against powerful interests. Yet the fundamental responsibility for guaranteeing the proper performance or effectiveness of the constitution cannot be consigned to the justice system alone. The efficacy of a great many of a constitution's elements relies on pressure from society, political action, and government initiatives. The government must not stop passing laws, collecting taxes, and building schools. At the same time, care must be taken to prevent the government from acting arbitrarily or abusively and to the detriment of the

disadvantaged. This concern is the reason for Holmes' "instruction," which in many aspects resembles Rousseau's notion that the effectiveness of a democratic constitution depends, above all, on the political organization of the governed in such a way as to force the government to pay due respect to the rights enumerated in the constitution and conduct its affairs in compliance with the limits established by it.

3. THE 1988 CONSTITUTION: FROM "MAXIMIZING COMPROMISE" TO CONSTITUTIONAL RESILIENCE

Although true that ready-made recipes exist for every taste, writing a constitution is no easy task. The available models include lean constitutions for classic economic liberals and expansive ones for social democrats. There are innumerable institutional arrangements too. Varieties of forms of government, electoral and political party systems, models of constitutional review, rights regimes, and ways of distributing power between national and subnational entities exist, in addition to a wide range of accessories that constitutions may or may not embrace. Once implemented, these institutional arrangements, in all their combinations, are continuously tested by internal tension and external pressure, resulting in a rich collection of either successful or failed experiments that reaches far back in history. With all the aggregate of historical experience, one would expect that making the most appropriate institutional choices when putting together a new constitution would not be excessively complicated for a group of specialists or even knowledgeable politicians working in good faith.

Roberto Campos, the most prominent liberal economist to participate in the 1988 constitutional process, expressed trepidation at the idea of turning over such an ambitious mission to an assembly of parliamentarians because he feared that each of them would feel "an irresistible temptation to write into the constitutional text their own utopia."[174] Campos questioned the decision to not follow the example of any successful experiment. In his opinion, "the ideal situation is that of England. […] The second-best is that of America."[175] The idea of importing a successful model was nothing new in Brazil. Indeed, the country's republican

life began with men whose eyes looked northward. This was at the end of the 19th century when people close to Rui Barbosa, well-versed in comparative law, put together a constitutional project inspired by the North American model. Their hope was that adopting the institutions of the United States would ensure Brazil a similar fate. Indeed, transplanting institutions without sufficient heed for the differences in circumstances has long tempted and continues to tempt peripheral nation-states.

This is one reason that it is not easy to disagree with the declaration that making a constitution is akin to a "dangerous sport."[176] Directly borrowing a model from another country can prove highly frustrating. If the resulting arrangement does not adequately reflect the political forces that it attempts to coordinate, the economic structure within which it is placed, or the society that it intends to regulate, its chances for success are slim to none. Adopting prefabricated models might be attractive to those seeking a façade constitution that would deflect criticism—like, for example, what happened with 19th century pro-slavery Brazilians who backed measures popularly termed "for the English to see," but which they later left unenforced. However, when a society is facing serious challenges that make reorganization an utmost necessity, and it chooses to undertake the task democratically, that society must dig deep into its own experience to come up with the institutional arrangement that has the best chance of success.

This does not mean that the experience of other societies should be ignored. The lessons to be drawn from political science, comparative constitutional law and, above all, history, certainly merit attention. In the end, after all, there exists no "legal laboratory" where laws and legal innovations can be "tested" before they are attempted in the real world. For that reason, everyone involved in the design of institutions must be attentive to the experiences of similar institutions in other circumstances. This attentiveness,

however, must go hand in hand with a clear awareness of the differences in the political, economic, and social contexts where those experiences took place. What worked in one set of circumstances may not work in another. The presidential system of government, for example, has proven relatively stable in the United States for more than two centuries, yet in Latin America, many scholars believe presidentialism has had an opposite, destabilizing effect.

A yet greater challenge than choosing the right set of institutions is designing effective institutions for a specific society. The challenge lies in ensuring that the proposed institutional solutions incorporate principles of justice and democratic values to which the relevant political actors genuinely commit, not to mention the social groups whose lives the constitution will directly impact. While the constitution is a legal document whose clauses generate sanctions and incentives for people and agencies to model their behavior in accordance with predetermined norms, it is first and foremost a political instrument that depends on the genuine commitment of those affected by it in order to be effective. In this sense, as Hardin emphasized, the establishment of a constitution is an act of massive political coordination that, when successful, creates incentives for political actors to pursue their interests without violating the rules.[177]

The project of political macrocoordination, carried out by Brazil's National Constituent Assembly over the course of twenty months during 1987 and 1988,[178] yielded an extremely ambitious constitution both in terms of the objectives it set for society and for the Brazilian State. It boasts a lengthy charter of protected rights and puts in place a highly consensual form of government.[179] In ideological terms, it seeks to conjugate the traditional national developmentalist discourse with a fresh pluralist tone that blossomed during the country's return to democracy. From a formal perspective, the extensive, detailed, and ubiquitous document strove to regulate

every major aspect of Brazilian political, economic, and social life. The text is also distinctive for the robust mechanisms incorporated to protect the work of the Constituent Assembly.

The elaboration of the 1988 constitution poses two intriguing questions. The first is why a parliamentary Constituent Assembly, in which most members were professional politicians who would go on to work in Congress or the executive branch, produced such a comprehensive text that placed so many limits on everyday political action? Why did experienced political operators choose a constitution that restricts, on several levels, the discretion of the legislature and the executive to handle the essential task of politics, the power to arbitrate distributive conflicts and make consequential decisions in areas ranging from the economy and administration to public morality, criminal policy, and so on? By constitutionalizing so many "public policies,"[180] that is, by transforming policy questions into constitutional norms, the Constituent Assembly shifted to the judiciary and other legal agencies, the responsibility that had traditionally belonged to the political branches. Moreover, the new constitution reinforced the judiciary and conferred new sweeping competences to the Public Ministry in addition to unprecedented powers for the STF. All of these powers were transferred to the legal establishment from traditional political sectors. Assuming that the politicians were acting rationally and sought to maximize their interests, what possible explanation is there?

A second apparently paradoxical question about the Brazilian constituent process is why the document produced by this congressional body, which was composed predominantly of moderate and conservative politicians who were charged with producing a text that would be spared the scrutiny of popular ratification, was so progressive. The final product contrasts starkly with the aggregate profile of its authors.

The explanation for these two counter-intuitive movements of the Assembly involves several factors, especially the following: the high level of distrust among political actors; the intensity of civil society and interest group participation during the initial stages of the Constituent Assembly; the adoption of regimental rules that favored the inclusion of minority interests in the constitution's first draft; the absence of either a comprehensive template prepared by experts in advance or any hegemonic political disposition to initiate or serve as a unifying theme for the proceedings to follow; and elevated party fragmentation (both among and within parties). It is also important to take into consideration the impact of Brazil's political culture—entrenched corporativism articulated through patrimonial networks and broad adherence to developmentalist ideology—on such a massive coordination of a political process.

THE TRANSITION

The notion that Brazil needed a new constitution materialized as a reaction to the authoritarian regime that based its power on force, institutional acts, decrees, and charters imposed in 1967 and 1969. Those charters never truly limited government power, as the ensuing succession of "institutional acts" (rule by decree) fundamentally prove. The opposition to the charters, organized around the MDB party, a political omnibus of often-inconsonant interests, and a variety of civil group organizations, demanded that the regime of exception be replaced through a process of reconstitutionalization that would reestablish the rule of law and democracy.

The first document issued by the MDB that spoke of the need for a new constitution to supersede the authoritarian regime was the "Recife Letter" of 1971. Sérgio Rocha, in his rich retracing of

the paths leading to the 1987-88 Constituent Assembly, reminds us that the reconstitutionalization strategy did not enjoy unanimous support within the MDB.[181] Moderate factions felt that removing the remaining vestiges of the authoritarian apparatus together with a few reforms to the 1969 charter imposed by the military would be enough to return the country to the democratic path it had followed up until the 1964 coup. The decision to support the call for a constituent assembly only crystallized within the MDB in 1977, following a stiff set of authoritarian government measures known as the "April package."[182] These measures were meant to strengthen the government's position vis-à-vis rising opposition. Among them were an extension of the presidential mandate from five to six years and the creation of so-called "bionic senators" who would bypass the popular vote in the 1978 elections.

The MDB's position was also influenced by various civil society organizations that saw the constituent process as indispensable to the reconstruction of democracy. On August 8, 1977, standing at Largo São Francisco, the iconic square facing the University of São Paulo School of Law, Gofredo da Silva Teles Jr. read aloud the "Letter to Brazilians," which criticized harshly not only the military regime but, above all, the April Package which was unconstitutional even under the terms of the military regime's own 1969 charter. The letter argued that human rights, the rule of law, and democracy could only be reinstituted through a new constitution and that solely the people, through a constituent assembly, could legitimately adopt such a text:

> It is often said that the Constitution is a product of Power. Yes, the Constitution is the work of the Constituent Power. But what must be added immediately is that the Con-

> stituent Power belongs to the People, and to the People only. […] Just as the validity of laws depends on their conformity with the precepts of the Constitution, the legitimacy of the Constitution can be evaluated to the degree that it reflects the socioeconomic realities of the community for which it was made. […] We declare illegitimate the Constitution established by any authority other than the National Constituent Assembly […].[183]

A campaign was thus launched for the reconstitutionalization of the country, one strongly embraced by a progressive group of legal professionals, many of whom were involved in the legal defense of political prisoners and the restoration of curtailed civil liberties. As José Carlos Dias recalls, the São Paulo Lawyers Association (AASP) organized countless campaigns, with the help of jurists like Márcio Tomás Bastos and Miguel Reale Jr., to sensitize colleagues across the country to the need for a new constitution.

Then, following Raymundo Faoro's election as president of its federal council in 1977, the Brazilian Bar Association (OAB), which had originally supported the 1964 coup, began to distance itself from the regime. Faoro, author of the classic work *Os donos do poder* (*The Powerholders*), believed redemocratization should begin by reinstating *habeas corpus* protections and passing an amnesty law. He thought a constituent assembly should only be held at some future point. The OAB only officially joined forces with those in favor of the constituent process at the beginning of the 1980s, after Bernardo Cabral had taken over as the Bar's president. Cabral would go on to serve as the Constituent Assembly Rapporteur.[184]

At the end of the 1970s, a new political force also emerged in Brazil. A series of strikes that began in the industrial zones surrounding São Paulo (Santo **A**ndré, São **B**ernardo, and São **C**aetano, the region known as "The ABC") and then spread across the entire country marked the arrival of a labor movement, led by Luiz Inácio Lula da Silva, onto the national stage. Its opposition to government controls further destabilized the military regime and forced the business community into labor negotiations. Meanwhile, the Catholic Church, which had supported the 1964 coup, began to criticize the regime of exception more and more sharply. Its criticism escalated after the creation, in 1972, of Commissions of Justice and Peace in the cities of São Paulo and Recife under the leadership of Cardinals Paulo Evaristo Arns and Hélder Câmara, respectively.

Internal fissures within the military regime created an opening, following the election of General Ernesto Geisel as president by the Electoral College in 1974, for dialogue between the authoritarian regime and the civil and religious leaders of the opposition movement. Prominent figures who left the regime such as Teotônio Vilela, Severo Gomes, Leitão de Abreu, and Petrônio Portela, played an important part as well. The swelling dissent culminated in the passing of the Amnesty Law, the end of the two-party system in 1979, and the decision to resume direct elections for state governors, the first of which was held in 1982. Lastly, as economic woes deepened, dissatisfaction among business sectors further eroded support for the military regime.

The 1982 elections for state governors cemented the trend of rising opposition that had begun with the 1978 legislative elections. The victories of Franco Montoro in São Paulo, Leonel Brizola in Rio de Janeiro, and Tancredo Neves in Minas Gerais were not only significant because they provided the opposition with electoral college votes among the most important electoral colleges in the country. Besides underscoring the irreversibility of the opening toward

democracy, these victories produced an institutional foundation upon which the movement for democratization could be mobilized. These circumstances led Dante de Oliveira, a young member of Congress from the Brazilian Democratic Movement Party (PMDB) in the state of Mato Grosso, to propose a constitutional amendment on March 2, 1983. The objective of the amendment was simple: reestablish direct elections for the presidency. The force of the movement that sprung up around the proposal took everyone by surprise. Under the banner, "Direct Elections Now!" (*Diretas já!*), broad swaths of Brazilian society filled the streets in unprecedented demonstrations, calling for the end of the military regime and for the right to choose their president. On hastily erected platforms in public spaces across the country, intellectuals, artists, social leaders joined politicians from a broad range of opposition parties that had sprung up after the official two-party system ended. One such potent public showing brought Ulysses Guimarães, Luiz Inácio Lula da Silva, André Franco Montoro, Leonel Brizola, and Fernando Henrique Cardoso, two of whom would eventually be elected to the Presidency and all of whom were renowned in their own right, to a historic rally at São Paulo's Praça da Sé on January 25, 1984.

Under pressure from the military, which had encircled the National Congress to keep protestors from entering its galleries, the amendment for direct presidential elections fell 22 votes short of the two-thirds majority needed for approval. The ensuing political and social frustration was enormous, and moderate opposition leaders leapt at the opportunity to leverage the sentiment for support from members of the Electoral College. The prospect of being defeated through a system of its own making caused further division within the ruling party. The Social Democratic Party (PDS) had by then succeeded the Arena party as the military government's base of political support. Following this

period of internal strife, the PDS nominated Paulo Maluf, a former governor of São Paulo state, as its presidential candidate. In response, José Sarney, who at the time served as party president, split from the PDS and formed a new political entity, the Liberal Front Party (PFL).

The opposition's moderate camp joined the PFL splinter to form the 'Democratic Alliance'[185] (*Aliança Democrática*), nominating Tancredo Neves, governor of the state of Minas Gerais, as its candidate for president, with José Sarney for vice president. The move was seen by many as yet another "coup by conservative political elites," plotted after the "Direct Elections Now!" movement mobilized the country against them. With the blessing of important opposition leaders like Ulysses Guimarães, president of PMDB—the main opposition party during the military regime—and the recently elected governor of São Paulo, Franco Montoro, Tancredo Neves capitalized on the political energy of the "Direct Elections Now!" movement. To obtain support from the most progressive political sectors for his indirect presidential bid through the Electoral College, Tancredo promised, among other things, to convene a constituent assembly. The move worked, and Tancredo was elected over Maluf.

On January 15, 1985, immediately after his victory in the Electoral College, Tancredo Neves gave a speech calling for a national debate on a new constitution. No clarification was given as to the process to be followed or the type of constitution to be formulated. The announcement triggered numerous initiatives all over Brazil, adding to the debates already under way between jurists and other leaders. The constituent process became the catalyst for a wide-ranging debate on the challenges facing Brazilian society.[186] In February 1985, many of these initiatives came together to form the "Pro-Popular Participation Plenary in the Constituent Assembly," which would eventually have significant impact on the Assembly's first

phase. Tancredo Neves himself, at the request of Senator Afonso Arinos de Melo Franco, a senior conservative dissenting politician, agreed to create a Commission of Constitutional Studies to gather proposals and prepare a first draft from which the Constituent Assembly could work. Partly because of complications arising from the precipitous death of Tancredo Neves, however, that commission would not start its work until July, some five months later.

The day before his inauguration as president, Tancredo experienced acute stomach pains and was taken to the hospital, where he was diagnosed with diverticulitis. He never recovered. When he passed away 39 days later, it was unclear who should assume the presidency. Should it be the vice president-elect or the sitting president of the Chamber of Deputies? The legal conundrum caused deep tension that was resolved through informal consultation with civic and military leaders and the acquiescence of the STF. Approached by General Leônides Pires Gonçalves, Chief of the Armed Forces, STF Justice Moreira Alves called his fellow justices to join him in his apartment for an informal meeting. With only Justice Sydney Sanches dissenting, the other members of the Court endorsed the legality of conferring the presidency on vice president-elect José Sarney.

Sarney took office on March 15, 1985. Ulysses Guimarães, president of the PMDB, immediately brought him the "New Republic" plan for government, issued by the Tancredo-Sarney campaign, which included the call for a National Constituent Assembly. Ulysses also initiated congressional proceedings to remove the rubble from the authoritarian regime in partnership with Fernando Lira, whom Tancredo had nominated as Minister of Justice and Sarney had duly appointed.

The defeat of the "Direct Elections Now!" amendment and the accession to the presidency, due to Tancredo Neves' death, of José Sarney, a former leader of the Arena party, the military regime's

original political organ, caused enormous frustration. The frustration was felt not only among the population at large but also by the progressive wing of the political class. Furthermore, it intensified distrust, between political parties and other social sectors, for the transition process, which would subsequently be confronted by the constituent process.

THE CONSTITUENT MOMENT

Sarney's inauguration thus took place in a climate of extreme political and social frustration. The Constituent Assembly became the focal point where forces seeking to transform Brazilian society and its State devoted their energies. At the time, politicians and especially jurists intensely debated the proper procedure for convening a constituent assembly. On one side, conservative politicians and jurists, many of whom had been Sarney supporters since his time in the conservative UDN party and who included Afonso Arinas and Célio Borja,[187] felt that holding a sovereign assembly elected for the occasion was unnecessary. Given the peaceful nature of the transition, one that had not seen institutional breakdown, they believed it sufficient to empower the National Congress with the competence to reform the 1969 charter. This notion was expressed by their proposal for an "instituted constituent assembly." Behind this legal argument clearly lay a desire to keep the reconstitutionalization process under the control of professional politicians and "jurists of the Crown," a term used for legal scholars and civil servants in the judiciary who build their careers by serving well whoever is in power at the time.

The group, composed of civil society leaders and the so-called "authentic members" of the official PMDB opposition, along with

representatives of more progressive sectors, demanded an autonomous constituent assembly consisting of representatives exclusively elected to serve on it. Raymundo Faoro's influential 1981 work, *Constituent Assembly: Legitimacy Recovered*,[188] convincingly argued that only a genuine constituent process could bestow legitimacy on the reconstructed Brazilian State. In Faoro's view, merely reforming the existent text was insufficient; an entirely new constitution had to be drawn up. Nor could the powers constituted by the previous charter restrict or limit the Assembly in any way. From a strategic point of view, this position could have been motivated by the desire to shield the Constituent Assembly from President Sarney's interference. It sought, to the highest degree possible, to prevent, or at least mitigate, the role of professional politicians and give more voice to social leaders, seen as a way to create a climate more conducive to genuine constitutional deliberation. Hypothetically, such an environment would be more favorable for the construction of the political rules and principles of justice that would govern a democratic society in the future.

In June 1985, the progressives suffered yet another blow. President Sarney issued a proposal for a constitutional amendment that would allow him to convene a congressional constituent assembly—the "instituted Constituent Assembly" proposed by Senator and Jurist Afonso Arinos de Melo Franco. The objective was to leave the task of revising the Constitution in the hands of the political establishment, removing significant participation from social sectors. As the government structure in place remained highly concentrated on the Executive, this would mean that, for all practical purposes, Sarney would dictate the new constitution.

Meanwhile, Flávio Bierrenbach, a PMDB congressional representative from São Paulo associated with the authors of the "Letter to Brazilians" and Rapporteur of the presidential amendment in the Chamber of Deputies, presented an alternative proposal that went

in the opposite direction. It called for a plebiscite through which the people would decide whether the constituent assembly should be congressional or elected for the occasion, in addition to several other procedures that would differentiate the constituent assembly from ordinary legislature. When his proposal was defeated, Bierrenbach suffered the embarrassment of being forced by Ulysses Guimarães to resign as Rapporteur. On November 27, 1985, the government's proposed amendment was approved, which determined that the National Congress, following the elections scheduled for November 1986, would have constituent power.

President Sarney, as mentioned earlier, fulfilled Tancredo's promise to convene a Provisory Commission for Constitutional Studies on July 18, 1985. The commission was called the Arinos Commission in honor of the man to whom the idea was attributed among official circles, while others preferred to call it the "Commission of Notables"—an ironic jab at the elitist profile of most of its members. The Arinos Commission, notwithstanding, surprised everyone by presenting a progressive proposal that belied expectations. In addition to calling for the rights prioritized by social democrats, it proposed a parliamentarian regime and reduced the presidential mandate to four years. The proposition submitted to President Sarney was so unexpected that he refused to forward it to the National Congress as representing the Executive's recommendation. For that reason, the Commission of Notables report did not play an official role in the new constitution's elaboration, yet Sérgio Rocha's detailed research suggests that the text circulated intensely among the members of the Constituent Assembly and held some influence.[189]

Several members of the Commission, as well as scholars who have analyzed its work, ascribe the paradoxical result to a depreciatory attitude toward the Commission's task expressed among its most conservative members.[190] They also highlight

the influence of Professor José Afonso da Silva on the final draft. Da Silva, an influential and progressive scholar from São Paulo, would go on to serve as Senator Mário Covas' direct adviser during the constituent process, which allowed him to leave an even deeper imprint on the 1988 Constitution.

INITIATING THE CONSTITUENT ASSEMBLY

Elections to the Constituent Assembly, open to all political parties, took place on November 15, 1986, and the Assembly convened for the first time on February 1, 1987. Election results were influenced by the implementation of the Cruzado Plan, which had replaced the country's currency with a new one in an attempt to rein in inflation and stabilize the economy. The Plan gave the government a pronounced albeit short-lived boost in popularity. That popularity translated into an overwhelming victory for the PMDB in both state legislative assemblies and the National Constituent Assembly. In the latter, it won 306 of the 559 seats. The party with the next highest number of seats was the PFL, which took 132 seats. Following it were the PDS with 38, the Democratic Labour Party (PDT) with 26, the Brazilian Labour Party (PTB) with 18, the PT with 16, the Liberal Party (PL) with 7, the Christian Democrat Party (PDC) with 6, the Brazilian Communist Party (PCB) with 3, the Communist Party of Brazil (PCdoB) with 3, the Brazilian Socialist Party (PSB) with 2, and the Christian Social Party (PSC) and Brazilian Women's Party (PMB) with 1 each.[191] However, this wide margin of electoral victory and majority failed to confer hegemonic power over the Constituent Assembly on the PMDB. In addition to the traditionally deep internal fissures that continue to this day, the party had absorbed a large number of

politicians representing diverse ideologies in the lead up to the election. Most migrated to the PMDB for strategic reasons, seeking to obfuscate prior ties to the military regime.

Once convened, the Constituent Assembly elected Ulysses Guimarães as its president by a vote of 425 to 69, defeating the PDT's candidate from Rio de Janeiro, Representative Lisânias Maciel.[192] Ulysses Guimarães thus assumed the role of coordinator and intermediary among the progressive, moderate, and conservative sectors within the Assembly. The first battle took place over the rules that would dictate the procedures. One suggestion proposed rules similar to those that governed the 1946 Constituent Assembly. In that constituent process, a commission of selected representatives gathered propositions from the rest of the Assembly and put together a first draft that was later submitted to the plenary. In fact, this was the model adopted during the 1824, 1991, 1934, and 1945 constitutional assemblies. Most of the members of the 1987 Assembly strongly rejected this proposal out of fear that it would sideline them from a crucial phase in the process. Others believed, however, that the dominant atmosphere of democratization would make following the same elitist procedure at this assembly inadmissible.

The responsibility of overseeing the drafting of the Internal Regiment of the National Constituent Assembly was assigned to Senator Fernando Henrique Cardoso from the PMDB in São Paulo, with the support of Representative Nelson Jobim from the PMDB in Rio Grande do Sul, and Representative Bonifácio de Andrada from the PDS in Minas Gerais. They produced an innovative text that was lauded as a victory by the progressive wing of the Assembly. The Internal Regiment played an extremely important role in opening the constituent process to much more input from civil society than was intended by the government. It divided the constituent process into two phases. During phase

one, members of the Assembly were assigned to one of eight commissions devoted to specific topics, each of which was divided into three subcommissions. According to Nelson Jobim, this division was devised following a publication of the Federal Senate that compiled and compared all the Brazilian constitutions from 1824 on, together with several foreign constitutions. Examining them closely, Jobim and a group of Assembly members extracted common denominators, which is how they arrived at the eight topical commissions and twenty-four subcommissions.[193]

The work of the commissions and subcommissions would then be sent to a Systemization Commission, which would produce the initial draft of the constitution for consideration in the Assembly's plenary. The second phase of the constituent process consisted of plenary discussions that primarily involved repeated rounds of speeches and votes. It was during this second phase that those opposed to clauses in the draft elaborated by the Systemization Commission could have them removed from the final text. They could do so by garnering enough support for an absolute majority—280 votes.

THE SOCIAL-CORPORATIVE PACT

The openings created by the Internal Regiment completely undermined the government's intention to maintain the constituent process under the tight control of professional politicians. Civil society organizations, labor unions, corporations, and even emerging movements dominated the first phase of subcommittee work. As the jurist Miguel Reale Jr, adviser to the Assembly's president, ironically phrased it, "*da tanga à toga todos participaram,*" meaning that, from indigenous peoples in traditional dress

to magistrates with their pompous robes, everyone had a chance to participate.[194] The Regiment permitted the 24 subcommissions and eight thematic commissions to collect not only proposals from members of the Constituent Assembly, but also to take suggestions from the distinct sectors of society, hold public hearings, and forward the proposals to the Systemization Commission for compiling. The rapporteurs chosen by party leaders enjoyed an enormous margin of discretion in deciding how to address the propositions. Senator Mário Covas from São Paulo took advantage of his position as leader of the PMDB, the party with the largest representation in the Constituent Assembly, to appoint rapporteurs who for the most part held progressive positions, causing great discomfort to the conservative factions.[195]

It is estimated that nine million people passed through the halls of the Constituent Assembly between March and November 1987: 182 public hearings were held, yielding 11,989 proposals and 6417 amendments to the first draft.[196] In this first phase, the Constituent Assembly's work could be compared to a vacuum cleaner that sucked in all the social demands that had been pent up during twenty years of dictatorship and intensified by the frustrating defeat of the campaign for direct presidential elections. The mobilization, however, was not limited to the civil society organizations, labor unions, and social movements that had gained astonishing momentum during the transition period. It also represented an opportunity for the inclusion of special corporative and patrimonial interests, such as protections for state-owned enterprises, certain monopolistic economic activities, the principle of labor union unity, and countless prerogatives and privileges for public servants, who benefited from the status they had historically held in Brazil's political culture and state institutions.

Just as had occurred in the Arinos Commission, where a progressive proposal was produced despite the conservative and

moderate majority, the progressive minority among the Assembly took advantage of the Regiment and capitalized on the wave of social mobilization in order to insert many of their social and economic demands into the first constitutional draft. However, the same space opened opportunities for the insertion of corporative and patrimonialist interests. The highly inclusive manner that characterized the start of the constituent process, with the opening of 24 thematically defined subcommissions, made it easy to exert intense pressure on the assembly, adding to the issues that were then woven into the new Brazilian constitutional fabric. The Constitution thus incorporated a wide range of diffuse rights, such as environmental rights, rights to historical and cultural heritage, consumer rights, and the rights of children, adolescents, and the elderly that had not made their way into the legal system during previous constitutional regimes, while, at the same time, providing for various privileges and special economic or public service sector interests. Moreover, many topics that had already been present in the Brazilian legal system as ordinary law were promoted to constitutional rank. Principles of civil procedure, civil law, tax law, and pension regulation were all given attention within the new Constitution.

Lack of confidence in the political class—not to mention mistrust among the politicians themselves—led most participants to adopt a maximalist attitude that sought to entrench as many of their interests as possible into the constitutional text. This defensive strategy prevailed over a strict procedural perspective, which would have conferred more discretion on ordinary political processes and thus left more decision-making room for future generations.

It quickly became evident that accommodating the volume of proposals and demands generated would be a Herculean task, for both the thematic commissions and the Systemization Commission whose president was Senator Afonso Arinos and Rapporteur

was PMDB Representative Bernardo Cabral from the state of Amazonas. Although the Systemization Commission convened on April 9, 1987, it did not receive preliminary reports from the thematic commissions until June 17, 1987. In addition to compiling the preliminary reports, the Rapporteur was to analyze petitions from public interest groups and hold public hearings where those groups could make their case. As for the Systemization Commission itself, its members discussed each proposal and decided by an up-or-down majority vote whether to include it in the draft to be sent for plenary discussion in the Constituent Assembly.

Because of the immense volume of information gathered, the work took much longer than expected. The first compilation of the Rapporteur, which some baptized 'Frankenstein,'[197] boasted no fewer than 501 articles. Its successor, the "Zero" project, managed to cut that number down to 496—but also provoked 20,791 proposals for amendments. An enormous sense of dissatisfaction marked this period of the constituent process, as the members of the Assembly felt uninformed and excluded from the discussions taking place within the Systemization Commission. The government was similarly unsettled as it saw one after another of its proposals systematically rejected. At the same time, it was a period of intense activity and negotiation within the Commission, during which it drew up nine drafts in all.

Finally, on November 18, 1987, the Systemization Commission finished its work and approved a draft that included 335 articles, 271 of which were deemed permanent and 63 transitional.[198] The sectors of society with the closest ties to business interests, as well as the most conservative factions of Brazilian life, reacted harshly.[199] They especially objected to the sections on economic regulation and social rights. Furthermore, the Executive branch was infuriated by the draft's approval of a parliamentarian system

of government. The reaction among these sectors led to the creation of an alliance known as the "*Centrão*," or "Big Center," composed mostly by pragmatic center right members of Congress.

THE POLITICAL PACT

The *Centrão* began by proposing a modification of the Constituent Assembly's Internal Regiment. The original Regiment stipulated that only an absolute majority of the members of the Constituent Assembly could reject the project approved by the Systemization Commission. In other words, the burden of building a majority in the Assembly's plenary was placed on those factions whose proposals had been rejected during the first phase of the constituent process, the one I have termed the "social corporative pact." The sentiment from conservative and governmental sectors was that the Systemization Commission had betrayed the confidence of the plenary by approving, in its name, a text that was in many areas not even remotely close to what the thematic commissions and subcommittees had discussed. For that reason, the *Centrão* argued that the procedural rules required modification to reestablish the balance of power between the Plenary and the Systemization Commission. The main demand was to invert the burden of obtaining absolute majority in approving the final text. For the leaders of the *Centrão*, those defending the text approved by the Systematization Commission, rather than those seeking changes to it, needed to shoulder the burden. In their view, this inversion was necessary to give the Plenary of the Constituent Assembly equal footing with the Systematization Commission.

The changes proposed by the *Centrão* were widely debated through the end of the year and approved on January 5, 1988.[200]

Two main alterations were made to the Regiment. First, more flexibility was granted to introduce amendments to specific clauses and sections, which would allow the Constituent Assembly to not only strike clauses but also change the language of the text elaborated by the Systemization Commission. The second was the inversion already mentioned, which shifted the burden of assembling an absolute majority from those who wanted to strike a clause from the Systemization Commission's draft to those who wanted to maintain it. The new majority, galvanized by the *Centrão*, approved a measure called the *destaque de votação em separado*, or *DVS*. Requiring a vote of at least 187 members of the Assembly, this mechanism enabled members to separate specific topics for isolated votes. In these cases, those defending the text approved by the Systematization Commission would have to garner an absolute majority to maintain the provision.

Although this rule-change represented a crucial victory for the *Centrão*, it did not guarantee the conservative faction the necessary majority support to change every decision reached in the first phase of the constituent process. This was due to the fact that the bloc was not as cohesive in relation to specific issues as it was in relation to the necessity of changing the regimental rules. Similarly, the ranks of the progressive faction among the Constituent Assembly did not display a unified posture regarding all the topics approved during the Thematic Commission and Subcommission phase. In this new context, the boundaries between the progressive and conservative camps often shifted with each vote on a new topic. Regional and corporative interests also complicated the ideological disputes, making the plenary phase of deliberation even more difficult.

Under pressure by deadlines and the worsening economic crisis, mechanisms became necessary for more efficient political coordination, one that would not take the constituent process out of the hands of its members yet still facilitate decision making.

The mechanism chosen was bolstering the power of the College of Leaders (*Colégio de Líderes*). This group, which included political party leaders and members of the Assembly's board of directors, selected the most controversial issues and called in those Assembly members particularly interested in them for additional discussions, meant to resolve impasses. This procedure made it possible to approve what would be called Constitutional Project B (*Projeto de Constituição B*) on July 5, 1988. In all, the Constituent Assembly had held 732 votes and 119 sessions during this phase.

This project was then submitted to a second round of voting in which the voting rules were, once again, readjusted. It was no longer possible for a minority of 187 members to call a *DVS* for a plenary vote on clauses approved in the first round. In addition, only suppressive amendments or ones that corrected errors were admitted, therefore, no more changes to the language of the clauses could be made. Conservative and progressive forces were back on equal footing and majority rule would determine what would stay in the text and what would be removed. Fearing an impasse, criticism from the government and business leaders rose anew. It was during this period that tension intensified between President José Sarney and Representative Ulysses Guimarães, head of the Assembly. On July 26, 1988, Sarney decided to confront the Constituent Assembly by roundly criticizing the statist content of the new constitution on national television and radio. Declaring that "Brazilians had reason to fear that the new constitution would make the country impossible to govern," Sarney claimed that certain articles would discourage manufacturing and private initiative, scare off investors, and ultimately lead to laziness and inefficiency. He also asserted that other articles might transform Brazil, a country that required more jobs for its young population, into a clogged machine that moved backward instead of forward. Its people, he warned, instead of accumulating wealth

through labor, would grow poor. Instead of progress, there would be regression. The reaction of Ulysses Guimarães was immediate. Demonstrating his leadership ability, he mustered 403 votes against 13 with 55 members abstaining to pass Project B. After the voting had concluded, he gave a historic speech defending the direct relationship between governance and social policy. It was hunger, misery, ignorance, and unchecked disease, he countered, that were ungovernable. Guimarães noted that the Constituent Assembly had written a new constitution because that is what the people had requested. "Our mandate is to write a new constitution, not to be frightened." The second round of voting would end on September 2, 1988, after 288 votes and 38 sessions.[201] Fear of institutional crisis, economic instability, and looming municipal elections had definitely motivated the various factions to seek some consensus around the most controversial topics.

For any constituent process to be successful, the relevant political and social forces must act in coordination. A constitution that is approved without the committed support and engagement of those forces stands little chance of survival. Ultimately, if the essential function of a constitution is laying the ground rules for political contest in a democracy, the very first requirement must be the willingness of all relevant forces to abide by the rules laid out by the constitution. Before the year 2013, there was no room for doubt that the primary political and institutional actors were genuinely committed to the regime created in 1988. Since 2013, certain phenomena indicate a weakening of commitment, among various political and institutional leaders, to the Constitution. Examples are Aécio Neves' refusal to accept the results of the 2014 presidential election, the use of institutional prerogatives by Eduardo Cunha and of the Lava Jato investigators which culminated in the impeachment of President Rousseff, and the decision of the Superior Electoral Court in the Rousseff-Temer campaign

violation case that allowed Michel Temer to remain in the presidency. Previous elections had not seen their results questioned, and disputes and conflicts of interest had been tackled through the procedures dictated by the Constitution. Even the (considerable) dissatisfaction that remained over certain rules imbued in the 1988 Constitution had been resolved according to the rules established for their rectification. The Constitution had proven itself capable of adapting to shifting conditions and balances of power and coordinating new zones of consensus. In short, it had shown surprising resilience.

RESILIENCE

The resulting "something-for-everyone" compromise yielded an extensive, detailed, and ambitious document. Many factors played into this: fragmentation of the political party system; a high degree of mutual distrust among the relevant political forces; multiplicity of interest groups whose voices held sway during the constituent process; a lack of a well-defined preliminary draft; and intense participation from civil society and other corporative organizations. The resulting document embraced a wide range of interests, many of which stood in tension with others. Still, the distinctive trait of the 1988 Constitution is not its "national developmentalist," *dirigisme*, corporativism, social democrat ideology, *officialism*, progressive or neoconstitutional inspiration, although the original text displays all of these features. Rather, its distinctive feature is its syncretism. It managed to incorporate some portion of the demands expressed by all the segments of society that managed to voice their interests at some point during the constituent process.

The 1988 Constitution set ambitious goals for Brazil's social transformation. It recognized a broad charter of rights, put in place a highly consensual pluralist political system, and laid the groundwork for an economy focused on national development. It did so while strengthening the country's law enforcement institutions, especially the Public Ministry, and incorporating several topics that had previously been regulated by ordinary legislation. It even went so far as to establish directives for an extensive list of public policies. At the same time, the text also enshrined privileges for certain groups, protections for corporative interests, and regulations for trivial, even irrelevant matters that corresponded to a myriad of well-established lobbies. The 1988 Constitution is therefore the product of a broad yet intense process of reconciliation. It was an attempt to reconcile several social, economic and opposing political forces—those that had destabilized the military regime and those that had supported it, many of which had retained their positions of power during the transition. It is worth remembering that José Sarney was the nation's president during the constituent process. Sarney had not only been one of the military regime's strongest pillars of civil support, which the regime had erected, he also openly opposed significant changes to the constitutional architecture. All that Sarney conceded was the removal of the "authoritarian rubble." Opposing him was Ulysses Guimarães. Although Guimarães had accepted the conservative proposal to give the National Congress constituent power, and thus made the process susceptible to commandeering by the government and traditional political class, Guimarães played a key role in turning that process into the most inclusive moment of Brazil's political history.

As a fundamental element in the democratic transition, the Constituent Assembly was by nature conciliatory, negotiated, and compromising. The absence of a preliminary draft to work from and the highly fragmented political system necessitated an

enormous amount of coordination and organization, involving multiple sectors of disparate power and influence degrees. The negotiations, hence, did not involve forces of comparable social strength that could form a symmetric pact around mutual interests. Their fragmented nature and incredibly wide range of topics covered allowed for actors with relatively weak bargaining power to score isolated victories. That possibility explains the large margin of approval for the new Constitution expressed by the Constituent Assembly. More than representing consensus around the intrinsic quality of the text as a whole, many members voted for it because they had been able to squeeze some of their suggestions into the final version.

Regarding the inclusion of diverse proposals in the constitutional text, what transpired in the Brazilian constituent process was in some respects the opposite of what occurred in the United States. The 1787 Philadelphia Convention was also marked by pointed conflicts of interests between states and economic sectors, in addition to sharp ideological divisions over the proper republican and federalist structure of government. The strategy adopted as a way to circumnavigate the conflicts and reach some consensus, however, differed completely from the approach employed in the 1988 Brazilian constituent process. Main areas of controversy over substantive questions were purposefully avoided in the North American constitutional text, which instead focused on establishing decision-making procedures. That is why many characterize the United States Constitution as comprising "everyone's second choice." The Brazilian strategy was to insert a wide range of interests from different sectors of society into the constitution, including some that are difficult to reconcile. This strategy, which I have called one of "something-for-everyone," could also be thought of, in comparison with the United States Constitution, as "everyone's first choice."

Constitutions as extensive, detailed, and ambitious as the Brazilian foundational text have long attracted criticism. Conventional constitutional thinkers idealize liberal texts like the concise United States Constitution of 1787. The skepticism regarding detailed constitutions replete with directives comes from many angles, beginning with the central hypothesis that there exists some causal correlation among textual concision and effectiveness, applicability, and longevity. According to this line of thinking, the difficulty of realizing the normative projects of constitutions increases in proportion to their ambition for social transformation, and this difficulty necessarily saps their authority and legitimacy over time. Their meticulous nature generates internal tensions and other instances of antinomy that impede their application. Lastly, extensive and detailed constitutions become obsolete more quickly, leading to a need for constant reform which, before long, completely disfigures the original text to the point that it must be replaced.

The 1988 Brazilian Constitution has been criticized, ever since its adoption, precisely along this three-fold negative diagnosis. In the first place, critics argue that its normative ambition will lead to enormous social unrest, for the State is simply incapable of meeting all the Constitution's promises (this is the material inefficacy critique). Critics have also identified several normative defects and contradictions from which constant interpretative crises and conflicts ensue. They point to the need for constant action from the legislature to address the Constitution's gaps and contradictions. Given the low degree of confidence in the parliament, it is plausible that the Constitution's need for so much parliamentary engagement could render the Constitution inoperable (the normative confusion critique). Thirdly, critics have argued that the broad thematic range and detailed content of the Constitution will make it reach obsolescence rapidly, requiring constant reform and ending in premature death (the onerous maintenance critique).

It is true that the 1988 Constitution faced, and still faces, problems of material inefficacy, interpretative conflicts, and even an excess of reforms, as its critics anticipated. Against all predictions, though, the Constitution has proved itself surprisingly resilient. Loosely applying the concept as it is used in the field of physics, resilience refers to the property of certain materials that absorb energy under stress without breaking or undergoing permanent modification. Such materials withstand the strain and gradually return to equilibrium. They are not rigid in that they do not tolerate certain types of pressure. Nor are they flexible in that their capacity for modification only responds to certain kinds of stress. Rather, they "accommodate" stimuli and pressure, preserving their functionality and identity under varying conditions.

Over the past three decades, the Brazilian Constitution has been amended 106 times, which seems to indicate, on one side, some "normative instability." From another perspective, however, an enormous capacity for adaptation can be observed. The vast majority of the constitutional amendments, it should be noted, did not affect the core clauses. The political system and the charter of rights have been, for the most part, left intact. Perhaps the greatest alteration in the area of social rights occurred 29 years after the Constituent Assembly approved the final text. It occurred when the Temer administration successfully pushed through 2017's Amendment no. 95 establishing a 20-year ceiling on public spending. The amendment affects the budgetary allocations for areas related to some of the social rights, particularly education and health.

Regarding separation of powers, the two main modifications have been to allow reelection for executive positions (Amendment no. 16, 1997) and to reform the judiciary (Amendment no. 45, 2004). The bulk of the constitutional architecture—comprising fundamental rights, the democratic system, federative structure, and organization of government—has thus been untouched

by the countless reforms approved in recent decades. Most of the constitutional reforms made have targeted the economic order, a range of public policies, and juridical statutes that had been incorporated into the Constitution. The impact of many of these amendments on the identity of the Constitution should not be minimized. 1995's Amendment no. 6, for example, opened the economic system, designed by the Constituent Assembly, to profound transformation by allowing its liberalization through massive privatization and integration into international markets.

It is also true that, after thirty years, the Constitution is facing its most intense stress test, one that has strongly affected the behavior of constitutional actors and institutions. Repeated instances of constitutional hardball, a spiraling cycle of institutional retaliations, occurring between 2013 and 2018, and the election of an autocrat populist in 2018 have produced a deep constitutional malaise. The outcome of this process will very likely have implications for the continued performance of Brazil's constitutional system. The resilient nature of the Constitution works in favor of accommodating all these pressures without rupturing, but adaptation will be necessary.

There seems to be a combination of factors behind the resiliency displayed by the 1988 Constitution. Obviously, a substantive commitment to the constitutional pact displayed by distinct political forces is the most important. An inclusive constitutional process that results in a constitution incorporating a wide range of social and political demands tends to instill greater loyalty. And, among the formal aspects that contribute to the resilience of the Brazilian constitution, special credit should be given to the conjugation of the charter's extension and detail.

The broad thematic range of the 1988 Constitution, together with its high degree of detail, as Elkins and Ginsburg explain, may paradoxically improve its life expectancy. It is much easier

for political actors to reach consensus on a modification to a specific clause of a detailed constitution than to renegotiate the grand principles of a concise one. When dealing with concrete topics, it is possible to estimate the potential consequences of modification. The same cannot be said of changes to the constitutional norms that undergird the text. When dealing with a detailed constitution whose criteria for constitutional reforms are flexible, constant revision is frequent, permitting constant adaptation.

Although the 1988 Constitution is both very extensive and detailed, many of its clauses require regulation by the ordinary legislator or even by the executive. In similar fashion, the Brazilian constitutional text also includes countless abstract principles that require legislative attention before they acquire normative force. The number of open and incomplete clauses contained in the constitution demands permanent activity from legislators to mediate the tension between these clauses and broad constitutional principles. The judiciary must also remain attentive and active to answer unresolved conflicts left over from the constituent process and exacerbated by the struggle of various sectors of society to push for the implementation of the Constitution's ambitious and often ambiguous objectives. This need for continuous complementation brings with it the benefit of constantly updating the Constitution's meaning through ordinary legislation and court decisions without the need for alteration to the original text.

Still, the great adaptive capacity of the 1988 Constitution derives from the model adopted to reform it. Aware that a document so broad would require constant adjustment, the Constituent Assembly opted for a double standard of rigidity to alter its clauses. The standard for general constitutional reforms is rather lax. All that is necessary is a three-fifths majority in Congress, first in the Chamber of Deputies, and then in the Senate. Even minimally cohesive coalitions have managed to change constitutional

clauses without much difficulty—especially when trying to make minor changes to very specific issues, which makes it easier to calculate the risks and potential gains of the alteration. This flexibility vanishes, however, when the barrier that circles the fundamental pillars of the constitutional architecture is encountered. This barrier is expressed in Article 60, § 4, which stipulates that no proposals for amendments "aimed at abolishing" the federative structure, democratic elections, separation of powers, or individual rights and guarantees can be considered. The core of the Brazilian constitution is thus protected by a much higher standard than the rest of its clauses. A such, it would not be incorrect to qualify the Brazilian constitution as one with a super-rigid, dense core surrounded by a plethora of flexible clauses. The ease with which the ordinary clauses can be reformed without affecting the cornerstone ones has allowed for constant updates to the Constitution that, nevertheless, do not disfigure it.

Several other political and institutional factors have contributed to the resilience of the 1988 text. The high degree of participation from a wide range of social actors during the constituent process, for example, as well as the strategy that allowed so many sectors to add some portion of their interests into the Constitution, helped create a strong sense of loyalty to it, loyalty previously unheard of in Brazilian history. The notion of a "Citizen's Constitution," promoted by Ulysses Guimarães, captures the inclusive nature of the constituent process that produced it. Factoring in the strong corporative commitments that permeated the Constituent Assembly's work, we can appreciate the multiplicity of actors committed to its survival, even if many parts remain ineffective or require changes. In this sense, the constituent process never ended, at least in relation to the Constitution's peripheral clauses. The text's "incompleteness" has kept political actors in an unending dispute over the Constitution's ultimate meaning, and

that struggle consolidates the Constitution's position at the origin of the axes of political action. Its extension, together with an inclusive pluralist political system, has enabled Brazilian society, at least for the past three decades, to move forward, adapting its constitution along the way without putting its rock-hard core in jeopardy. Nevertheless, the ascension of a far-right populist leader who for decades, as a member of the National Congress, tirelessly challenged the fundamental principles of the 1988 Constitution represents the greatest resilience test that text has yet endured.

4. SUPREMOCRACY IN CRISIS

The 1988 Constitution gave the Supreme Federal Tribunal (STF) a central role in the Brazilian political system. In recent years, its decisions have made headlines almost every day. They are covered on the front page of the country's primary newspapers as well as in the sections devoted to politics, business and economy, legislation, and policing, and even make it regularly into the specialized press covering science, education, and culture. All of the most relevant discussions in Brazilian society seem to demand, at some point, the STF's attention, making it a constant presence in our public life.

Although the STF played an important role in previous constitutional regimes, which included significant episodes of jurisprudential fertility and political prominence, such as that experienced during the First Republic, or of great moral courage, for example, at the outset of military rule in the 1960s, those achievements do not compare to the preeminence that the Court currently enjoys.

The idea of placing a court at the center of the Brazilian political system from where it would watch, protectively, over that system is not novel. As Leda Boechat Rodrigues[202] reminds us, Emperor Don Pedro II, near the end of his reign, looked into the possibility. He considered solving the institutional impasses that afflicted the Empire by replacing the *Poder Moderador* (Moderator Power) with a STF similar to that of the United States. The *Poder Moderador* was established by the 1891 Constitution as a fourth branch of government. It was headed by the Emperor and its function was to solve conflicts among the other branches of government in order to stabilize the political system. Rui Barbosa, one of the principal architects of the republic's first constitution, seems

to have channeled Don Pedro's intention to substitute the *Poder Moderador* for a judicial apex court with the power for constitutional review when he wrote that "[t]he Federal Supreme Court is the vigil at the summit of the State." The institutional history of the republic, notwithstanding, followed a different course. The role of final arbiter for major institutional conflicts that was transferred to the STF was actually performed by the military during the republican era, as Alfred Stepan has demonstrated.[203] During the transition to democracy in the 1980s, the STF gradually took on a moderating role, such as when it made a pronouncement on the proper succession process in the wake of President Tancredo's unexpected illness and subsequent death.[204] It was only after the promulgation of the 1988 Constitution, however, that the STF moved to the center of the political arena, from where it progressively assumed a role that goes beyond the traditional functions of a Supreme Court or even a Constitutional one. The term I have often used to describe this new institutional arrangement is 'supremocracy.'[205]

By supremocracy, I refer to the unprecedented power conferred to the Brazilian STF, in the form of a final word on the validity of decisions made by other branches of government regarding an extensive range of political, economic, moral, and social topics, even when those decisions come in the form of constitutional amendments. Supremocracy is a consequence of the mistrust in politics, on the part of the 1988-89 Constitutional Assembly as explained in the previous chapter, that resulted in hyperconstitutionalization of Brazilian life. Its architecture is based on the concentration of three jurisdictional functions in the hands of a sole court. Another innovative feature are direct channels through which primary political actors can access the Court.[206] Supremocracy has also clearly benefitted from the wide discretion margin conferred to the Court and its components. This margin is a consequence of the absence of a strong precedent tradition, the

Court's difficulty in establishing interpretive standards, and its unwillingness to limit itself to answering only the questions put to it by parties to the dispute in question.[207] It is also important to note the rise of various currents of constitutional theory associated with the "third wave of democratization" that, out of concern for the effectiveness of the new constitutions established in the 1980s and 1990s, concede greater freedom for the judiciary in interpreting and applying the Constitution.[208]

Because this system shifts power to the judiciary at the expense of the representative branches, supremocracy clearly creates enormous counter-majoritarian difficulties by placing so much decision-making power in the hands of a group of unelected magistrates. Many of these decisions are fundamental for the *polis* and should therefore be decided by majority rule according to democratic theory. Supremocracy, however, should not be taken as an attempt to usurp power, for it largely derives from the constitution itself. This does not mean, of course, that in the exercise of its functions the STF, or its justices, never exceed their bailiwick by either abusing their power or appropriating that of the other branches.

The expansion of the Brazilian STF's powers is not without parallels in other parts of the world, although it is important to make certain distinctions. There currently exists a considerable body of literature on the rise of law and legalism at the expense of improvement in the political sphere and, by consequence, the increased authority of courts in relation to parliaments and governments.[209]

Some analysts believe the strengthened authority of courts is an immediate consequence of the spread of the free market system to a global level.[210] In the eyes of investors, courts represent a more reliable means of guaranteeing legal certainty, stability, and predictability than democratically elected legislators who face pressure from "populist" demands that, from an economic perspective, are necessarily inefficient. Hence the term "juristocracy,"

which Hirschl used to describe the expansion of Court powers, and which inspired the term "supremocracy" I use in the title of this chapter.[211]

A second current of thought maintains that the broadening of the role of the law and the judiciary derives from deterioration in the representative system to the point that it is incapable of meeting the expectations of justice and equality inherent in the ideal of democracy and in central principles of contemporary constitutions.[212] That deterioration would explain the current shift in attention to the judiciary as ultimate guardian of the fundamental rights and ideals enshrined in constitutions, which in all appearance has created a paradoxical situation. In seeking to respond to the egalitarian demands that have gone unmet in political spheres, the growing centrality of the judiciary has weakened the authority of the executive and legislative branches, but that is not all. The shift has also brought upon the judiciary itself a responsibility for the unresolved crisis of the representative system, further deepening distrust in the political structure as a whole.

For many constitutional scholars, the shift in authority from the representative branches to the judiciary is, above all, a consequence of the popularity of constitutions equipped with constitutional review power, which have their origins in the United States Constitution. It is also clear to these scholars that the trend is not a recent phenomenon. The expansion of judicial authority, however, has grown markedly sharper as constitutions incorporate increasingly ambitious aspirations for social transformation. Traditional liberal constitutions limit themselves to enshrining a limited list of rights, focusing instead on erecting public institutions designed to enable each generation to make substantive democratic decisions through changes in law and public policy. Unlike liberal constitutions, however, many contemporary constitutions seek to guide the behavior of the legislature and executive by transferring to the

judiciary the responsibility of overseeing the behavior of the representative branches.[213]

The fundamental hypothesis of this chapter, which does not undercut the explanations mentioned above, is that the distrust in the political system that emerged in 1988, as well as the uncertainty caused by such an ambitious constitutional text, led the Brazilian Constituent Assembly to adopt a dual strategy to protect its oeuvre. On the one hand, the representatives sought to insert as many rights, interests, institutional competences, prerogatives, and legal and corporative privileges as possible into the Constitution. This was to make it difficult for future majorities to renege on them. On the other hand, they endowed the STF with ample power to block future decisions of the representative branches that might threaten those rights, interests, or prerogatives, even when implemented by constitutional amendment. In addition, the Constituent Assembly bestowed upon the STF the power to judge the principal authorities, including members of parliament themselves, and the power to resolve conflicts among the branches.

The political environment was highly conflictive, fragmented, and characterized by reciprocal mistrust at the time. The independence of law enforcement agencies was also on the rise, creating a new variable in Brazil's political landscape to reckon with. In this context, it appeared prudent to reinforce the STF's ability to mitigate or stabilize, at least minimally, the expectations created by the new Constitution. It also appeared prudent to modulate its implementation. The Constituent Assembly thus made the Supreme Court, due to its historical trajectory and nature of its composition, the moderating guardian of the 1988 constitutional pact. Its attributes include powers to check decisions made by circumstantial political majorities. In addition, it can modulate and limit the action of the other branches, including the *Ministério Público* (Public Prosecutors) in the new system that the Constitution created for their

operation. In a sense, the STF offered a sort of insurance against the uncertainties that the new constitutional text introduced.[214]

Combining the purpose of protecting an ambitious, detailed Constitution with a wide range of additional competences, the STF took up a new position in Brazil's institutional hierarchy. This is why the Court has been called upon to issue the final word on innumerable political, moral, economic, and social questions—at times validating and legitimizing a decision of the representative branches, at others reversing decisions that enjoyed majority support. Although the STF shares these attributes with other constitutional courts around the world, the scale and nature of the Brazilian case are distinctive. By scale, I refer to the sheer quantity of topics that enjoy constitutional status in Brazil and hence are doctrinally recognized as judiciable. The nature of the Brazilian Court is unique in that there is no obstacle preventing it from taking up the validity of any action issued by the representative branches, even in the case of "constituent" changes, i.e., constitutional amendments or reforms. This puts the STF above parliament because Congress, at least in theory, cannot overrule the Court's decisions, unlike what transpires in the majority of constitutional democracies. The STF exercises control over both ordinary politics, scrutinizing the constitutionality of laws and executive action, and over constitutional politics. The high courts of India and Colombia are perhaps the only others that come close to the "supremocratic" status the Brazilian Court attained in 1988.

THE INSTITUTIONAL PATH TO SUPREMOCRACY

A long series of institutional choices exacerbated the concentration of power in the hands of the STF. The first of these choices

involves the ambitious quality of the 1988 Constitution itself. According to Seabra Fagundes, well-founded mistrust of legislators explains why extensive and detailed provisions were included in the constitutional text. Indeed, the issues covered go well beyond those considered strictly constitutional and regulate minutely, if not obsessively, a broad range of social, economic, and public relations in a sort of maximizing compromise.[215] This process, which several observers have called the 'constitutionalization of law,'[216] created an enormous zone of constitutional tension that led to an explosion in constitutional litigation. The equation is simple: if the constitution covers everything, almost no room is left for political leaders to make politically impactful decisions.

The second institutional choice that helps us understand the expansion of the STF's authority are its overlapping functions. The Brazilian STF possesses attributes that in most contemporary democracies are delegated to at least three different types of courts: constitutional courts, courts of appeal, and courts of first and final review (when high-level officials are implicated).

To perform the function of constitutional court, the STF is obligated to directly consider the constitutionality of laws and normative acts issued by the federal and state governments. What stands out in the Brazilian case is the STF's competence to assess amendment constitutionality. Section 4 of Article 60 of the Constitution establishes that the Court must determine whether proposed amendments infringe upon the broad set of protections grounded in the *cláusulas pétreas* (clauses 'carved in stone'). This attribution gives the STF the final word on constitutional amendments in the political system, thus reducing the maneuvering room available for Congress to circumvent the Court, should it disagree with a ruling, a strategy often employed in other countries. The Constitution also attributes to the Court the competence to rule on unconstitutional omissions by the legislative or executive

branches and to ensure, through injunctions, the immediate and direct implementation of fundamental rights.

The 1988 Constitution also gave the STF the thorny mission to serve as a specialized forum for the trials of high-level officials and to resolve disputes over secondary rules and acts of the legislature and executive. Because of an outlandish rate of criminality among the highest ranks of the Brazilian republic, the STF became the court of first instance (an equivalent of a trial court in common law systems) for certain offenses committed by ministers and members of Parliament, as many spectators were able to observe on live television while the Court heard arguments in the *Mensalão* trial and more recently with *Lava Jato*. The Court is not sufficiently equipped, however, to analyze minutely the facts of these cases. Even if its institutional capacity were increased so it could do so, its limited time available would be consumed by an unending series of criminal hearings, diverting the Court from responsibilities more directly related to its constitutional role. The problematic results of this attribution have resulted in impunity for many offenders whenever the Court does not exercise its criminal jurisdiction and powers of selectivity. Beginning with its decision in the *Mensalão* case, the STF experienced both the enormous power of this attribute, one that had formerly lay dormant, and the heavy costs of jurisdictional superpositioning and the political tension that prosecuting high-level officials generates.

This designation as a specialized forum also involves secondary acts of the legislature and the executive, which often relate to the internal rules of governance for these two branches. When disputes over them flare, the STF is called upon to intervene. Most of the time it does so through opinions written by a single justice (*decisão monocrática*). In these circumstances, the STF—or the individual justice—acts as an arbiter for politically motivated arguments over the legislature's internal conflicts. I know of no other high court

that is on call to resolve squabbles when legislators cannot settle issues themselves. The same is true of the Brazilian STF's power to challenge, through *mandados de segurança* (writs of mandamus), actions of the republic's president that include, for example, the president's choice of a position in his or her cabinet. The competence to serve as a specialized forum gives the STF enormous power over the legislature and the executive but, at the same time, the excessive involvement in controversies that could be—and should be—resolved elsewhere has entailed significant reputational cost.[217]

The third jurisdictional function of the STF is that of a court of final review, which implies reviewing, each year, hundreds of thousands of cases decided in the lower courts. The quantity of cases results from the coexistence of diffuse and concentrated systems for constitutionality control. Because of the lack of a *stare decisis* tradition in the Brazilian legal culture, even in relation to decisions issued by higher courts, the STF has had to oversee the implementation of its own decisions. Since 1988, over a million *recursos extraordinários* (extraordinary appeals) and *agravos de instrumento* (bills of review) have been considered by the eleven judges serving on the STF—and that is without counting the thousands of *habeas corpus* petitions, many of which involve procedural irregularities, that are sent to the STF each and every day. For as inhumane such an expectation is of the judges, it is utterly irrational for the millions of people under the STF's jurisdiction who are waiting for the Court to issue a decision so their cases can be closed. It is important to note that this obvious dysfunction benefits vexatious litigants who know how to exploit the system to prolong trials and put off complying with sentences. Government agencies, businesses that provide public services and goods, and banks are the primary litigants in the current system.

Still, although the statistics displayed on the STF's webpage indicate that it handles around 70,000 cases a year, the Court does

not actually take up that many. As Marcos Paulo Verissimo demonstrated in 2008,[218] the number of plenary decisions issued by the Court do not make up even 0.5% of the cases it resolves, a figure that is backed by the ongoing STF in Numbers Project at the Getulio Vargas Foundation in Rio de Janeiro.[219] Instead, a secret algorithm assigns the majority of cases to a rapporteur—a judge to whom the law confers the power to evaluate the merits or the conditions of admissibility for a petition or appeal, whether ordinary or extraordinary.[220]

This causes two very serious problems. The first is that, in the vast majority of cases, a sole judge exercises the STF's entire jurisdiction on his or her own. The second problem involves the practice of determining the docket of cases to be considered *en banc* based on the cases that the justices decide not to preside over individually. Politically, control over the timing and substance of the docket is of enormous value. This power, and the criteria for wielding it, which are not explicit, evade comprehension no matter how much public control over the Court's activity exists. The underlying fear is of a dangerous level of selectivity regarding the cases that are taken up versus those that must wait eternally for consideration.[221]

Constitutional Amendment no. 45 from 2004 attempted to correct the backlog, partially by introducing *arguição de repercussão geral* (claim of general repercussion) into Brazil's legal system. In applying this instrument, one that is similar to the US writ of certiorari, the STF should only take up appeals that significantly affect the rest of society, thus allowing the Court greater discretion in deciding which cases to take up.[222] The amendment also reemphasized the binding nature of its decisions in similar cases, and allowed the Court to issue *súmulas vinculantes* (binding rulings) in order to reinforce the Court's authority to apply, when consensus among the justices was present, its decision in one case

to other instances of the same legal question in all other judicial or administrative processes.[223] The reform was meant to address the enormous degree of constitutionality control fragmentation in the Brazilian system. Neither the introduction of claims for general repercussion nor for binding judgments, however, have satisfactorily enhanced the authority of the STF's decisions, primarily because of the justices' reluctance to relinquish the power that deciding cases individually affords them.

The politicization of the STF is also a direct consequence of expanded access to the Court, introduced by the 1988 Constitution. By granting the power to propose various constitutional motions to political actors, including governors and political parties, Article 103 of the Constitution turned the STF into what often seems like a forum for the losing side to contest decisions passed by majority rule. In this respect, the political party that brought the most cases before the STF during the Cardoso (PSDB) administration was the PT and that which did so during the Lula and Rousseff (PT) administrations was DEM, closely followed by the PSDB. In the same manner, state governors have actively employed their access to the STF in order to block measures approved by their predecessors in the state assemblies and legislatures or to challenge federal legislation that affects their interests.

Another extremely important factor in strengthening the STF's status as an arena for political struggles is the admission of *amici curiae* briefs[224] issued by civil society organizations and other groups, in cases where the interests at stake go beyond the individual level. This practice has opened the Court to new voices, increasing its pluralistic quality as well as its political relevance, making it a stage for resolving political conflicts that the political corps previously fought out internally. In addition to *amici curiae*, public hearings are now held in important cases. The STF brings in specialists, militants, and scholars whose contributions to the

proceedings are not necessarily limited to legal arguments but may be technical or partisan in nature, adding an enormous quantity of consequential arguments to the Court's decision-making task. Hearings held in controversial cases like the use of stem cells for scientific research, affirmative action in university admissions, medications covered by the public health system, and abortion in the case of anencephalic fetuses have demonstrated the political potential of these new forms of access. They have certainly widened the role of the STF, expanding its jurisdictional authority beyond the strict confines of legal scrutiny. They have done so by bringing political considerations to the table.

The extensive reach of the Constitution into many areas of social life, together with a superimposition of attributes and expanded access to the STF, have led to an explosion in constitutional litigation. Any abrupt or irregular movement by administrators or legislators generates some constitutional incident that, by default, eventually seeps into the STF's jurisdiction. The data speaks for itself, and with eloquence.

TABLE 1. **Motions for Declaration of Unconstitutionality Filed by Political Parties between 1988 and 2016**[225]

	ADMINISTRATION							
	SARNEY (1988-89)	COLLOR (1990-92)	ITAMAR (1993-94)	CARDOSO (1995-2002)	LULA (2003-10)	ROUSSEFF (2011-16)	TEMER (2016)	TOTAL
PT	3	26	12	140	5	4	1	191
PDT	3	21	10	51	28	3	2	118
SOCIAL LIBERAL PARTY (PSL)				68	12	9	1	90
PFL/DEM			1	4	51	9	1	66
PSDB	1	5	1	2	48	8		65
PSB		19	5	13	2	4	3	46
PCB/PPS	1		1	8	12	9	2	33
HUMANIST PARTY OF SOLIDARITY (PHS)				25	7		1	33
PL	1			24	6			31
SOLIDARIEDADE						23	7	30
PMDB		5	2	16	5	1		29
PTB				11	16	1		28
SOCIALISM AND FREEDOM PARTY (PSOL)					10	10	6	26

(it continues)

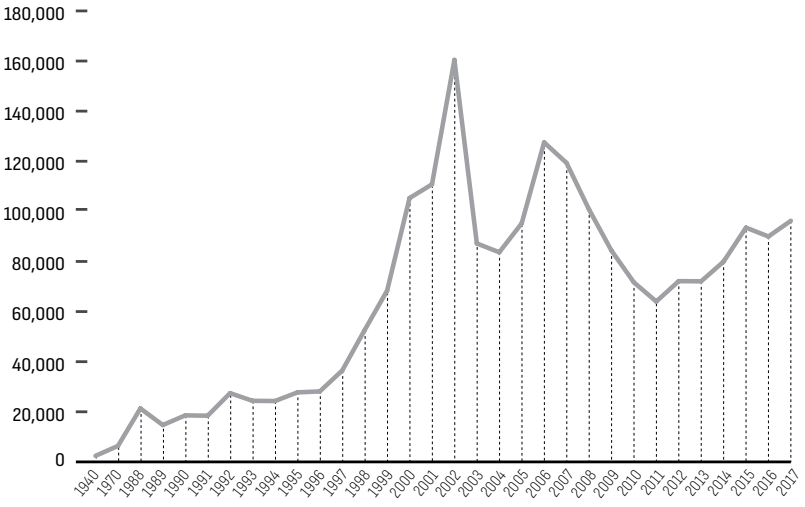
	ADMINISTRATION							
	SARNEY (1988–89)	COLLOR (1990–92)	ITAMAR (1993–94)	CARDOSO (1995–2002)	LULA (2003–10)	ROUSSEFF (2011–16)	TEMER (2016)	TOTAL
PROGRESSIVE PARTY (PPB/PP)				10	8	2	2	22
GREEN PARTY (PV)			1	1	10		1	13
PSC		1	2	1	7	2		13
PARTY OF NATIONAL MOBILIZATION (PMN)				8	2	2		12
OTHER PARTIES (THAT FILED FEWER THAN 10 MOTIONS EACH	1	10	7	13	9	12	9	61
TOTAL	11	89	43	429	242	100	37	951

Source: Ana Laura Barbosa, researcher at the FGV DIREITO SP Supremo em Paula Project, using database generated by Jeferson Mariano Silva in *Jurisdição constitucional no Brasil (1988-2016)*, the Harvard Dataverse (2017), and information issued by the TSE.[226]

In 1940, the STF took up 2,419 cases, a figure that reached 6367 in 1970. Following the promulgation of the 1988 Constitution, the number jumped to 18,564 in 1990, 105,307 in 2000, and 160,453 in 2002, the year in which the STF received the most cases in all its history. In 2004, after the judicial reform implemented by Amendment no. 45 introduced claims of general repercussion, conferred

binding effect to STF decisions, and introduced a new instrument to issue binding rulings, the number began to go down. In 2011, the STF received a "mere" 64,018 cases. Then the number started to rise once again, reaching 96,235 in 2017. The volume of cases directly derives from the increased number of issues explicitly covered by the Constitution, from excess of competences attributed to the STF, and from the defective system that allows lower court decisions to be appealed all the way to the STF, which Amendment no. 45 failed to resolve.

FIGURE 1. **Number of Cases Taken Up by the Supreme Federal Tribunal by Year**



Source: Graph produced by Ana Laura Barbosa, researcher at the FGV DIREITO SP *Supremo em Pauta* Project, on the basis of data released by the STF itself (on trial progress) and Carlos Mário Velloso (for data between 1940 and 1970).[227]

INSTITUTIONAL POSTURE

In addition to institutional and normative alterations that contributed to the STF's increased relevance in the political system, the effect of Brazil's legal and constitutional culture on the STF's attitude is also highly pertinent. Law enforcement institutions operate, or ought to operate, within the parameters established by the legal culture. Legal culture refers to both the way legal concepts are rationalized and argued and to the way rules and principles are systematized in legal doctrine. These yield the parameters based on which legal decisions can be judged vis-à-vis their deference to the representative branches of government. To summarize, the institutional posture assumed by distinct judicial systems generally results from at least three elements: normative ambition, the competences attributed to the judiciary, and the parameters of discretion established by the legal culture.

Deference and responsiveness are the two basic fundamental constitutional postures in adjudication. Two correlated degenerate attitudes can be added to the legitimate judicial ones: omission and usurpation. In between these four ideal types lie shadowy zones in which constitutional courts enjoy enormous discretion.

Deference, in the strictest sense, describes the institutional posture of courts that show a high degree of respect for legislation, defining the content of a right or regulating its exercise. It is an institutional stance based on a robust conception of majoritarian democracy. Accordingly, appreciation for a rigid separation of powers predominates, and the judiciary shows as much respect as possible for the decisions of the representative branches. The justification for such a large degree of respect for legislation, in addition to its representative nature, lies in the power of the population to sanction disapproved lawmakers through elections, popular oversight from which the judiciary is exempt. Deference is

thus characterized by an *a priori* respect for the will of those who represent the majority.

In a legal system that possesses a rigid constitution and institutions authorized to verify the constitutionality of laws and other normative acts, deference in the absolute sense cannot exist. Were deference to ordinary legislation absolute, we could not speak of a constitutional democracy, but rather of a purely majoritarian regime. Nor would we be talking about a regime where fundamental rights belong to a superior category of law because of their recognition and protection by the constitution.

Deference must not be confused with omission either. Omission refers to the judiciary's inability or failure to meet its fundamental obligation to "protect the Constitution." The judiciary may adopt an omissive stance for many reasons, such as when it lacks the necessary authority, integrity, tradition, or autonomy to stand up to political actors, yet, in any case, omission always refers to a situation in which the judiciary fails to meet an obligation that was clearly conferred to it by the constitution.

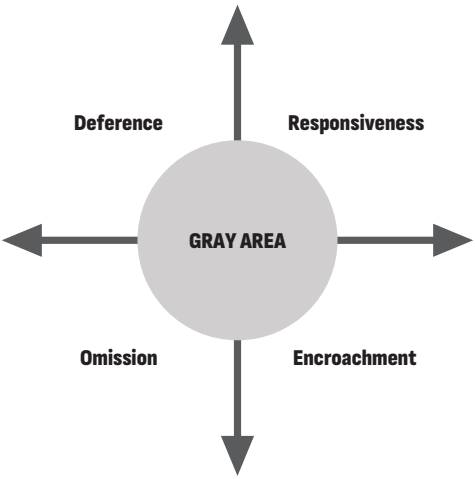
Responsiveness, for its part, is closely associated with the notion that the judiciary must be actively committed to the task of making the constitution and, particularly, fundamental rights effective to the greatest degree possible. The proposition that the judiciary should adopt a responsive posture follows from the design of the constitution, considered in the light of certain legal theories that legitimate that attitude.

Responsiveness must not be confused with usurpation. Usurpation occurs when the judiciary, without proper normative justification, encroaches on functions attributed to the other branches. Moreover, the judiciary usurps power not in order to issue a normative judgment on the constitutional validity of certain acts or norms, but rather with the objective of overturning political or technical decisions made by those branches and based on the

judicial authority's own political or technical assessment. The perception that the judiciary has not sufficiently anchored its decisions to accepted legal norms and principles explains why judicial activism, especially when the activism is extreme, is often accurately viewed as usurpation of power by the judiciary.[228]

Both deference and responsiveness are legitimate comportments. The mode by which the Constituent Assembly attributed competences to the judicial organs and structured the norms that comprise the constitution, together with the legal and political doctrines that give these postures their legitimacy in a given community, should determine which stance prevails in any specific situation. Omission and usurpation, however, are degenerate attitudes because they move away from underlying justifications of constitutional norms and doctrinal standards in a particular context. They are characterized by low congruence between what the norms establish and what the magistrates actually decide. The following chart seeks to express the relationship between legal congruence and functional attributions to illustrate the different postures of constitutional courts or their ilk. The vertical axis represents the degree of congruence between the court's interpretation and application of legal norms. The horizontal axis represents the degree of preeminence the court enjoys in the exercise of its functions.

INSTITUTIONAL COMPORTMENTS



Source: Authors' own elaboration.

As a set of institutions created to settle conflicts based on pre-established norms, the legitimacy of the justice system directly relates to its capacity to express its judgments in congruence with the law. The more congruent its arguments, the better. The justice system also enjoys broader or narrower authority, depending on the political design established by the constitutions. The constitution determines when and where the judiciary has more or less preeminence within the political system.

Brazil's last Constituent Assembly created an ambitious constitution with a broad charter of rights. That constitution determined that fundamental rights are directly applicable. It erected innumerable remedies to ensure their effectiveness, even against omission by the other branches. The 1988 Constitution establishes that all laws are reviewable by the judiciary for lesion or threats

to rights, and it prohibits the abolition of rights, even by constitutional amendment. For all of these reasons, there is no room for doubt that the Constituent Assembly intended for the Brazilian judiciary, starting with the STF, to adopt a responsive stance, at least where the protection of fundamental rights is concerned. The final authority to resolve problems arising from the ambiguous content of the constitutional norms, and to mediate instances of tension among those norms, and even the authority to take part in the formulation of solutions to the problems related to their effectiveness, was conferred to the STF.

If the primary responsibility for defining the legal content of the open-ended norms established by the Constitution, fundamental rights among them, had been attributed to the legislature, then the judiciary would have to assess whether the legislature's propositions were valid with respect to the constitutional norms, similarly to how the executive is responsible for elaborating and implementing public policy. The judiciary would have the power to assess the validity of the norms, even in cases where the other branches eschewed their duties. The decision to adopt a responsive behavior, however, cannot be the product of a court's own volition, but rather must reflect a decision at the level of the institutional design to which it belongs. Responsiveness also has its limits, just as deference does. When a court is overly responsive, its demeanor crosses over into usurpation.

The 1988 Constitution determined that the STF should maintain a considerably responsive institutional posture out of wariness for the protection of fundamental rights. This does not mean, however, that the Constitution calls for the same degree of responsiveness from the Court in all the remaining areas regulated by its text. Calculating when the circumstances call for one stance over another, as well as the degree or nuance of the appropriate behavior requires the elaboration of a rational decision-making model.

The courts must develop this model in dialogue with scholars through past-decision analysis. Rational, consistent standards are indispensable for society (and the legal community) to stabilize expectations regarding the behavior of the courts, and for any social control over the judiciary itself. The STF, unfortunately, has not managed to establish clear and consistent standards that form a model for decision-making capable of orienting its jurisprudence.

THE EXERCISE OF SUPREMOCRACY

The STF did not immediately react to the institutional incentives that the 1988 Constitution created. Unlike the democratic transitions that occurred in Germany, Italy, India, Portugal, Spain, Hungary, or South Africa, where the adoption of a new constitution involved the creation of a constitutional court where none had existed before, the 1988 Constitution maintained the STF that already occupied the apex of the Brazilian judiciary. It did not even go so far as to alter its composition. This factor largely explains why the Brazilian STF took longer than other courts to take up the active, commanding stance that the new constitutional system designed for it.

Examining the STF's posture over the last three decades reveals that the Court went from a negligent or omissive stance to a deferential one, and then gradually assumed a more responsive position. Over this period, and especially since the crisis in 2013, the STF has also made decisions that, arguably, step outside its jurisdiction.

THE COLLOR ERA

The STF's demeanor during the Collor administration was marked first, by the challenge of analyzing the legality of the Executive's reckless implementation of various economic measures, and then by the task of overseeing the ensuing impeachment trial, a first for the new constitutional regime.

For an example of the Court's initial omissive, or at least reticent, posture, as compared to the transformative potential attributed to it by the 1988 Constitution, we might take the decision of Justice José Carlos Moreira Alves in *Mandado de Injunção* no. 107.[229] The Constituent Assembly conceived of the writ, among several innovations, for "whenever the absence of a regulatory provision disables the exercise of constitutional rights and liberties" (Article 5, LXXI).[230] Ironically, the very Constitutional provision that instituted the writ of injunction still lacked an implementing law (i.e., a regulatory provision) establishing the proper procedure to follow to order injunctions and, in particular, defining their limits and reach. This occurred because the bill had stalled in Congress. The opinion issued by the Attorney General of the Republic, written by Deputy Attorney General Inocêncio Martins Coelho, proposed that no writ of injunction be issued until Congress passed regulatory legislation. That position would in effect have completely neutralized the procedural instrument, meant precisely to ensure protection of fundamental rights whenever the legislature failed to perform its duty, and the STF rejected it unanimously.[231] Notwithstanding, the solution proposed by Justice Moreira Alves was to merely admonish Congress for its delay (or omission) on the grounds that the STF was not able to take any action beyond admonition, which immensely reduced the instrument's efficacy.[232] The same Justice, Moreira Alves, allegedly declared, years later at a conference hosted at the University of São

Paulo School of Law, that his objective had been "to kill the writ of injunction." This initially negligent attitude toward the writ would evolve over decades to the point where the STF no longer felt constrained to elaborate a regulatory provision in the absence of an implementing law, as occurred during the case of the civil servant strike in the year 2007 (MI 670-9-ES).[233]

The greatest instance of omission by the STF during this period, however, involved *Medida Provisória* no. 151 (Provisory Measure 151) and its subsequent iterations. *Medida Provisória* no. 151 froze the financial assets of individuals and businesses, above a certain sum, in order to reduce the amount of money in circulation and thus slow the hyperinflation that was crippling the economy at the time. Freezing assets in this way was the principal mechanism of the so-called "Collor Plan." Petitioned by the PDT, the STF took up the constitutionality of Provisory Measure no. 151, subsequently approved by Congress into Law no. 802/90. By an eight to three vote, the Court decided not to concede the PDT's motion. For Justices Paulo Brossard, José Neri da Silveira, and Celso de Mello, the Collor Plan directly infringed the right to property by blocking access to bank accounts. The remaining justices, however, preferred to adopt an omissive posture, alleging that invalidating the plan could lead to enormous financial disturbances and the return of hyperinflation.

The STF's behavior started to shift, albeit timidly, toward its current standards when it declared unconstitutional a series of provisory measures, issued by the Executive, which were basically reworded versions of other provisory measures that Congress had already expressly rejected. These declarations of unconstitutionality by the STF represented the first limits placed on the Collor administration. Provisory measures, according to the regime established by the 1988 Constitution, could be issued by the Executive to address urgent issues. They have immediate effect

and the force of law, but Congress must approve or reject them within thirty days, or they expire. They also expire if Congress does not vote on them at all. Beginning with the first-ever administration under the 1988 Constitution, that of President Sarney, it became common practice for the government to reissue provisory measures that expired if Congress did not vote on them, as their importance or urgency was considered predominant. President Collor, however, went further. He began to reissue provisory measures that Congress had voted down. He introduced slight formal modifications in an effort to circumvent the legislative rejection, effectively attempting to govern outside the legislature's control. The decision to invalidate Provisory Measure no. 190, which only reimplemented Provisory Measure no. 85 and against which Congress had already voted, was the first clear manifestation of the STF's power to curb the president's power. It is worth noting that the ADI 239[234] that Justice Celso de Mello issued and that Justice Sepúlveda Pertence qualified as historic, did not prohibit the president of the republic from reissuing provisory measures that lapsed because Congress had not voted on them within the thirty-day period. It only maintained that the executive could not reissue provisory measures that Congress had expressly voted down.

An even more curious case, yet one that is very representative of the timidity and ambivalence with which the STF exercised its new powers during this period, is that of ADI 223.[235] Once again, the center-left PDT filed a motion asking the STF to consider the constitutionality of a provisory measure, in this instance Provisory Measure no. 173.[236] Freezing bank accounts had caused economic chaos, for neither individuals nor businesses were able to pay debts, salaries, or make large purchases. As a result, the judiciary was flooded with lawsuits filed by individuals and businesses seeking access to their assets, many of which were conceded by judges and courts of first instance

(trial courts) through *medidas liminares e cautelares* (provisional injunctions and precautionary measures). In response, the Collor administration decided to issue a provisory measure restricting the concession of provisional injunctions and precautionary measures that counteracted the Collor Plan. Justice Paulo Brossard, the reporting judge in the case, warned his colleagues on the STF regarding the case's gravity with rhetorical flourish. He asked whether the Constitution that had been "solemnly" promulgated a short time earlier was in force and applicable to all, or whether it was a "mere ornament" that could be observed "*si et in quantum*"—to the degree convenient and depending on the circumstances. His resounding opinion demonstrated that the measure directly violated the right of access to justice (Article 5, section XXXV). Nevertheless, it failed to convince enough of his colleagues on the Court. Once again, the majority feared the potential consequences of such a ruling and, as a result, the STF endorsed an ingenious compromise presented by Justice Sepúlveda Pertence. For Justice Pertence, although the STF could never abstractly consider restricting the right to file lawsuits as unconstitutional, it could do so in concrete cases, where judges of first instance (trial court) found that the nonconcession of injunctive relief violated fundamental rights whose protection was attributed to the judiciary. The STF thus avoided direct confrontation with the administration yet cleared a path for thousands of injunctions to go forward granting plaintiffs access to their assets. The case made it clear that the coexistence of diffuse constitutionality control—the control exercised by all Brazilian judges—and concentrated constitutionality control—which lies exclusively with the STF—would not be as harmonious as hoped. The "lower clergy" of the judiciary had rebelled against the Collor Plan, striking a fatal blow to Collor's economic stabilization strategy, despite the STF's decision not to rule it unconstitutional. In

any case, the solution proposed by Justice Pertence was an important step in containing President Collor's authoritarian outbursts.

The worsening of the economic crisis, together with several accusations of corruption against the President and his closest advisers, opened a path for the National Press and the Brazilian Bar Associations, represented by Barbosa Lima Sobrinha and Marcelo Lavanère Machado, respectively, to file an impeachment petition against President Collor. Upon receiving the charges, the president of the Chamber of Deputies encountered an initial obstacle. The law regulating impeachment, Law no. 1079/50, approved when the 1946 Constitution was still in force, had not been adapted to the stipulations for impeachment set out in the 1988 Constitution. The main problem was that the earlier regime had established that the president of the republic would be removed from office following a two-thirds vote of the Lower House of Congress, while according to the 1988 Constitution removal only took place after the Senate had accepted the charges. To resolve this and other discrepancies, such as those of the period of time granted for the President to formulate a defense and the procedure for voting, the president of the Chamber of Deputies decided to create a new practice for impeachment by, essentially, fusing current constitutional rules with 1950s law. The revised procedure, commonly referred to as the "Ibsen Law" after the president of the Chamber of Deputies, opened a flank in the impeachment process that the president's lawyers challenged before the STF.

In the opinion of Justice Paulo Brossard, the STF was to abstain from even considering the writ of mandamus submitted by President Collor's lawyers—for he believed that the STF should have nothing to do with the impeachment. He believed the full responsibility for the impeachment process had been exclusively conferred to the National Congress, leaving no role whatsoever

for the STF. In a delectable if ironic passage that clearly reflects a deferential attitude, Justice Brossard asked:

> Why does the judiciary abstain from interfering in the impeachment process? Is it because impeachment is an exclusively political question? Certainly not. Is it to respect the principle of *interna corporis* by which the process is solely an internal affair of the legislature? Again, no. Rather, it is because we are dealing with extraordinary jurisdiction that the Constitution took away from the judiciary and explicitly conferred to the National Congress. Might Congress, in exercising its duty in this area, commit an error, or abuses, or exceed its authority? Of course it might. […] In truth, no branch of government has a monopoly on knowledge and virtue; all branches act rightly and all make mistakes. They act rightly more than they make mistakes, fortunately, but they still make mistakes. It is human nature. And even the final decisionmaker acts rightly or wrongly. Inevitably, no matter who it is. […] No man, and no institution created by him, is perfect and infallible.[237]

Justice Brossard's call for an unqualified attitude of deference toward the National Congress was rejected by all of his fellow STF Judges. A majority, however, did believe that the Court's intervention should be limited to ensuring respect for due process, which

meant fully guaranteeing President Collor's right to mount a proper defense. The STF agreed unanimously that the decision on the merits of the charges against the president was for Congress to make. Thus, the STF, in its first decision broadcast on live television, partially conceded the writ of mandamus filed by President Collor, making certain adjustments to the procedure devised by the president of the Chamber of Deputies so that it met the 1988 Constitution's requirements.

President Collor tendered his resignation immediately before the impeachment session took place in the Senate, but the Senate disregarded the resignation and convicted him of the charges on December 30, 1992. Less than a year later, the STF would absolve Collor of corruption crimes based on lack of evidence, but it never addressed the motion by President Collor's defense that the acquittal invalidated his impeachment the year before. The Senate ruled that Collor would be deprived of his political rights for eight years. Following this period, in 2007, Collor joined the very body that had removed him from the presidency, after winning election for senator in the state of Alagoas.

THE ITAMAR AND CARDOSO ADMINISTRATIONS

Under the administrations of Presidents Itamar Franco and Fernando Henrique Cardoso, the STF maintained, generally speaking, deference toward the executive and legislature. It largely ratified the program of economic measures that they put in place, and approved certain constitutional reforms, too. These were amendments that permitted denationalization and greater privatization of the economy, and required the Court, during an initial phase of pension reform, to decide whether a proposal to tax

retirement pensions violated the recently established right to a full retirement pension.

The recent experience of the Collor Plan, in which the government's actions were widely challenged by judges and first-instance courts, had made it clear to the government and to the STF itself that mechanisms were needed to reinforce the STF's jurisdictional authority. Constitutional Amendment no. 3 did exactly that by creating, among other measures, the ADI. This instrument confers binding force to the STF's assessment of the constitutionality of a normative act, strengthening the Court's ability to impose its decisions on the other spheres of the judiciary and thus reducing the risk of "rebellion by the lower clergy" similar to the one provoked by the Collor Plan.

In order to reduce the level of state participation in the economy, denationalize it further, render the administrative bureaucracy more flexible, reduce budgetary deficits, and, ultimately, achieve fiscal equilibrium, the administration of Fernando Henrique Cardoso took a different approach than Collor by opting for a broad set of constitutional amendments. Amendments nos. 5 to 9 enabled the government to implement a broad privatization plan that the STF did not challenge. In this case, the Court's deferential stance toward the political branches played a part in enabling the implementation of reforms, including pension reform, without significant difficulty.

Despite the Court's tendency toward deference, it did surprise many during the Itamar Franco administration by declaring, for the first time, that some of a constitutional amendment's provisions were unconstitutional. To increase tax revenue, Congress passed a law creating a tax on financial transfers (the *Imposto Provisório sobre Movimentação Financeira*, or IPMF). Because Congress knew the tax would draw constitutional scrutiny, the bill was backed by a constitutional amendment, under the theory that doing so would

negate the discrepancies between the proposed tax and the constitutional text. The STF expressed a different opinion in ADI 926.[238] In the Court's view, the new tax clashed not only with the prohibition on taxing places of worship or paper used in the publication of books and magazines, which are immune to taxation per Article 150 of the Constitution but also violated the principle of *anterioridade*, which stipulates that new taxes can only be collected for the fiscal year after they are levied. The STF held that these limitations on the State's right to tax could be considered *cláusulas pétreas* (unamendable clauses) even though they were not listed under the Constitution's charter of fundamental rights. The only dissent came from Justice Sepúlveda Pertence, who argued that such a broad understanding of unamendable clauses would stall the Constitution's the process of renovation and adaptation. The Court also held, this time unanimously, that taxation by the federal government of financial operations performed by state and municipal governments represented a potential threat to the federal system, whose protection against aggressive amendments is established by Article 60, Paragraph 4, of the Constitution.

Although the declaration of unconstitutionality, in addition to postponing the implementation of the new tax until the following fiscal year, did not affect a good part of the measures that the amendment would have legalized, it did make it clear that the STF would no longer hesitate to rule on the validity of constitutional amendments. This enormous power stems from Paragraph 4 of Article 60, according to which, "[n]o proposal of amendment shall be considered which is aimed at abolishing: I – the federative form of State; II – the direct, secret, universal and periodic vote; III – the separation of the Government Powers; IV – individual rights and guarantees." In other words, the STF would not abdicate its "supremocratic" competence to oversee constitutional reforms enacted by Congress.

It is important to keep in mind that, the same year as ADI 926,[239] Congress had begun discussing making broad reforms to the judiciary, which included, among other measures, creating some sort of external control on judicial activity, in the fashion of controls seen in several European countries. By jumping in to evaluate the constitutionality of a relatively minor amendment such as the IPMF, the STF may have been subtly reminding the political branches where the final word on the validity of constitutional amendments lay.

Lastly, still during the Cardoso administration, the STF began adopting an active and responsive stance regarding social rights, particularly the right to health. Starting in the early 2000s, the STF faced a series of cases involving the distribution of medicaments, differentiated treatment of patients admitted to public hospitals, and the right to childcare services. Many of these cases reached the STF through motions filed by state and municipal public administration organs that were forced to comply with first-instance judicial decisions that ran counter to public policies put in place by the federal and local administrations.

The cases made evident a clear alteration in the traditional division of power among the branches of government. Elaboration and implementation of public policy had always been recognized as the responsibility of the representative branches, and the judiciary was to show deference to their decisions. Starting with a decision related to the distribution of a combination of antiretroviral drugs for HIV treatment (RE 271.286-8[240]), the STF made it clear that the government could not avoid its obligation to guarantee fundamental rights—in this case, the right to health and life—because of budgetary limits. This extremely responsive stance of the STF has not only been criticized by those opposed to social rights but also by many, such as Octavio Ferraz, who seek to address the inequalities in Brazilian society and have identified

various instances where judicial interventions hindering public policies have disproportionately affected the poor, creating regressive effects.[241]

What became evident during the Itamar and Cardoso administrations is that the STF would no longer neglect its duties through omission or even deference. In unceremoniously overturning a constitutional amendment, the Court took a major step toward assuming its role in the supremocratic arrangement. At the same time, by taking on an increasingly responsive posture, declaring its competence to interfere with public policies that affect fundamental rights, the STF showed that it was growing increasingly comfortable with its new position in the system for the separation of powers that the 1988 Constitution established.

THE LULA ADMINISTRATION

Following a stabilization of the Brazilian economy and the smooth transition from the Cardoso presidency to that of Luiz Inácio Lula da Silva, the STF also underwent a transformation in composition and posture. Lula had the opportunity to nominate no fewer than seven justices to the Court during his two terms as the nation's president: Joaquim Barbosa, Eros Grau, Carlos Ayres Britto, Cármen Lúcia, Carlos Alberto Direito, and José Antonio Dias Toffoli. Many of them shared a vision aligned with the ambitions of the 1988 Constitution, particularly in the area of fundamental rights. Perhaps Carlos Ayres Britto best represented this strict commitment to the Constitution's new fundamental rights language, one which would lead to an even more responsive institutional stance.

The STF's docket depends not only on the motions and lawsuits filed but also on the disposition of the justices to take up the

cases. During this period, the legislature made significant progress in shoring up basic rights protection, generating backlash from conservative sectors, consigned to the minority in Congress following Lula's election. Unable to prevent the legislation from passing, they adopted a judicial strategy of filing repeated lawsuits to block:

- The implementation of affirmative action policies designed to increase access to university education through racial quotas, first through ProUni (the "University for All" Program), and, subsequently, at the University of Brasília (ADI 3197[242] and ADPF 186[243]).

- The controls on firearm possession established by the "Disarmament Statute" (ADI 3137[244]).

- Scientific research using stem cells from frozen embryos no longer apt for reproductive purposes (ADPF 54[245]).

- New protections for free speech (HC 82424[246] and ADI 4815[247]).

- Expanded protection for the right to assembly following the "Praça dos Três Poderes" demonstrations (ADI 1969-4[248]).

- The establishment of the "Raposa-Serra do Sol" indigenous territory, seen as threatening agricultural interests and border security (PET 3388[249]).

These represent a small sample of the cases taken up by the STF that demonstrate the Court's willingness to adjudicate difficult and often unpopular issues. It is important to note that the STF limited

itself largely to ratifying the measures passed by the representative branches in the areas of affirmative action, gun control, stem cell research, and even the boundaries of indigenous lands. In each of these cases, Congress had either passed a law or the President had issued a legal order, as in the case of the Raposa-Serra do Sol territory. Although it ratified these progressive measures for the most part, the Court's rhetoric went beyond a mere defense of the traditional separation of powers doctrine that calls for judicial deference to the representative organs. In most of the important cases during this period of time, the plaintiffs, who had been relegated to the minority by electoral defeat, sought to overturn legislation passed by the majority by challenging its constitutionality on substantive grounds. The STF did not shy away from addressing the merits of their arguments, but rather countered the arguments, reaffirming the measures' conformity with the requirements of the fundamental rights established by the Constitution.

On balance, the STF's performance in protecting fundamental rights during Lula's administration is quite positive, even when compared to other high courts around the world commonly considered progressive.[250] This assessment, of course, depends on one's ideological orientation, but it would be very difficult to deny that the STF behaved in a very active and responsive fashion when it came to implementing the ambitious charter of rights incorporated into the 1988 Constitution during Lula's two terms as president. It should still be remembered, however, that in the majority of the cases, the Court's activity consisted of reaffirming the legitimacy of decisions made by the executive and legislative branches in response to challenges brought by parties that had been defeated in the preceding elections.

Despite its respect for majoritarian decisions and responsiveness to complaints, many aspects of the role played by the STF in redesigning Brazil's representative system are still open to

criticism. I am not referring to the Court's ideological tendency or even to any of the objectives it pursued, but rather to its systematic interference with the legislative process, interference that Adriana Ancona de Faria astutely diagnosed at an early stage.[251] As has been described previously, the establishment of a proportional system for elections in immense electoral districts—ones that follow state boundaries—contributed to the multiplication of political parties, increasing the burden of forming a stable parliamentary coalition to support the administration's agenda. To limit the proliferation of political parties, President Cardoso signed Law no. 9096 in 1995, which would enter into force 10 years after. It established a performance clause that political parties needed to meet before receiving official recognition in Congress or access to public funding and free television and radio time. Upon taking effect in 2005, only parties whose Chamber of Deputies candidates obtained a minimum of 5% of the valid votes in at least one-third of the states, plus a minimum of 2% of the valid votes in the remaining states, would be eligible for these public benefits.

Notwithstanding the consensus among political elites regarding the difficulty of coordinating the Brazilian presidential system with a large number of parties and a fragmented Congress, the STF unanimously overturned, in December 2006, the mandatory performance clause for political parties. Justice Marco Aurélio Mello, writing for the Court, described the legislation as a genuine "massacre of the minorities" and, by consequence, an affront to the principle of political pluralism (ADI 1351 and ADI 1354).[252] Meanwhile, at around the same time, the first revelations of the *Mensalão* corruption scandal began surfacing. This scheme of monthly payments to coalition partners was directly related to the increased difficulty of maintaining the coalition, as party fragmentation deepened.

The unanimous decision left no room for doubt regarding the restrictions the law placed on small factions and the effect these had for their prospects for political survival, and for these effects, the law could legitimately be considered unconstitutional. Notwithstanding, the STF could have used its prerogative to temper the legislation by nullifying its extreme measures without dismantling the entire project. Had it chosen that path, it could have maintained a modicum of order in the representative system. Instead, in adopting a broad reading of the principle of political pluralism and rejecting the solution approved by the representative system to ensure the operability of coalition presidentialism, the STF became a protagonist in the redesign of Brazil's electoral system.

Less than a year after the decision that overturned the performance clause, effectively halting the implementation of a powerful mechanism to mitigate the instability of Brazil's coalition presidentialism system, the STF declared that representatives in the Lower House who switched political parties would lose their seats. The Court thus added another item to the constitutional list of hypotheses in which a representative could lose their mandate (MS 26602, 26603, and 26604).[253] In this "party fidelity" ruling, the Court not only exercised counter-majoritarian power on the basis of the right of minority groups to form political parties but also chose to reform the Constitution with a moral intent: politicians were not to betray their political party. It is clear that the ease with which representatives switched—and continue to switch—parties for pragmatic or solely financial reasons compromises the integrity of the representative system. Still, by attempting to interrupt the vicious cycle by court order, the STF effectively created a new category of justification for interrupting parliamentary mandates, one that is quite distinct from those established by Article 55 of the *Constituição Federal* (CF). The hypothetical conditions that the Constitution sets for removing parliamentary members from

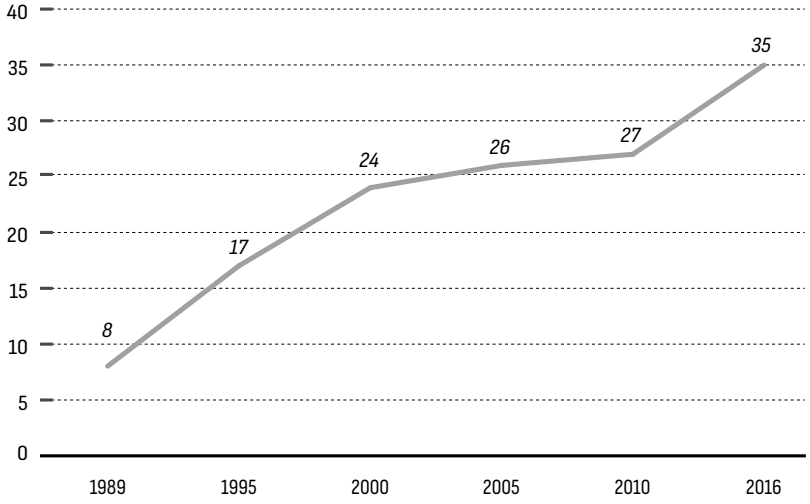
office, as Justice Celso de Mello observed, constitute an instance of *numerus clausus*, meaning the set of conditions cannot be expanded. Notwithstanding, the Justice did not surmise that the STF had overstepped its authority in the decision, for the Court holds a "monopoly over the last word on the exegesis of the norms affirmed by the text of the Fundamental Law." Moreover, citing Francisco Campos, a preeminent conservative jurist, Justice Celso de Mello declared that "[t]he Constitution is under constant elaboration by the courts to which it falls to apply it […]. The constituent power also operates in the courts entrusted with the protection of the Constitution." The decision certainly represents an important step in the consolidation of Brazil's supremocracy for, in this instance, the STF does not merely alter the Constitution's meaning. Rather, the Court's president explicitly claims for the Court the legitimate power to reform it.

The decision determining the loss of mandate for party infidelity, disregarding its problematic aspects from the perspective of democratic theory and separation of powers, had serious implications for the national political landscape. Since the decision did not prohibit politicians from migrating to new political formations or to parties formed from the fusion of existing ones, the STF played a decisive role in sparking a race to form new political parties. In the absence of any performance clause or restrictive rule to join a new party, combined with various financial and political incentives created by the legislature, such as the Political Party Fund (*Fundo Partidário*), Brazil passively witnessed an avalanche of new political agglomerations.

The compounded fragmentation of the National Congress, particularly in the Chamber of Deputies, drove up the costs of maintaining a coalition base for the administration. Besides, the composition of these coalitions became increasingly heterogeneous and lacked any common programmatic core. With the intention

of correcting a defect in the political system, the STF ended up playing a role in making the system even more unintelligible and difficult to coordinate.

FIGURE 2. **Number of Political Parties per Year (1989–2016)**



Source: "*Partido do 'você não me representa'*" ("The 'You Don't Represent Me' Party"), *O Globo*. Available at https://infograficos.oglobo.globo.com/brasil/partido-do-voce-nao-me-representa.html.

THE ROUSSEFF ADMINISTRATION

During the Rousseff administration, the STF maintained a fairly responsive posture in the area of fundamental rights. It heard several important cases, upholding the legality of same-sex civil unions (ADPF 132 and ADI 4277[254]), the freedom to protest in the

context of the "Marijuana March" (ADPF 187 and ADI 4274[255]), the right to publish unauthorized biographies (ADI 4815[256]), and the right to abortion in case of anencephaly (ADPF 54[257]). It also made an initial step toward the decriminalization of early first-trimester voluntary abortion (HC 124,306[258]).

The issue where the Court faced the most opposition was that of same-sex civil unions, for both the Civil Code and the Constitution expressly establish that civil unions join a man with a woman. For a majority of the STF's justices, however, this literal reading of the Constitution entailed a serious violation of the principles of human dignity and equality. It would exclude couples formed of individuals of the same sex from the benefits and rights enjoyed by couples of opposite sexes. In fact, through its decision in this case, the Court rectified a Constitutional provision without altering the constitutional text, in order to realign it with the principles of human dignity and equality.

In the case of civil union for same-sex couples, the STF confronted tension among norms established by the Constitution itself. On the one hand, there were provisions establishing that all persons be treated with equal respect and consideration. On the other hand, there was the clause explicitly stipulating that only couples composed of one man and one woman enjoyed the right to a civil union. Assuming a deferential position to the ban meant accepting that the specific clause constituted an exception to the general one. The deferential position would thus imply a violation of the rights of a minority that has traditionally suffered discrimination—which is unacceptable if the principle of fundamental rights is to be fully respected. As the political system, reflecting the opinion of a majority of its citizens, did not protect a minority that has traditionally suffered discrimination, its protection fell to the STF, which struck down the exclusionary provision. A court whose mission is ensuring the maximal effectiveness of the

norms for fundamental rights, according to Article 5, XXXV, and Paragraph 1 of the same article, cannot abdicate its responsibility to protect a minority with a history of discriminatory bias levied against it. It must provide it with the same level of basic rights as other sectors of society enjoy. The same-sex civil union decision is an example of a case in which many felt the Court acted too responsively, giving rise to ample debates over the soundness of the decision and the Court's behavior. Critics of the decision felt the Court had clearly usurped authority, while those in favor found the Court's extreme responsiveness appropriate, for it had adopted an interpretation that favored, to the greatest degree possible, the full exercise of fundamental rights.

In the case of abortion, in which the Court broadened the category of circumstances listed in the Criminal Code that exempt women who have abortions from punishment, critics once again accused the STF's First Panel of usurpation. Unlike the same-sex union case, however, the tension that the Court addressed was not that of constitutional norms. In the case of abortion, the STF's decision only went as far as establishing an interpretation of the Criminal Code that better conformed to superior constitutional norms.

In a case related to political reform, the Court also upheld the "*Ficha Limpa*" Law.[259] The Court ruled that barring the candidacy for office of individuals who had been convicted of crimes against public administration by a panel of judges did not offend the presumption of innocence, even if their appeals were still pending (ADC 29, 30 and ADI 4578).[260] The STF also issued a decision prohibiting campaign contributions by private companies in order to reduce the influence of large donors on the political system. Both decisions greatly affected the 2018 elections. The *Ficha Limpa* Law prevented former President Lula from appearing on the ballot. The prohibition of corporate donations benefited richer candidates and candidates linked to religious groups.

It also led the National Congress to increase the amount of public funding for political campaigns, which increased the power of the party leaders and strongmen who controlled the distribution of those resources.

Starting in 2013, the political crisis that culminated in the impeachment of President Rousseff engulfed the STF. The most relevant cases in this process involved the *Operação Lava Jato*. To begin with, there was the imprisonment of PT Senator Delicídio do Amaral (AC 4039),[261] followed by the removal of MDB Representative Eduardo Cunha from the presidency of the Chamber of Deputies, immediately after the house vote to proceed with impeachment (AC 4070).[262] Later on, Senators Aécio Neves, from PSDB, and Renan Calheiros, from MDB, were removed from office, the latter of whom had refused to respect an order of the STF (ADI 5526 and ADPF 402).[263] The Court also issued contradictory rulings when it first prevented Lula from assuming the position of Chief of Staff in Rousseff's cabinet and, later, authorized Moreira Franco to take up a cabinet post in the Temer administration under very similar circumstances (MS 34070 and MS 34609).[264] Conflicts over central issues in *Lava Jato* also raged within the Court: the constitutionality of the execution of a conviction after condemnation in the second instance of the lower courts, which directly affected the continued imprisonment of former President Lula (ADC 43 and 44)[265] was key, as was a question over the investigators' use of coercive tactics that the Court subsequently declared unconstitutional.

Although investigations into the *Mensalão* corruption case, the vast scheme of congressional vote-buying previously mentioned, began in 2007 with charges against 40 defendants, the actual trial (AP 470)[266] only began in August 2012. This was more than seven years after Representative Roberto Jefferson, from the PTB, set off a political bomb with revelations he made to journalist Renata Lo

Prete. Previously, the only time the STF had exercised its jurisdiction over cases involving top authorities was in the impeachment of President Collor de Mello, whom it eventually absolved of corruption charges for lack of evidence.

Among the many explanations for the Court's apparent reluctance to try members of Congress for criminal behavior, one requirement stands out. Until 2001, when the requirement was removed by Constitutional Amendment no. 35, the STF was obliged to obtain prior consent from one of the houses of Congress before initiating procedures against their members. The change was made because of difficulty encountered in the case of Hildebrando Pascoal Nogueira Neto, a former colonel in the Military Police. This member of Congress, known as the "chainsaw congressman," would eventually be convicted of leading death squads in the rural state of Acre that borders Peru and Bolivia. It was only after Amendment no. 35 that the STF was able to consider the charges filed by the Public Ministry directly, without obtaining authorization to do so from Congress.

The *Mensalão* trial (AP 470)[267] drew the STF into the center of public opinion. In all, 69 sessions were televised live over a period of one and a half years. Among the 24 people convicted were prominent leaders such as José Dirceu, Lula's Chief of Staff, and José Genoino, president of the PT, as well as a partner and executives of Rural Bank and several congressmen from distinct parties that formed the governing coalition. The latter were convicted of taking money in exchange for their support of the administration's legislative agenda. Many of the decisions involved the legal reasoning that turned this case into a watershed for the consolidation of Brazilian supremocracy. An example is the Court's rejection of the defendants' argument that not registering money received for the campaign could not be considered a crime, but only an administrative offense of campaign finance regulations. That ruling—which

allowed prosecution to go forward on separate crimes of corruption, money laundering, and criminal conspiracy—was subsequently revised by both the High Electoral Court (TSE) and the Superior Court of Justice (STJ, the highest appellate court in Brazil for nonconstitutional questions of federal law). The TSE revised the STF's ruling in its decision not to charge the Rousseff-Temer ticket with electoral regulation offenses in June 2017, while the STJ introduced its revision in a 2018 case involving Geraldo Alckmin, a leader of the PSDB and former governor of São Paulo state. In both of these cases, the imputations were restricted to charges of irregular campaign contributions under the jurisdiction of the electoral courts, and not of criminal offenses. This contradicted the STF ruling in the *Mensalão* case that the campaign contributions included a corruption scheme involving both money laundering and conspiracy. The STF's acceptance of the *domínio do fato* (command responsibility) doctrine also introduced confusion into the Brazilian criminal law system. The central premise of the *domínio do fato* theory is that the people at the top of a hierarchical structure can be held responsible for the criminal behavior of the subordinates under their control. The STF's adoption of this doctrine, at least as accepted by the Court, diminished, or at least relativized the importance of subjective responsibility, according to which any criminal action must be directly attributable to the individual accused of it. Another peculiarity of the *Mensalão* case is the STF's refusal to allow the case to be broken up into individual cases that could be tried separately. Instead, the Court asserted its jurisdiction over the entire investigation and heard the evidence against all of those accused—an approach it would reverse when it came to trying the defendants in *Lava Jato*.[268] The *Mensalão* case would expend an enormous amount of the STF's time and energy and, moreover, project its justices to an even higher level of recognition on the national stage.

Through the *Mensalão*, the STF took a definitive step toward consolidating its power to try the highest-ranking authorities of the country. The trial also clearly demonstrated the difficulty of reconciling this role—in which the Court acts, simultaneously, as the first and last instance of adjudication for alleged crimes committed by high-rank officials and members of Parliament—with the other functions that the Court exercises. The case not only deprived the Court of precious time needed for other issues, but also seriously heightened the tensions between the apex court and the country's political class.

With the worsening of the political and economic crises, and in the midst of ongoing revelations of systemic corruption by the *Operação Lava Jato*, which began filing indictments in 2014, President Rousseff lost control of her congressional coalition. This made it possible for Eduardo Cunha, then-president of the Chamber of Deputies, to accept one of the several motions to impeach her. The political crisis provoked by the initiation of impeachment proceedings once again brought the STF to the center of national attention. In an effort to recuperate popular support and improve congressional relations, President Rousseff decided to appoint former President Luiz Inácio Lula da Silva, who at the time was only under investigation, as her Chief of Staff. The cabinet position would mean that jurisdiction over the investigation into Lula's finances by federal prosecutors in the city of Curitiba would pass to the STF. In order to prevent that from happening, the Popular Socialist Party (PPS) filed a collective writ of mandamus against Lula's nomination as Chief of Staff. Justice Gilmar Mendes unilaterally conceded the writ, having concluded that the nomination involved obfuscation of purpose (MS-MC 34070).[269] Disregarding the Constitution's clear attribution of the competency to choose his or her cabinet to the President (Article 84, section I), and the lack of any bar on nominating someone under

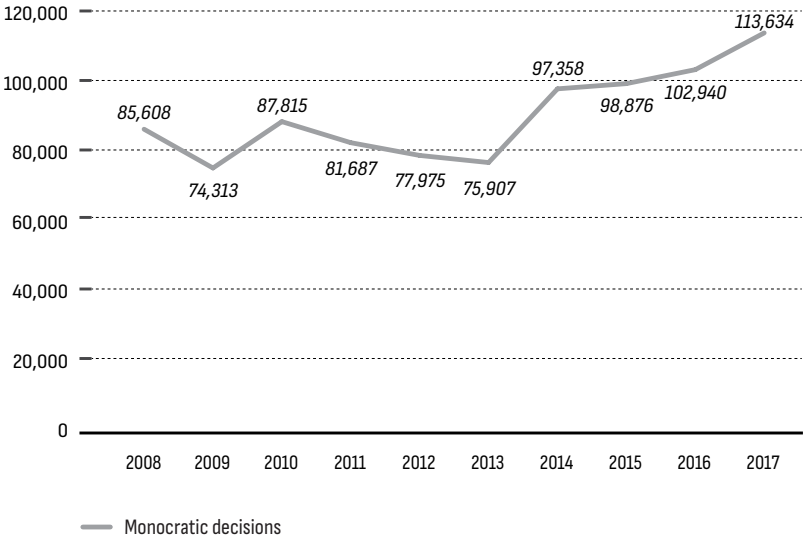
investigation for a cabinet post, Mendes perceived the presence of "atypical illicitness"—an illegal act that is not explicitly proscribed in the law. He qualified President Rousseff's nomination of Lula as her Chief of Staff as attempted "obstruction" of the judicial process. He denied having relied for evidence on the recording of a phone call between Lula and Rousseff—a conversation, taped illegally, in which the two discussed the nomination and that had also been illegally leaked to the public by first-instance judge Sergio Moro—in order to prevent losing jurisdiction over Lula's investigation. Instead, Mendes insisted that he had based his conclusion on official comments, made by President Rousseff on March 16, 2016 at the nomination ceremony. The case contrasts starkly with a decision passed by Justice Celso do Mello following President Rousseff's removal from office. Despite very similar circumstances, Celso do Mello did not block President Temer from appointing former state governor Moreira Franco, who was also under investigation, to his cabinet (MS-MC 34609).[270] Celso do Mello explicitly justified his decision on the grounds of the presidential prerogative to choose members of cabinet and a lack of any legal obstacle barring the nomination of someone who has not been convicted of a crime. Despite the political and legal similarities between the cases, the difference between the decisions reached by the two justices reaffirms not only growing fragmentation among the Court's members, but also the alarming amount of chance that operates in the system by which cases are assigned to judges.

Diego Werneck Arguelhes and Leandro Ribeiro[271] coauthored a riveting article that describes the rise of monocratic decision making in the Court, which they call "ministerocracy." This is a radical version of "supremocracy" in which an individual justice (a minister in the Brazilian vocabulary) assumes a significant amount of the power that the Constituent Assembly conferred

to the STF. Looking at the figures released by the STF itself, we observe an impressive increase in the number of unilateral decisions issued this way since 2013. As this increase does not correspond to a proportionate rise in the overall number of cases brought to the Court, it must reflect increasing fragmentation of the STF's jurisdiction.

Several factors combined to present Eduardo Cunha, then-president of the lower chamber of Congress, with the opportunity to authorize one of 63 motions for impeachment to move forward, which he did on December 2, 2015. These factors included the worsening economy, the rising animosity toward the administration from sectors of society driven by revelations of the extent of corruption coming out of *Lava Jato*, and the heightened tension between the Rousseff administration and sectors within the MDB. The MDB, the PT's largest coalition partner, was unhappy with the amount of control it had over certain interests, particularly the national oil company Petrobras.

FIGURE 3. **Number of Monocratic Supreme Federal Tribunal Decisions (2008–17)**



Source: Graph produced by Ana Laura Barbosa, researcher at the *Supremo em Pauta* Project at FGV DIREITO SP, using figures published by the STF.[272]

Cunha selected the motion for impeachment filed by Hélio Bicudo, a former PT congressman and one of the party's founders, Miguel Reale Jr., a distinguished professor of criminal law from the University of São Paulo, and Janaína Paschoal, a young conservative professor, also from the University of São Paulo School of Law. Their motion alleged that President Rousseff had obtained illegal loans from public financial institutions to cover the budgetary deficit, a practice conventionally known as "fiscal pedaling." The motion also identified credit lines extended in 2014 and 2015 without congressional authorization and, finally,

accused President Rousseff of omissive conduct related to the many charges of corruption involving Petrobras executives and members of her coalition. Cunha only recognized, however, the charges involving "fiscal pedaling" and the extraordinary lines of credit obtained through decrees that Congress had not approved. Cunha argued that the charges related to corruption originated during the Lula administration and, therefore, could not be the subject of impeachment proceedings against Rousseff.

As with the impeachment of President Collor, the STF was immediately brought into the process (ADPF 378).[273] Rousseff's supporters protested both procedural anomalies and an absence of just cause. As early as December 8, STF Justice Fachin suspended the impeachment proceedings until the two Houses of Congress could determine the procedure to be followed.[274] This was necessary because, despite the many disputes that arose during the Collor impeachment, Congress had still neglected to adapt the old 1950s law on crimes of responsibility, which established the impeachment procedures, to conform to the 1988 Constitution. Justice Fachin also annulled the election of the Special Commission in charge of impeachment that Eduardo Cunha had designed at the House.[275] On December 17, the STF issued its decision in ADPF 378, brought by the Communist Party of Brazil, partially modifying decisions made by Justice Fachin and establishing procedural directives to reconcile the 1950 Law no. 1079 with internal regulations of the two houses of Congress and the 1988 Constitution. The Court had done the same for the Collor impeachment years earlier.[276] The decision made it clear that the STF would limit its interference to ensuring respect for the formal requirements of due process. The Court would not take up the question of "just cause," for the justices understood that, following the argument proposed by Justice Paulo Brussard during the Collor impeachment, the determination of a crime of respon-

sibility had been exclusively conferred to the Federal Senate by the 1988 Constitution. On March 17, 2016, a Special Commission was elected by open ballot in accordance with the STF's instructions. On April 17, 2016, the Chamber of Deputies voted by more than the necessary two-thirds majority to proceed with impeachment. On May 12, the Senate approved the report elaborated by Senator Antonio Anastasia indicting the President and, by consequence, provisionally removing Rousseff from office for the duration of her impeachment in the Senate. The trial was presided by STF Justice Ricardo Lewandowski and ended on August 31, 2016. Rousseff was convicted of the charges by a vote of 61 against 20 senators. During the sentencing hearing, a motion was approved to vote separately on the questions of removal from office and loss of political rights. Consequently, President Rousseff was removed from office, but her political rights were not suspended. As a result, a new case was brought to the STF, questioning the nonimplementation of the full penalty. Again, the STF refused to judge substantively the decisions made by Congress during the impeachment process.

THE TEMER ADMINISTRATION

The "supremocratic" system continued to evolve during and after the provisional removal and definitive impeachment of President Rousseff. Once the impeachment trial started in the Senate, STF Justice Teori Zavascki issued a precautionary measure that removed Representative Eduardo Cunha from the Chamber of Deputies presidency (AC 4070).[277] Even though Article 55 of the Constitution does not contemplate the removal from office of a member of Congress through a precautionary measure, even in

the context of a criminal investigation, the STF determined that Cunha had been inappropriately using the prerogatives of his position as president of the Lower House to obstruct investigations being carried out against him. The Court maintained that he had used his prerogatives not only to interfere inappropriately with a legal investigation, but also to stall the charge of dishonorable conduct that had been filed against him with the Ethics Committee of the Chamber of Deputies.[278] Notwithstanding the Court's qualification of the measure as "exceptional" and warranted by the equally exceptionable circumstances in which it was taken, the action reinforced the Court's acknowledged capacity to rewrite the Constitution. The case of Eduardo Cunha clearly involved enormous political and legal complexity. If, on one side, the constitutional text did not explicitly authorize the judiciary to remove a member of Congress from office by precautionary measure, the STF argued that allowing a member of Congress to use their prerogatives to block judicial action represented an actionable violation of the Constitution. Once again, the STF did not hesitate to venture into the gray zone when constitutional rules and principles pointed in conflicting directions.

The removal from office of Eduardo Cunha served as precedent for similar precautionary measures issued by a single justice and which removed Senators Renan Calheiros and Aécio Neves from office too, both of whom were under criminal investigation. In these instances, however, the political class resisted the STF's intervention. Calheiros, a senior senator who had presided over the legislative body several times in his career, simply refused to acknowledge Justice Marco Aurélio's order, directly confronting the STF's authority in a gesture rarely witnessed over the past thirty years. The imbroglio ended when Justice Cármen Lúcia, then-president of the Court, issued a rather sheepish opinion admitting that the STF could not remove a member of parliament from

office without prior consultation of the congressional house in question (ADI 5526).[279]

In August 2016, the STF reaffirmed its disposition to fortify the criminal justice system. In adjudicating a case of *habeas corpus* (HC 126292),[280] the Court overturned the doctrine it had established in 2009 which prohibited the imprisonment of defendants convicted on appeal if legal recourse to challenge their conviction was still available to them (HC 84078).[281] The controversy has its origin in the wording of Article 5, LVII, of the Constitution: "no one shall be considered guilty before the issuing of a final unappealable penal sentence."

For more than twenty years, the STF had interpreted this clause such that a criminal sentence could be executed after the conviction was upheld on appeal, without having to wait for final review by the STJ or the STF. Defendants convicted on appeal have the right to demand review of their case by the STF when they allege their prosecution has violated the Constitution. What's more, they can demand review by the Superior Court of Justice (STJ) when they allege their prosecution has violated federal law. Articles 102 and 105 of the Constitution establish these "exceptional" or "special" appeals (*recurso extraordinário* or *recurso especial*). While those appeals are pending, however, the Court understands that execution of the criminal sentence is constitutional because the appeals do not challenge or overturn the conviction, as Justice Néri da Silveira observed in 1991 (HC 68726).[282] The appeals merely assess whether it was federal law or the Constitution that has been infringed upon. A narrow Court majority (six to five), however, struck down that interpretation in 2009. The majority, led by Justice Eros Grau, held that the Constitution's wording was clear on this point and that the STF could not disregard it. The majority therefore argued that, if guilt can only be assessed once all possibility of appeal is exhausted, then it makes

no sense to allow the imprisonment of someone whose guilt has not yet been definitively determined (HC 84078).[283]

Later, in 2016, once the Court's makeup had undergone some changes, a new majority challenged this understanding. For Justice Teori Zavascki, author of the *habeas corpus* leading opinion (HC 126292),[284] the final determination of guilt must not be confused with the possibility of interim execution of a sentence. The new majority observed that the Constitution had never prohibited certain forms of imprisonment from being imposed before a conviction sentence has been definitively determined. In addition to forms that involve the interim execution of sentences while special and extraordinary appeals are pending, these include detention when a police arrest *in flagrante delicto* is made and preventive imprisonment where there is risk to public safety or of flight. According to Justice Barroso, what permits the practice is clause LXI of Article 5, which impedes imprisonment without a "written and justified order of a competent judicial authority," rather than a "final and unappealable penal sentence." The majority went on to emphasize the negative effects caused by the 2009 decision, particularly the incentive it created for delay tactics, the discredit it brought to the criminal justice system, and, relatedly, the perception that the judiciary had become more selective. Because affluent defendants were able to make greater use of delay tactics, prolonging their trials, they effectively received differentiated treatment from the justice system.

This matter is clearly of enormous importance for the proper functioning of the criminal justice system, especially for operations against corruption and organized crime. By permitting the provisionary execution of a criminal sentence before the ultimate judgment—and in fact anticipating eventual imprisonment—the STF created a strong incentive for defendants to cooperate with investigators in exchange for reduced sentences.

Seen in the specific circumstances in which the decision was made, many considered it the STF's response to those seeking to destabilize *Lava Jato*. The decision came at the exact moment when the Federal Regional Court for the Fourth District was reaffirming, on appeal, many of the sentences originally handed down by Judge Sérgio Moro.

The issue, already controversial in legal circles, became even more so because it would directly affect former President Lula. His initial conviction was also about to be analyzed by the Federal Regional Court. If the Regional Court decided to uphold the trial judge's sentence, Lula would be sent to jail, as eventually occurred on April 7, 2018. Making matters worse, Justice Gilmar Mendes, whose vote had given majority status to the 2016 decision allowing the interim execution of sentences, made it publicly known, outside of a court case, that he had changed his mind. This would negate the majority understanding and preclude the imprisonment of defendants whose convictions were upheld on appeal if any type of appeal was still available to them. Several justices had been unhappy with the 2016 decision and argued that the Court should reexamine the question. Despite Gilmar Mendes' change of heart, however, the Court's president, Justice Cármen Lúcia, refused to put it on the docket,[285] arguing that it would not be appropriate for the STF to revisit a decision so recently handed down.

In one of its most controversial sessions in decades, the STF denied President Lula's motion for *habeas corpus*, in which his legal defense team specifically argued that he could not be imprisoned before a final and unappealable decision had been made. One of the main peculiarities of the session was the vote of Justice Rosa Weber. She had voted against interim execution of sentences in 2016 and, as far as observers could tell, had not changed her position. However, she rejected Lula's *habeas corpus* petition on

the argument that, throughout her career as a judge, her respect for plenary decisions has prevailed over her personal views. For the sake of legal predictability, she claimed that she had denied other petitions for *habeas corpus* even though it was against her understanding, as expressed in the 2016 case. In other words, she decided to show deference to a previous plenary decision made with regards to a provisional injunction (i.e., not a final decision), even though she was now part of a new plenary that was reaching a final decision in a concrete case. She now had the opportunity to rescind the previous decision, in which she was defeated, not by acting individually counter to a plenary decision, but as part of a new majority formed by the positioning of Justice Mendes. The decision to deny this *habeas corpus* was seen by many as the result of political and public pressure on the STF. Particularly troublesome was a message posted on Twitter on April 3, 2018, by General Villas Boas, who at that moment served as Commander-in-Chief of the Army. The day before the STF would decide whether former president Lula should be immediately sent to prison, the General "ensure[d] the nation that the Brazilian Army believes it shares the aspiration of all good citizens who repudiate impunity and respect the Constitution … and remains attentive to its institutional mission." Justice Celso de Mello, the most senior member of the Court, spurned the general's message before issuing his vote, but the message was still viewed as a clear if veiled threat to the STF. Even the General recognized, a year later, that his action was situated at the "limit" of his competence. The event could be considered an illegitimate intervention in the Brazilian constitutional process on the part of the military, one in which the Army infringed upon the STF's attribution as holder of the final word in constitutional matters.

At the peak of political clashes stemming from the impeachment of President Rousseff, the STF still managed to find time

to address questions of enormous repercussions for fundamental rights, mostly in cases adjudicated individually by justices or in panels of five. The first of these cases involved the Court's competence to review the constitutionality of amendments. Justice Ricardo Lewandowski had individually issued a preliminary injunction that declared null and void Articles 2 and 3 of Constitutional Amendment no. 86/2015. That amendment had established a ceiling for public health expenditures. According to the Justice, because the amendment implied a nominal reduction of the budget allocated for public health, it should be considered unconstitutional. He argued that the Constitution, in establishing the subjective right to health in Article 196, imposed upon public authorities the obligation to implement "social and economic policies aimed at reducing the risk of illness and other hazards and at the universal and equal access to actions and services for its promotion, protection and recovery." Such policies are to be progressive, meaning they cannot be vulnerable to budgetary decisions that deprive them of resources necessary for their implementation.

The 1988 Constitution established, through Constitutional Amendment no. 29/2000, a system to determine the minimum for annual public health expenditures, similar to the system imposed for public education. In 2015, Constitutional Amendment no. 86 reduced the amount of resources allocated to public health. A case was brought to the STF on the grounds that the Constitution does not permit regression in expenditures reserved for the accomplishment of the right to health. The case became extremely important because it provided a precedent for the discussion of the constitutionality of Amendment no. 95/2016. This amendment, passed under the Temer administration, created a strict fiscal regime that would remain in force for twenty years. The regime effectively implemented a ceiling on public spending, meaning that the amount of funding for social programs would be limited

unless cuts were made in other programs or tax revenues raised. From a constitutional perspective, however, the problem is that the 1988 Constitution explicitly establishes the minimum expenditure, based on the amount of tax collected for both public health and education. What would happen if the recently introduced ceiling on spending prevented the government from allocating the minimum amount required by the constitutional text? The response offered by Justice Lewandowski in granting a preliminary injunction, suspending the limitations imposed by Amendment 86/2015, was that not even constitutional amendments can reduce the protection and promotion of a basic social right. As of the time of writing, the Court plenary had not yet taken up the case.

Supremocracy—together with its extreme variant, ministerocracy, in which individual justices exercise the authority conferred by the Constitution to the Court as a collegiate body—derives from the combination of the constitutional model adopted in 1988 with the institutional architecture of the Court, but is also dependent on the stance taken by the STF justices. There are evident tensions between supremocracy and majoritarian models of democracy in which the final word on important social issues rests with majority rule. In the Brazilian system, just as in many other contemporary democracies, consensualism overlaps with majority rule in many circumstances. By adopting a rigid constitution with a broad charter of rights and conferring to a court the competence to protect the constitution from possible attacks by the political branches, Brazil opted for a robust consensual model of democracy in which majority rule does not always carry the day. In this model, the will of the majority is rejected when it violates the basic rules of democratic politics, the principles on which those rules are based, or fundamental rights. Although the Constitution explicitly confers many of these attributes to the STF, justifying those powers from the perspective

of democratic theory remains extremely difficult. Furthermore, other characteristics have jeopardized the Court's authority, such as a lack of ingrained institutional procedures for decision making, lack of transparency in the process for setting Court docket, and fragility of the Court's commitment to its own precedents. Lastly, when ministerocracy stands in for supremocracy—which, as we have seen, has been on the rise—the difficulty of justifying the Court's powers increases substantially.

On one side, the self-assured resourcefulness displayed by the Court in resolving questions of utmost importance could be a sign of the Brazilian judicial system's institutional strength—a positive development in a country where regard for the rule of law has been historically poor. In a system where the political branches no longer seem to respect the spirit of the pact at the core of the Constitution, nothing could seem more reassuring than the intervention of its legitimate guardian, the institution whose foremost mission is to preserve it. In another sense, however, the Court's aplomb is also an indication that the country's representative system has weakened to the point that it can no longer satisfactorily perform the functions expected of it. The current situation is wrought with contradictions. Although the Court's intervention could be seen as positive and desirable in theory, we all know that in practice, the path will be strewn with errors. There is no consensus among jurists with regards to the proper interpretation of the Constitution or the best way to solve the innumerable tensions among its principles. This does not mean we should give up on finding the most rational and controllable approach to the task, as exhorts Konrad Hesse, a former German Constitutional Court justice.[286] Yet there are problems that transcend the strictly interpretive difficulties that arise in the application of a constitution. These problems relate to the dimensions of authority deemed appropriate for a court to exercise within a regime that considers

itself democratic. As STF Justice Celso de Mello has observed, no sphere of power within a republic can be free of all control. For that reason, he argued in ADI 239-7[287] that it was necessary to fight for the progressive reduction and eventual elimination of immunity within the corridors of power. Clearly, the solution is not one of putting in place some electoral control of the Court, but rather, developing the rationalization of its jurisdiction and a clearer, more solid framework for its decision-making process. Implemented properly, these developments would reduce the tensions between constitutionalism and democracy that are inherent in the operation of a constitutional jurisdiction as pervasively sweeping as that of Brazil.

Certain changes on an institutional order are both indispensable and pressing in order to eliminate ministerocracy and rein in the supremocratic malaise. Initially, redistributing the competences of the STF is crucial. The Court cannot continue performing the functions of a constitutional court, a court of final appeal, and a specialized court all at the same time. Only by growing the amount of cases decided by lone justices has the Court been able to keep up. This assumption, on the part of the justices, of prerogatives attributed to the Court as a whole through an exacerbated use of individual opinions is responsible for a substantial part of the steep decline in the public's sense of trust for the institution.[288] In order for it to perform its primary task, that of constitutional court, it is essential that the STF be relieved of a great number of its secondary tasks which are eroding its authority.

By significantly reducing the number of cases on its docket, the Court could improve its modus operandi. Before all else, instances in which a single justice speaks for the whole court should be eliminated or at the very least limited to a strict minimum. The authority conferred to the STF as an institution cannot be wielded individualistically by each of its justices. Because it is

the court of final review, and therefore no recourse is left in cases of improper decisions, the Court should be compelled to make its decisions after plenary review. Without a drastic reduction in the number of cases on its docket, eliminating single-justice decisions will be impossible.

Concentrating the STF's focus on the constitutional aspect of its jurisdiction, in addition to making it possible to consider cases exclusively *en banc*, would also enable the Court to refine and consolidate its deliberative procedures. Currently, the justices debate amongst themselves a great deal, which is a positive quality. Their debates, however, would benefit from a reduction in the number of cases before them, from an increased amount of time for them to prepare their opinions, and from a greater degree of self-restraint on the part of the justices themselves. To safeguard the Court's integrity and make its jurisprudence as authoritative as possible, the collegiate exercise of its functions is essential. The manner of its collegiate decisions is also important. They should produce clear written decisions that represent a majority of the justice's opinions, making explicit the facts of the case, the legal question identified, the criteria applied in making the decision, as well as any rule that can be derived from the decision. If the decisions fail to meet these standards, they will not leave a precedent for it or other courts to follow and the STF will have failed to improve legal certainty. Nowadays, court decisions are simply a sum of eleven opinions.

Take, for example, the Court's decision in the case of stem cell research. Upon examination, it becomes clear that there were several differing opinions. Even if we take the opinion of the justice who served as rapporteur in the case, it remains unclear what portions of the decision were accepted by the majority, which parts were not, and what the precise implications of the decision are. The Court should not reach its decisions through a simple arithmetic

tally of what are often very dissimilar opinions. Brazil's legal system requires decisions that reflect a significant level of consensus attained through intense discussion and deliberation by the STF. There will always be a place for dissenting and concurring opinions, but a majority of the justices should be able to produce a single opinion that all sign, one that they agree on, and that represents the decision of the Court as a whole. This would result in greater consistency among decisions that have serious implications for the political system.

Furthermore, it may be a good idea for the STF to structure its deliberations in three phases. In the first phase, the Court could select a few cases within its broader appeal jurisdiction to take up during each term, while the cases that fall within its concentrated jurisdiction over constitutional matters would be taken up in the order received. The second phase would provide space for public hearings and oral arguments at which the justices' presence would be obligatory. After this phase, the Court would hold sessions to deliberate and judge the cases. After each decision was made, the majority-leading justice would be tasked with writing the Court's opinion. Issuing eleven separate opinions is unnecessary, especially since having many opinions adds little substance and often confuses those who must interpret, apply, or abide by them. A more consistent deliberation process would afford the STF more time to develop clearer interpretive standards and tests, which would provide ballast for more stable jurisprudence—not only for the jurisprudence of the STF, but also for that of judges and courts of first instance (trial courts).

Lastly, justices must follow a more rigorous protocol, which is imperative for the proper functioning of the Court as the final arbiter in a constitutional democracy. Constant interference in public debates and lack of a firm position regarding conflicts of interest have contributed to the drop in the STF's perceived legitimacy. If

the justices are committed to rebuilding the institution's reputation, they must make greater efforts to reach impartial, collegial decisions and exercise greater discretion.

Reducing the court's responsibilities and workload, systematizing the deliberative process, and establishing a clearer paradigm for the Court's majority opinions will not, on their own, resolve the crisis in which the Brazilian STF finds itself. These measures would, however, yield more strongly principled decisions and reduce the number of fringe decisions that have deteriorated the Court's authority in recent years. This authority decline is making the nation's moderator function shift back toward the military. It is essential, for the good health of the Brazilian democracy and to shield the Constitution from the present surge of hostilities, that the STF recover its authority.

EPILOGUE

DEFENSIVE DEMOCRACY IN ACTION: THE ROLE OF THE BRAZILIAN SUPREME FEDERAL TRIBUNAL[289]

INTRODUCTION

The election of a far-right populist to occupy the presidency of the republic in 2018, sturdy supporter of the military regime (1964-85) and hostile to the constitutional model of 1988, has subjected Brazilian legal and political institutions to an intense and rigorous test of resilience. Over four years (2019-2022), President Jair Bolsonaro and his followers promoted a strong process of political and social polarization, attacked the fundamental rights of vulnerable groups, and incited the military against the constitutional powers, with the Supreme Federal Tribunal (STF) as their privileged target. Bolsonaro took advantage of the COVID-19 pandemic to foment a cultural war against science and a systematic boycott of efforts and authorities involved in promoting public health. The electronic ballot box (adopted in 1996), a central tool of the Brazilian democratic process, and the Superior Electoral Tribunal (TSE), responsible for conducting the elections, were also subject to antidemocratic attacks.

Unsatisfied with the defeat, by a small margin, in the 2022 election, radical segments of Bolsonarism promoted an attempt coup on January 8, 2023, when the Supreme Federal Tribunal (STF), the National Congress and the Presidential Palace in Brasilia were invaded and depredated, with the aim of provoking a military intervention, fortunately without success.

Brazilian constitutional democracy survived this superposition of threats and attacks perpetrated by Bolsonaro. Coalition

presidentialism, with all its idiosyncrasies, inhibited constitutional or even legal transformations that could destabilize the core of the "democratic rule of law,"[290] keeping us away from a process of democratic erosion similar to what happened in countries like Venezuela, Hungary, Poland or Turkey. We did not witness in Brazil what is conventionally called "abusive constitutionalism" or "authoritarian legalism".[291] What occurred in Brazil was a subtler form of erosion that we call "authoritarian infralegalism," accompanied by an insidious incitement to military intervention.[292]

Civil society organizations and social movements—which had suffered strong fragmentation during the long crisis that led to the impeachment of President Dilma Rousseff —united in defense of democracy and the rule of law, culminating in the great acts of August 11, 2022.[293] The mainstream media, object of numerous attempts of intimidation, also behaved in a vigilant manner in the Bolsonaro period, fulfilling their duty to denounce abuses of power and ensure the right to information to citizens.

In this extensive arc of protection of Brazilian democracy, the STF has occupied a central role. Without the defensive performance of the Brazilian STF, as well as of the Superior Electoral Tribunal, Brazilian constitutional democracy would hardly have survived. The central objective of this text is to analyze the behavior of Brazilian constitutional institutions, especially the stance of the STF, in the defense of democracy from the authoritarian onslaughts perpetrated by former President Jair Bolsonaro.

THE IDEA OF MILITANT DEMOCRACY

The concept of defensive democracy derives from the idea of "militant democracy". This expression was coined by the German jurist

and political scientist Karl Loewenstein in 1935[294] and later developed and deepened in two seminal articles published in *The American Political Science Review* in 1937.[295] Of Jewish origin, Loewenstein was forced to leave Germany soon after Hitler's rise to power in 1933, seeking refuge in the United States. A former student of Max Weber, he pointed to the predominantly "emotional" nature of fascism, which he considered not as an ideology, per se, but as a simple method of assuming and maintaining power.

These characteristics made it difficult to confront fascism through rational arguments, as well as through the traditional mechanisms of liberal constitutionalism. Loewenstein was particularly critical of the position of Hans Kelsen, for whom democracy, understood as a formal process of decision making, based on the will of the majority, should be "neutral" in relation to the results of the democratic process.[296] He was also critical of the so-called "fundamentalist liberals," for whom the restriction of democratic freedoms, even in the name of defending democracy, consisted of an unacceptable contradiction, even when applied to those who use these freedoms in an abusive and malicious way, with the purpose of eroding liberal democracy.[297]

The concern with the erosion of the republic and the need to create mechanisms for its self-defense is not recent. Machiavelli, in *Discourses*, praises the institution of *dictatorship of* the Romans, as a fundamental remedy for the survival and greatness of the Roman republic, when immerged in "situations of abnormality," remembering that the "*dictator* was appointed for a limited period and with the sole purpose" to ward off the "threats to the republic," in no way interfering "in the constitutional authority of the government" and other institutions, at the risk of usurping them.[298]

With the emergence of the first modern democratic/republican regimes, authors such as James Madison, also draw attention to the risks of a faction becoming majoritarian,[299] threatening the

survival of the republic. These authors emphasize, however, the need for the creation of mechanisms that prevent the erosion of the republic. Madison proposes, above all, that institutions should be arranged in such a way as to prevent factions, defined as groups willing to suppress minority rights, from coming to power, even when they receive majority support. In this sense, federalism and other mechanisms of checks and balances, by favoring the maintenance of a pluralistic society, would contribute to reduce the risks of a tyranny of the majority.

With the crisis of the Weimar republic in the late 1920s and early 1930s, in which the mechanisms of liberal constitutionalism did not prove sufficient in the face of attacks by the enemies of parliamentary democracy, the need to mobilize more forceful tools for the defense of the German republic returned to the center of the constitutional debate.

Even nonliberal authors, such as Carl Schmitt, began to propose that the country's constitution should defend itself against its enemies, restricting amendments that altered the core of the constitutional text,[300] as well as the banning of parties disloyal to parliamentary democracy, such as the Nazi (National Socialist German Workers' Party was the official name of Hitler's party) and Communist parties of Germany. It is important to point out that the Weimar Constitution did not have any unamendable clauses, nor did it explicitly authorize the abolition of parties. Schmitt's argument, however, is that a constitution cannot tolerate its own death, echoing Abrahan Lincoln's warning that the "Constitution is not a suicide pact," which became incorporated into the American constitutional political repertoire.

With Hitler's rise to power in 1933 and his use, albeit abusive, of constitutional means, the question of the defense of democracy against its internal enemies took on a more dramatic dimension. The irony with which Goebbels referred to democracy as the

regime that "granted its mortal enemies the means to destroy it" left no more room for democratic thought to evade the responsibility of formulating a consistent doctrine on the defense of democracy.

Similarly, Hitler's threat in 1930—when testifying as a witness in defense of young officers involved in an insurrectionary case—that "[w]hen we possess the constitutional power, we will mould the state into the shape we hold to be suitable," after all, "the constitution only maps out the arena of the battle, not the goal [...]",[301] make it clear that liberal democracy could no longer remain neutral with respect to the outcomes of the majoritarian process. It was necessary to devise institutional barriers so that extremist groups would not reappropriate the democratic process with the aim of suppressing it.

Although militant democracy does not ignore that the survival of democracies is associated with innumerable political, cultural, economic and social conditions,[302] its focus is different, of a more emergency, conjuncture and institutional nature. The problem of militant democracy are those moments when a majority, seized by strong "emotionalism," is willing to act against the very institutions of democracy and the rule of law, by abusing of its liberties and processes.

When rational dialogue loses its capacity to convince, and ordinary institutions for the defense of democracy, such as the courts or parliament, are themselves under threat, what can be done? How to institutionally contain the effects of these cycles of antidemocratic "emotionalism"? The answer of Hans Kelsen's legal formalism and democratic proceduralism, for example, is simple resignation.[303] Nothing can be done when the majority decides for the end of democracy. The militant response offered by Loewenstein, by contrast, is that when the life of democracy is at stake, it must defend itself with all vigor.

From the experience of the impotence of liberal political theory and legal positivism in the face of Nazi-fascism, Karl Loewenstein proposed that "democracy should become militant," abandoning the passive stance advocated by positivism and "fundamentalist liberalism." Loewenstein's militant democracy therefore consisted less of a complete legal and political doctrine, and more of a call for democracies and the rule of law to establish and deploy self-defense mechanisms as a reaction to the debacle of the Weimar republic.

From the political perspective, it proposes the formation of broad antifascist alliances. In the legal and institutional sphere, it proposes the creation of legal tools to authorize, when necessary, the restriction of rights, the prohibition of political parties or extremist groups in the democratic process, as well as the creation of institutions aimed at debating the action of these groups and movements. The original doctrine of militant democracy only implies, although in a very incipient way, that institutions and the authorities that inhabit them, should assume a forceful and active posture in defense of democracy, whenever it is under threat. This third component of the idea of militant democracy, which received less attention from Loewenstein, is nevertheless fundamental in articulating a broader system of defense of democracy at this juncture. Even if at no point Loewenstein authorizes militant democracy to give "vacation to the law," assigning broad discretion to the institutions responsible for imposing limits on extremist groups, as in Machiavelli's institute of Roman dictatorship—it does advocate that in the fight against fascism "fire should be fought with fire." And that is what makes it particularly controversial.

Numerous objections and criticisms have been raised against the incomplete doctrine of militant democracy. The first one highlights the contradictory and inconsistent nature of the doctrine, as it advocates measures contrary to democracy in order to protect it from authoritarianism. A second objection warns that militant

democracy would be elitist in nature, since it stems from an inherent distrust in the people to determine their own destiny, assigning to elites, especially those entrenched in state bureaucracies, the responsibility for determining which conducts or outcomes of the democratic process can be tolerated and which should be censured. Associated with this objection, some critics charge that the doctrine of militant democracy fails to establish safeguards to prevent those responsible for defending democracy, with powers to restrict rights or even the possibility of political participation by sectors considered radical, from employing their prerogatives in an abusive manner. A third, and very serious objection claims that, by alienating certain sectors of the political system, militant democracy contributes to the radicalization of these sectors, providing an additional reason for their anti-system behavior.

Loewenstein's original formulation, in fact, gives rise to this type of criticism, not least because, more than a robustly constructed theory, it was a reaction to the process of erosion of the Weimar regime and the theoretical impotence of positivism and liberalism in providing a repertoire of tools capable of defending the democratic order.

The relevance of the idea of militant democracy derives, therefore, more from its acute capacity to point to the dangers of democratic erosion, than from the specific proposals it offers to solve the problem. To a great extent, Loewenstein anticipates the so-called "paradox of tolerance," elegantly presented by Karl Popper, when he warned, in 1945, that "unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed… We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant. We should claim that any movement preaching intolerance places

itself outside the law and we should consider incitement to intolerance and persecution as criminal, in the same way as we should consider incitement to murder, or to kidnapping, or to the revival of the slave trade, as criminal".[304]

German Federal Constitution Tribunal Theory of Combatant Democracy

The objections to the idea of militant democracy did not eliminate, however, the imperative to create more robust mechanisms for the self-defense of democratic regimes. The reconstitutionalization processes in Germany, after its defeat in World War II was marked by a strong concern to prevent authoritarian leaders and parties from returning to power by constitutional means. How to prevent majorities hostile to liberal and democratic values from again taking advantage of democratic liberties to destroy them?

The devastating experience of the erosion from within of German liberal democracy in the 1930s gave the apprehensions of militant democracy a special position in the drafting of the constitutions that succeeded totalitarian and authoritarian regimes in these three countries. The Bonn Basic Law (1949), as the German constitution is called, not only incorporated some of the tools proposed by Loewenstein, but expanded and refined his propositions.

In addition to adopting a robust fundamental rights regime, which has the protection of human dignity as its cornerstone (Article 1), and a fairly consensual political system (federalism, multiparty system, strong Constitutional Tribunal, etc.), the Basic Law adopted a number of mechanisms aimed specifically at protecting the democratic order, among them it authorized the restriction of fundamental rights when they are being abused by those whose aim is to threaten the democratic order (Article 18); these include allowing the banning of parties (Article 21, 2) or associa-

tions (Article 9, 2) that threaten the democratic rule of law; and entrenching human dignity, democracy, the federation and the basic structure of the German state by means of clauses that cannot be amended (Article 79, 3).

In the years following its establishment in 1951 in Karlsruhe (Southwest Germany), the Federal Constitutional Tribunal carved out its own doctrine of what came to be known as "combatant democracy" in order to prevent extremist groups from rising to power. It also employed the expressions "defensive democracy" or even "belligerent democracy," in imposing legal impairments to extremists' groups. In 1952, the Tribunal declared unconstitutional the Reich Socialist Party, created in 1949 as a successor to Hitler's National Socialist Party, because it considered that the organization sought to "eliminate the free and democratic order" after analyzing its program, structure, and composition.

For the Tribunal, the constitutional order established in the postwar period represents a conscious effort to maintain a balance between the principle of tolerance of the most diverse political ideas and the defense of certain fundamental values. In light of Germany's recent history, however, the Constitutional Tribunal stated that "the state can no longer give itself the right to maintain an attitude of neutrality toward political parties".[305] In 1956, the Communist Party of Germany would also be banned, for similar reasons.

In the 1970s, the Court again employed the doctrine of "combatant democracy" in a case concerning surveillance of citizens suspected of conspiring against the democratic order. In order to contain extremist groups such as the Badder-Meinhof, the German Bundestag passed an amendment to article 10 of the Basic Law, authorizing the legislature to create surveillance mechanisms that would be exempt from judicial oversight.

When asked about the constitutionality of this amendment, the Constitutional Tribunal, based on the doctrine of "combatant

democracy," declared that "a regulation or instruction that restricts freedoms [...] even if unbeknownst to the (investigated) citizens [...] is valid when the aim is to protect the existence of the state and the free and democratic order." Under the same argument, the need for supervision by the judiciary could be removed if there were some form of "equivalent to judicial control" to be implemented by the administration.[306]

In that judgment, the Tribunal for the first time published the dissenting votes of three justices, strongly criticizing the flexibilization of constitutional guarantees, even if under the argument of defending democracy. As the threats to the constitutional order became less severe in postwar Germany, the combative stance of the Court also decreased, as in the judgment of the request for the banning of the extreme right-wing NPD (National Democratic Party) in 2003, which was dismissed unanimously by the justices (107 BVerfGE 339),[307] albeit on procedural grounds. In this sense, the doctrine of "combatant democracy" must be sensitive to the actual risks to which democracy is exposed in a given political conjuncture.

DEFENSIVE CONSTITUTIONAL DEMOCRACIES

Many countries that became democratic after long periods of authoritarian regimes in the second part of the 20th century, such as Germany, Italy, Portugal, Spain, Brazil, or South Africa, also incorporated in their legal and constitutional systems, to a greater or lesser extent, explicit mechanisms for defending democracy or limiting extremism, stemming from the doctrine launched by Loewenstein and requalified by the German Constitutional Court.

The constitutional architecture of the second and third "waves of democratization," in Huntington's language,[308] adopted robust bills of rights, favored power decentralization, multiparty system, empowered constitutional courts, besides allowing rights restrictions for those who attacked democracy and/or fundamental rights. This defensive constitutional architecture also started to encourage the adoption of a new type of criminal legislation, aimed at punishing acts contrary to democratic institutions and the rule of law, as well as restricting certain types of speech with the potential to destabilize democratic institutions and discriminate against historically discriminated minorities.

In this sense, these new democracies of the second half of the 20th century no longer place themselves in a position of "neutrality" toward those who maliciously use their franchises to attack the liberal and democratic order. Hence one correctly speaks of "defensive constitutional democracies" as a model that emerged from the second and third wave of democratization[309] in Europe, Latin America, Africa, and even Southeast Asia.[310]

With the rise to power, by vote, of numerous populist rulers, of authoritarian matrix, in countries such as Venezuela, Hungary, Poland, Turkey, India, the United States, the Philippines, Brazil, and Nicaragua in recent decades,[311] debates around militant and defensive democracy have recommenced.[312] As Jan-Werner Müller, one of the contemporary scholars of populism and also of militant democracy, argues, despite criticism of Loewenstein's original formulation, there is a certain consensus that democracies not only can but should be concerned with the creation of institutional mechanisms aimed at containing threats and attacks aimed at eroding democracy from within the political system.[313]

The practical challenge is to establish, within a narrow normative space constructed by the robust grammar of fundamental rights,

inherent to a defensive constitutional democracy, a strict regulation on what is and what is not allowed to be said or done in a democracy. What speeches or conducts of a political nature can be prohibited in a regime founded on the idea of tolerance, freedom of expression and pluralism? Who can control such conducts? More than that, it is necessary to establish dogmatic/doctrinal parameters that mark the "institutional posture" to be assumed by the authorities, especially in the judiciary, responsible for the defense of democracy, in situations of attack by majorities that are disloyal to democracy. This posture should be compatible with the premises of the democratic rule of law and, at the same time, powerful enough to contain the cunning strategies of the new authoritarian populists.

The task of those who propose to establish a system of defensive democracy is to design constraints that are "enabling" in nature, that is, that are intended to strengthen democracy by unclogging "democratic channels" through the preservation of democracy's constitutive rights while ensuring the integrity and autonomy of law enforcement agencies.[314]

THE BRAZILIAN MODEL OF DEFENSIVE DEMOCRACY

With the 1988 Federal Constitution, which sealed the transition from military rule to democracy, Brazil adopted a democracy of a clearly defensive nature, which benefited from the concerns brought about by the incomplete doctrine of militant democracy. Since then, the Brazilian political system adopted a strongly "consensual model of democracy",[315] founded on a robust and extensive bill of rights and a strong system of separation of powers, in clear reaction to the previous authoritarian, centralized and hyperpresidential regime that prevailed from 1964 to 1985.

The 1988 Constitution defined coalition presidentialism as the central piece of the political system, by combining presidentialism with multiparty system, by opting for a proportional electoral system for the composition of the House of Representatives. Since its adoption, this model has imposed on all presidents of the republic the need to build broad parliamentary coalitions, if they intend to govern with the minimum of effectiveness, or even not be removed from power through an impeachment process.[316]

The STF was given the role of "guardian" of the Federal Constitution. In its hands were concentrated the attributions of constitutional court, court of cassation, as well as the responsibility for judging all members of parliament and the first level of government officials for criminal behavior. Stand to directly access the STF was extended to political parties, governors and confederation of unions. By giving the STF the prerogative to analyze the constitutionality of constitutional amendments made by the National Congress, the Constitution transferred to the STF an enormous power of veto and supervision over the Brazilian political system.[317]

The Office of the Prosecutor General (PGR) received the specific attribution to carry out "the defense of the legal order, the democratic regime, and the inalienable social and individual interests," by force of article 127, caput, of the *Constituição Federal* (CF).

Among the defensive democracy mechanisms, stand out a very broad and detailed charter of fundamental rights, which incorporates not only civil and political rights, but also economic and social rights, as well as diffuse and intergenerational rights. The bill of rights established mandates for the criminalization of racism, torture, terrorism, as well as "actions by armed groups, civil or military, against the constitutional order and the democratic rule of law" (Article 5, XLII, XLIII and XLIV of the CF).

The party freedom granted by the Constitution, although broad, require that political parties respect for "the democratic regime, the multiparty system, the fundamental rights of the human person," besides explicitly forbidding "the use by political parties of paramilitary organizations" (article 17, caput and paragraph 4, of the CF), and they may be prevented from operating if they violate these principles.

The Bill of Rights and the basic structures of the democratic rule of law were entrenched by a robust list of "carved in stone clauses" (*cláusulas pétreas*), designed to prevent the deliberation of constitutional amendments "tending to abolish" the system of separation of powers, the federation, the democratic electoral process, as well as individual rights and guarantees (article 60, paragraph 4, clauses I to IV, of the Constitution). The STF has been given the task of protecting this broad set of fundamental clauses.

The 1988 Constitution also incorporated elements of democratic self-defense by establishing several mechanisms to deal with different types of crises. In dealing with impeachment, it established as a crime of responsibility of the president of the republic to attempt against the free functioning of the other powers, the exercise of fundamental rights, the enforcement of laws and judicial decisions (article 85, II, III and VII of the CF), among other constitutional principles. It also foresees the possibility of enacting a "State of Defense" and a "State of Siege," which requires congressional approval, when there is a threat to the democratic rule of law, authorizing the restriction of some rights, such as the freedom of assembly, secrecy of correspondence and communication, as well as the making of arrests for crimes against the State, which must be immediately informed to the judicial authority (articles 136 and 137 of the CF).

In the same way, the "federal intervention"—such as the one decreed after the attempt coup on January 8, 2023, with the purpose

of reestablishing order in the Federal District—has as one of its foundations the defense of "the republican form (of government), the representative system and the democratic regime," besides the protection of "the rights of the human person" (article 34, VII, a and b). It is impossible to deny, therefore, the defensive nature of the Brazilian Constitution, as well as the existence of several mechanisms of the so-called toolbox proposed by militant democracy.

The escalation of attacks on Brazilian democracy after the election of Jair Bolsonaro in 2018, led the National Congress to approve in 2021 Law 14,197 (Law for the Defense of the Democratic Rule of Law), which revoked the old National Security Law enacted by the military regime (Law 7,170, of 1983). The new legislation inserted in the Penal Code several criminal dispositions aimed at defending the "democratic rule of law," similar to those incorporated by Portuguese and German legislation.

Besides a chapter on crimes against national sovereignty, which did not exactly bring novelties, Law 14.197/21 innovated by establishing the following criminal dispositions:

> Violent Abolition of the Democratic Rule of Law
> Article 359-L – To attempt, by the use of violence or serious threat, to abolish the Democratic Rule of Law, preventing or restricting the exercise of constitutional powers.
> Coup d'état
> Article 359-M – To attempt, by the use of violence or serious threat, to depose the legitimate constituted government.
> Interruption of Electoral Process
> Article 359-N – Impeding or disrupting the

> election or the verification of its results by improperly violating the security mechanisms of the electronic voting system established by the Electoral Justice.
> [...]
> Incitation
> Article 286 – Publicly inciting the practice of crime [...]
> […] The same penalty is applied to anyone who publicly incites animosity among the Armed Forces, or between the Armed Forces and the constitutional powers, civil institutions, or society.

With the introduction of these provisions in the criminal legislation, the Brazilian system of defensive democracy was strengthened, paradoxically, by a conservative Congress, in a political conjuncture characterized by permanent attacks by the president of the republic himself and his supporters. Although Bolsonaro vetoed some provisions of the new legislation, which regulated the dissemination of antidemocratic messages or created a subsidiary criminal action in case of omission by the General Prosecutor of the Republic to bring charges against those who commit crimes against the democratic rule of law), the system for the defense of democracy gained greater coherence and robustness.

Criminal legislation has the important function of distinguishing, in a stricter way, illicit conduct from licit conduct, restricting judicial discretion in imposing limits on fundamental rights, such as freedom of speech or expression. These legal restrictions must necessarily pass through the filter of constitutionality. The fact is, however, that in the Brazilian case the Constitution has given the

legislator, as well as those who have the responsibility to defend it, a clear mandate. Its defensive nature leaves no room to contest both the legitimacy of criminalizing certain antidemocratic conducts, with the consequential restriction of rights, and an authorization for bodies such as the STF and the PGR to assume a defensive posture.

By defensive institutional posture we understand an active and vigorous behavior of legal officials and the Judiciary in defense of democracy, extracting the full protective potential from the normative framework of the defensive democracy, with the objective of containing attacks and concrete threats to the democratic order.[318]

Finally, Brazil, like many other democratic countries, has the challenge of regulating antidemocratic conduct, as well as those of a discriminatory nature, in the context of social media, in order to adjust its system of defense of democracy to the new virtual agora.

AUTHORITARIAN POPULISM: BOLSONARO'S STRATEGIES

Jair Bolsonaro's authoritarian populism bet on three strategies to subjugate Brazilian constitutional democracy: *visceral polarization*, *authoritarian infralegalism*, and *incitement of the military* against civilian powers. The combination of these three strategies imposed an "existential risk" to Brazilian democracy.[319]

The *visceral polarization* has a strongly emotional and antipluralist nature. Bolsonaro presented himself since the beginning of his campaign as an authentic representative and exclusive interpreter of the will of the people, denying legitimacy to all those who were willing to contest him. His positions have always sought to transform divergences, inherent to pluralist societies and the democratic process, into insoluble confrontations, denying credibility

to his opponents and even to the institutions that dared to criticize or impose limits on him.

As Ricardo Barbosa Jr. and Guilherme Casarões point out, bolsonarism has promoted a profound change in the way the Brazilian political debate has come to be organized. Its "radical right-wing populism"[320] was structured from a fusion of Christian nationalism, reactionary militarist patriotism, and, I would add, a selective radical libertarianism, appropriating these multiple platforms to attack progressive moral, political, social, environmental, and economic positions.

It also sought to appropriate positive values of constitutional democracy, such as freedom of expression and demonstration or the "auditable vote," in order to distort and attack the rights of vulnerable groups and the integrity of the very institutions of constitutional democracy. Through the intensive use of social media, with the systematic dissemination of deliberate lies, bolsonarism invested against pluralism, stigmatizing those in opposing camps as "communists, globalists, cultists of gender ideology, enemies of the homeland, corrupt, and anti-Christian".[321] The same kind of delegitimizing discourse was reserved for the electronic ballot boxes.[322]

This visceral polarization was immensely enhanced by the intensive employment of social media, as Bolsonaro built "a relevant alternative public sphere, controlling an important disinformation network",[323] of a predominantly emotional nature. In this way Bolsonaro was able to frayed the democratic fabric, forging an unhospitable environment to build political consensus and tolerant coexistence intrinsic to a pluralistic society.

The second strategy adopted by the Bolsonaro government was *authoritarian infralegalism*. Like the other authoritarian populists of this historical period who came to power by vote, Bolsonaro sought to employ the law and its institutional prerogatives not only

to advance the interests and worldview of the radical right, but also to weaken the resilience of institutional control systems.

The difference between the legal method employed by Jair Bolsonaro and other populists, such as Hugo Chávez in Venezuela or Viktor Orbán in Hungary, stems from the fact that Bolsonaro had to deal with a rather consensual constitutional system endowed with numerous mechanisms to defend democracy and constitutional values. Unable to form a solid congressional coalition, Bolsonaro did not have the strength to pass constitutional amendments that would alter the progressive nature of numerous provisions of the 1988 Constitution.

Likewise, he was not able to change the voting system, which would eventually give him advantages in the frustrated attempt for reelection in 2022. He also failed to establish the necessary consensus in the National Congress to promote changes in several ordinary laws, such as the Disarmament Statute, the Civil Code, the Forest Code, and countless other laws that concretize constitutional values and principles, incompatible with the postures of the radical right that he represents.[324] In this sense, Bolsonaro was the most powerless president of the New Republic, from a legislative perspective.

FIGURE 1. **Coalition Presidentialism: Failure in the Legislative Arena**

SUCCESS RATE

How many bills proposed by the President became law

56,7%
1995-jun. 1998

46,2%
1999-jun. 2002

62,2%
2003-jun. 2006

47,1%
2007-jun. 2010

59,7%
2011-jun. 2014

37,9%
2019-jun. 2022

DOMINANCE RATE

How many bills that became law were proposed by the President

60%
1995-jun. 1998

58,6%
1999- jun. 2002

62,1%
2003-jun. 2006

36,8%
2007-jun. 2010

35,1%
2011-jun. 2014

28,3%
2019-jun. 2022

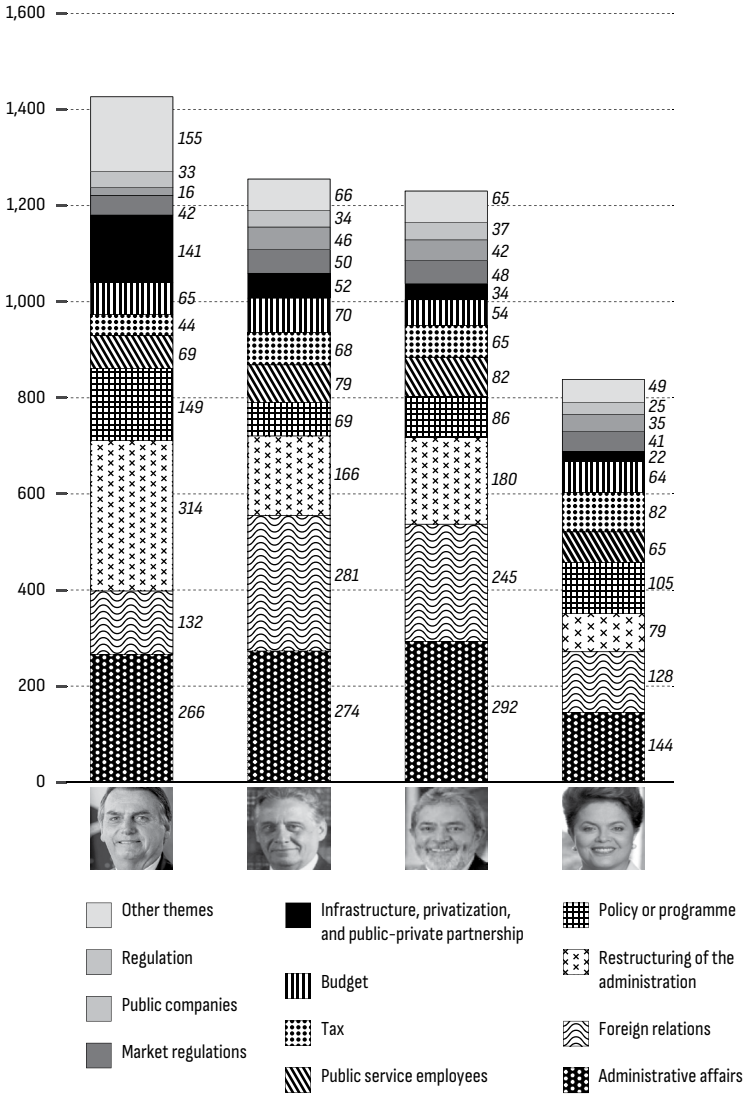
*Last update: 10.06.2022 – Including provisory measures (*medidas provisórias* – MPVs), bills (*projetos de lei* – PLs), complementary bills (*projetos de lei complementar* – PLPs), and proposed amendments to the Constitution (*propostas de emendas à Constituição* – PEC); excluding National Congress bills (*projetos de Lei do Congresso Nacional* – PLNs).

Source: Oscar Vilhena Vieira, "O STF e a Defesa da Democracia no Brasil," *Journal of Democracy* 12, no. 1 (June 2023): 7–55, using data from Oscar Vilhena Vieira, Rubens Glezer, and Ana Laura Pereira Barbosa, "Infralegalismo Autoritário: A Estratégia do Governo Bolsonaro para Implementar Sua Agenda Iliberal Sem Apoio no Legislativo," in *Estado de Direito e Populismo Autoritário: Erosão e Resistência Institucional no Brasil (2018-2022)* (São Paulo: Editora FGV, 2023).

In view of his weakness in the National Congress, Bolsonaro chose to employ, in an intense and abusive manner, the institutional prerogatives of president of the republic to cause the erosion of certain areas of the constitutional order, neutralize institutions and public policies of a progressive nature inscribed in the Constitution and in ordinary laws, as well as promote the conservative, predatory or even authoritarian interests of the different groups that supported him.

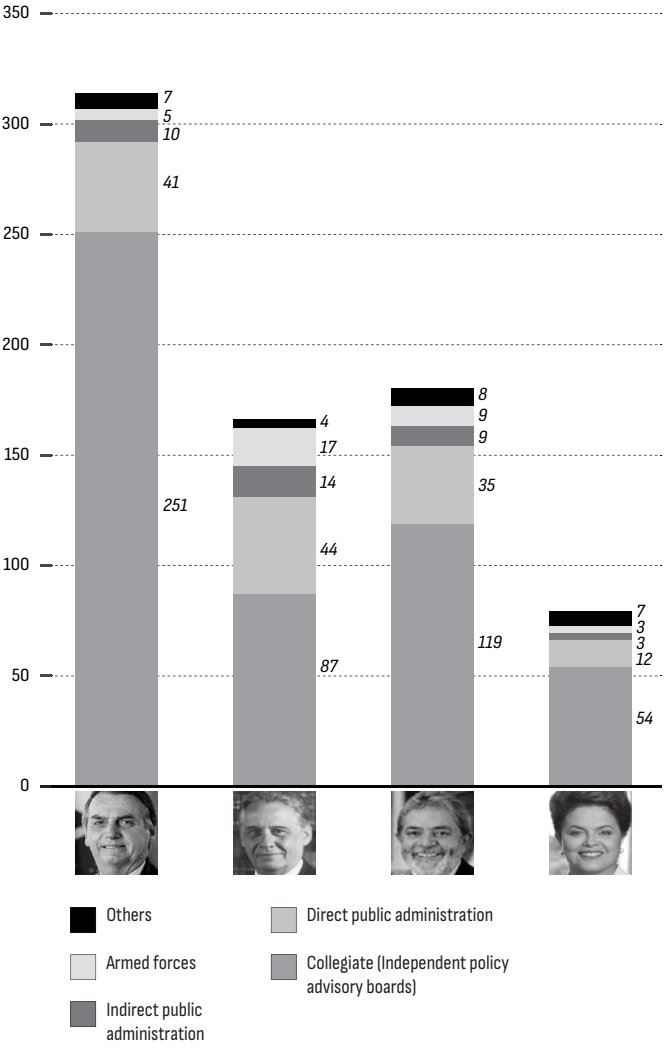
This was done by abusively issuing infralegal acts, contrary to ordinary legislation or the constitutional order; by appointing authorities who were disloyal to the legal purpose of the public institutions they came to command; by adopting para-institutional actions, such as illegal orders issued broadcast via "lives" or social networks; by constraining the budget of several agencies; and by changing the competencies or composition of governmental bodies and councils.

FIGURE 2. **Total Legislative Decrees by Theme**



Source: Vieira, "O STF e a Defesa da Democracia no Brasil."

FIGURE 3. **Management Body Affected by Restructuring**



Source: Vieira, "O STF e a Defesa da Democracia no Brasil."

Bolsonaro's third strategy was to *incite the military* against the constitutional powers. This resource, repeatedly employed in our republican history, also involved an expansion of the participation of military personnel, as well as police and other armed segments, in political activities, both in the Legislative and Executive branches. During the campaign, Bolsonaro made use of his military background and as a defender of the corporate interests of the armed classes, systematically resorting to barracks values and aesthetics, presenting himself as a representative of the "military party."

His government had eight ministers of military origin, surpassing the participation of uniformed men in the ministries of the military governments themselves (1964–85). There was also a 33% increase in the number of active militaries in commissioned positions, in relation to previous governments, according to data from the Ministry of Finance.[325]

From the perspective of destabilizing constitutional institutions, the most serious was the insidious way he incited the Armed Forces against the constitutional powers, especially against the Supreme Court. The threats and incitement started even before the inauguration, when his son, federal deputy Eduardo Bolsonaro, stated that all it took was a "soldier and a corporal" to close the Supreme Court, between the first and second round of the 2018 elections.[326] Since the beginning of his term, the former president was incisive in his criticism of the Justices of the STF and the institution itself. Many were the acts of hostility to the democratic order.

On April 20, 2020, the president of the republic participated in a demonstration in favor of military intervention in front of the Army Headquarters in Brasilia, where there were banners calling for the closure of the National Congress and the Supreme Court. In August 2021, with the objective of intimidating the STF, Bolsonaro ordered fighter planes to fly over its building, causing a military

crisis that would culminate in the replacement of the three commanders of the Armed Forces, as reported by former Defense Minister Raul Jungmann.[327]

On September 7, 2021, Bolsonaro sent a message to the then president of the STF, Justice Luiz Fux: "Either the head of this Branch will frame his [Justice] or this Branch may suffer what we don't want [...] whoever acts outside the [Constitution] will be framed or will ask to leave," referring to Justice Alexandre de Moraes, who had already presided over several investigations into the criminal conduct of the president and supporters.[328]

The incitement of the military against the STF and the Superior Electoral Court escalated in 2022, the year of the presidential election. The process of disqualifying the electronic ballot boxes was heightened by the manifestation of the military in the commission formed by the Superior Electoral Court to evaluate the integrity of the electronic ballot boxes. As the president of the republic pointed out, Justice Luís Roberto Barroso, who presided over the TSE at the time, when inviting a military man to be part of the commission, did not take into consideration that Bolsonaro was the commander of the Armed Forces, and, therefore, all military men and women were obedient to him.

The result was a coordinated action to sabotage the electoral process, which resulted in a proposal by the president to hold a parallel vote count, to be done by the military, for the 2022 elections, in clear violation of the exclusive competence assigned to the Electoral Justice to conduct the electoral process.

On August 8, 2022, Justice Edson Fachin, then president of the Superior Electoral Tribunal, put a stop to the attempts to disrupt the electoral process, when he declared that the questioning made by the pro-Bolsonaro military at the TSE was unfounded and had been filed extemporaneously. More than that, Fachin excluded the officer who took advantage of his condition as a member of

the electoral process oversight commission to spread false news aimed at discrediting the polls.[329]

The coordination of these strategies and multiple threats posed enormous challenges to civil society, opposition parties, the media, and institutions committed to the defense of democracy. In this article, as already stated, the focus is on the conduct of the Supreme Court, which should not diminish the actions of other institutional spheres and sectors of civil society that have also taken a stance committed to the defense of democracy.

STF: FROM RESPONSIVE POSTURE TO DEFENSIVE POSTURE

A favorite target of attacks by the former president and his supporters, the STF took a reasonably restrained position at the beginning of the Bolsonaro government. It even proposed a "republican pact" among the branches of government. As the government's conduct proved increasingly hostile to the Constitution, the STF's behavior also changed, and it began to respond more quickly and robustly to demands—many of them conveyed by strategic litigation—aimed at protecting fundamental rights and other structural principles of the constitutional order.[330]

When the more direct attacks on the Tribunal's jurisdiction and later on the electoral system became more incisive, the STF went a step beyond responsiveness, assuming a properly defensive posture, as it became even more forceful in the application—to its full extent—of the normative framework of "defensive democracy," as well as in assuming a proactive posture, aimed at suppressing the omission or inertia of the other actors in the Justice system, who would leave democracy without the proper institutional legal protection.

The involvement of the STF in the long and complex political crisis that Brazil has immersed itself in since 2013, which led to the impeachment of President Dilma Rousseff in 2016 and the arrest of former President Luiz Inácio Lula da Silva in 2018, culminating with the election of a far-right populist to occupy the Presidential Palace, has raised doubts about the Tribunal's ability to contain a president of the republic so averse to constitutional protocols.

On the one hand, the STF had been heavily criticized (but never threatened) by the left since the *Mensalão* trial in 2006. This criticism became even more acute with the beginning of the *Operation Car Wash* in 2014. By endorsing the operation that led to the imprisonment of former president Lula, the STF became the object of severe censure by jurist legal experts.

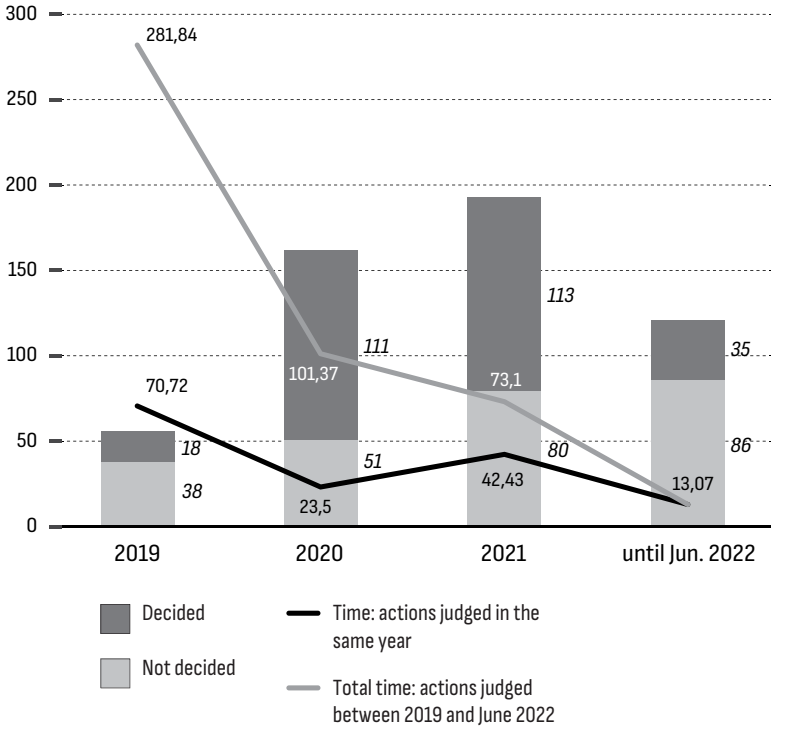
On the other hand, conservative and extreme right-wing sectors have long accused the STF of maintaining an "activist" and "progressive" stance, especially in the field of customs. With the change of position in relation to *Operation Car Wash*, which began in the Second Panel of the Supreme Court, reviewing the understanding of various topics, such as the possibility of imprisonment after conviction in second instance, the hostility of groups on the right, including the military, toward the STF was potentiated.[331]

The famous tweet by General Villas Bôas, then commander of the Army, threatening the STF if it were to allow the candidacy of Luiz Inácio Lula da Silva in the 2018 elections, exemplifies the tension not only between right-wing and extreme right-wing groups and the STF, but also a growing backlash from the Armed Forces—resentful of having been stripped of their self-assigned moderating role—toward the Tribunal.

As highlighted in a previous study,[332] there was an appreciable difference in the behavior of the STF between the first year of the Bolsonaro government (2019) and the following years, not only in

relation to the pace of decision making and the collegiality with which the Tribunal began to decide, but especially in terms of the forcefulness of its decisions. In other words, there was a clear change in the posture of the STF. "While in 2019, only 33.9% of the actions filed against the Government had a first decision rendered in the same year, in 2020, this number rises to 68.5%. In addition, the average time between the filing of the lawsuit and the first decision decreased from 2020: from 70.72 days in 2019, it went down to 23.5 in 2020."

FIGURE 4. **Delay in the Trial of Lawsuits in the STF Docket (2019-Jun. 2022)**



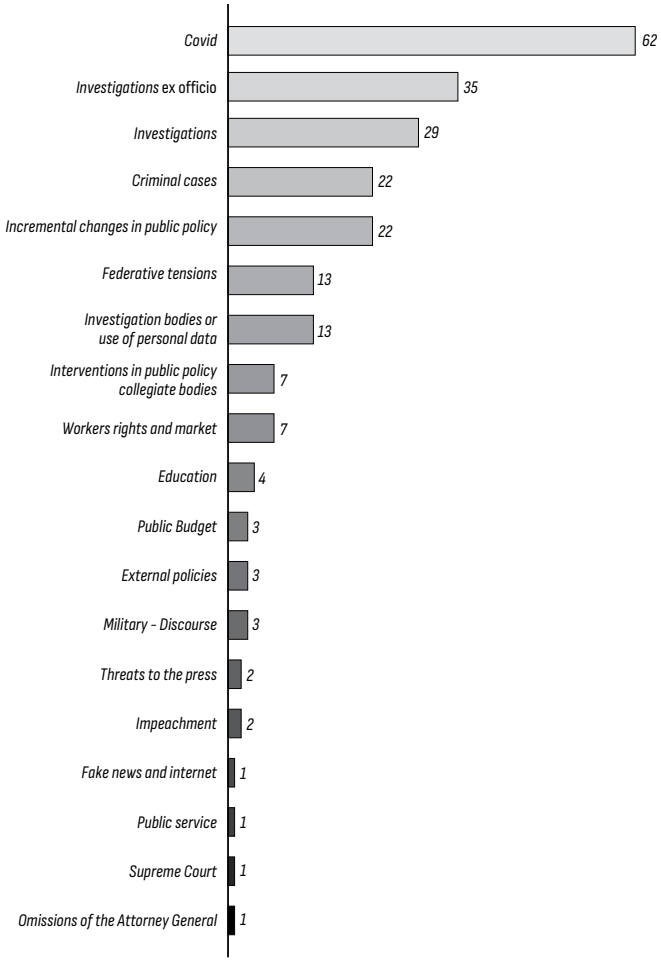
Source: Oscar Vilhena Vieira, Rubens Glezer, and Ana Laura Pereira Barbosa, "Supremocracia e Infralegalismo Autoritário," *Novos Estudos CEBRAP* 41 (January 9, 2023): 591–605.

It is important to highlight that several actions proposed by the Bolsonaro administration in 2019 on central issues concerning human rights and the environment, such as the decree that made it impossible for the National Mechanism for the Prevention and Combat of Torture to function (ADPF 607),[333] the prohibition

of social visitation in maximum security establishments (ADPF 579),[334] the decrees that relaxed access to firearms and ammunition (ADPF 581)[335] or the release of pesticides (ADPF 559),[336] were not immediately faced by the STF in that first year of government. This does not mean that the court remained inert, as in ADI 6121,[337] in which the STF partially overturned Decree 9.759/19, which extinguished all public administration participatory collegiate bodies.

Ana Laura Barbosa, researcher of the *Supremo em Pauta* Project, at FGV School of Law in São Paulo, prepared a database with 198 actions and inquiries in progress at the STF during the Bolsonaro period, which had as their object acts and conduct considered hostile to the Constitution and its principles, carried out by the then president and his supporters. These actions and inquiries generated 231 decisions, between January 2019 and December 2022. The analysis of the merit of these actions justifies pointing out the central role assumed by the STF in the defense of the constitutional order, even though it has not been able to contain part of the process of institutional erosion promoted by the Bolsonaro administration. More than 50% of the decisions made by the Supreme in this context refer to the government's conduct during the COVID-19 pandemic, added to the investigations and inquiries related to antidemocratic acts, as can be seen in the Figure 5.

FIGURE 5. **Themes of the STF Decisions (in the 231 Decisions that Comprise the Research Universe)**



Source: Vieira, "O STF e a Defesa da Democracia no Brasil."

Responsive Posture

The response of the STF to Bolsonaro's attacks against fundamental rights and public policies of constitutional origin was robust. The defense of vulnerable groups, the protection of public agencies against attempts at co-optation and instrumentalization for illegal purposes and, above all, the forceful action during the pandemic period, show that the STF has taken an increasingly "responsive" posture in the face of hostility to the 1988 Constitution.

In the very first months of the government, the STF suspended the validity of decrees and provisional measures that sought to restrict fundamental rights. It prevented the suppression of various councils for social participation, such as the National Council for the Rights of the Child, which had been created by law and could not be dismantled by decree (ADPF 622; ADPF 623; ADPF 747);[338] it prevented the transfer of National Foundation for the Indigenous People (FUNAI) to the Ministry of Agriculture, where the greatest resistance to indigenous rights was concentrated (ADI 6172);[339] defended major newspapers against an attempt to financially strangle them (ADI 6229);[340] suspended the effects of an ordinance authorizing the tacit registration of pesticides (ADPF 656 and 658);[341] invalidated various decrees issued with the aim of relaxing access to firearms (ADI 6675 and others);[342] suspended a decree of a discriminatory nature regarding the education of children with special needs (ADI 6590);[343] suspended a health policy that discriminated against the LGBTQ+ population (ADPF 787);[344] restricted the access of religious groups to the lands of isolated indigenous peoples (ADI 6622);[345] invalidated the decree that made the functioning of the National Mechanism for the Prevention and Combat of Torture unfeasible (ADPF 607);[346] invalidated the provisional measure that allowed simplified environmental licensing

(ADI 6808);[347] and prohibited the contingency of resources for the National Fund for Climate Change (ADPF 708).[348]

Regarding the capture and abusive employment of public institutions to favor the interests of the incumbent government, in confrontation with constitutional norms, the STF prevented the appointment of a Federal Police director aligned with Bolsonaro, which could compromise the institution's autonomy to investigate government acts (MS 37097);[349] prohibited the disclosure of a dossier, with personal information, aimed at exposing and intimidating Bolsonaro's critics within the security forces (ADPF 722);[350] established the due interpretative contours of article 142 of the CF, making it clear that the Armed Forces have no "moderating function" in the political system (MI 7311 and ADI 6457);[351] limited the Military Police's action in Rio de Janeiro communities during the pandemic (ADPF 635);[352] restricted the sharing of information within the intelligence system, establishing public interest criteria for its practice (ADI 6529);[353] defended the autonomy of federal universities (ADPF 759; ADI 6565);[354] and restricted amendments by the rapporteur employed to execute the so-called "secret budget" (ADPF 850 and 851)[355] in order to secure parliamentary support.

The most forceful action by the STF, however, came in response to the irresponsible, denialist, antiscientific, and in many ways cruel stance taken by the Bolsonaro's government during the COVID-19 pandemic, as well as the federal government's attempt to prevent states and municipalities from carrying out measures to prevent the virus and protect public health.

Since the beginning of the pandemic, the STF has taken decisions aimed at ensuring access to information related to the health emergency (ADI 6351 and others);[356] suspended the government's campaign against policies of social isolation established by states and municipalities (ADPF 688; ADPF 689);[357] imposed defeat on the federal government by authorizing other federal entities to

conduct actions and take measures to prevent and combat the virus, also establishing that the government should adopt scientific criteria in combating the pandemic (ADPF 672);[358] suspended a provisional measure that flexibilized worker protection in the face of the COVID (ADI 6342 and others);[359] forced the Ministry of Health to disclose data (ADPF 690);[360] determined that the government should adopt a set of measures to protect indigenous populations (ADPF 709),[361] as well as *quilombola* (maroon) populations (ADPF 742);[362] overturned the ban on the mandatory use of masks (ADPF 714);[363] confirmed the mandatory nature of vaccination (ADI 6586 and ADI 6587);[364] released the importation of vaccines by states and municipalities (ADPF 770);[365] forced the Union to take emergency measures in the case of the health crisis installed in Manaus (ADPF 756);[366] granted an injunction determining the installation of a Parliamentary Investigation Commission (CPI) in the Federal Senate on the government's actions in the pandemic (MS 37760);[367] suspended a federal government order prohibiting employers from requiring proof of vaccination (ADPF 898),[368] as well as an order of the Ministry of Education (MEC) prohibiting the requirement of proof of vaccination for returning to school (ADPF 756);[369] and finally the STF did not recognize the ADPF proposed by the federal government to prevent vaccination campaigns for children and adolescents in the states (ADPF 756).[370]

This set of decisions shows that the STF has not refrained from controlling abuses and violations of fundamental rights by the Bolsonaro government, as well as negligence in the implementation of public policies with constitutional roots. This does not mean, however, that numerous issues have not passed beyond judicial control, with strong impact on the violation of rights of vulnerable groups and erosion of the law enforcement system itself.

Defensive Posture

The posture of the STF became defensive as a result of the escalation of attacks on the Court and on democracy. The fact that no solid barrier was stablished by ordinary control mechanisms of intelligence and law enforcement, imposed on the "guardian" of the Constitution the need to supply the omission of control agencies, determining the opening of a series of *ex officio* inquiries to supply these omissions.

On March 14, 2019, invoking the provisions of article 43 of the Internal Rules (*Regimento Interno*) of the STF, the president of the STF, Justice Dias Toffoli, determined the opening of a criminal investigation (Inquiry 4,781)[371] in order to investigate "fraudulent news, known as Fake News, slanderous *accusations*, threats and offenses coated with *animus caluniandi, diffamandi and injuriandi,* which affect the honorability and safety of the Supreme Court, its members and family members," appointing Justice Alexandre de Morais to conduct the investigation (Portaria GP no. 69, 14/03/19).

This can be considered the first step of the STF toward a more combative posture in defense of its jurisdiction. Although not explicitly invoking the expression "defensive democracy," in his short manifestation in plenary aimed at justifying the opening of this heterodox inquiry, Dias Toffoli made it clear that "there is no democracy without an independent judiciary and a free press," which is why offensive acts aimed at intimidating the Court cannot go unnoticed.

President Toffoli's decision was a reaction to increasing threats and acts of intimidation against members of the Court, as well as the manifestation of a member of the Public Prosecutor's Office, published on the website *O Antagonista*, with "false" and "offensive" and "threatening" information regarding members of the Court.

In the same context of attacks on the STF, more radicalized sectors to the right began to propose the impeachment of members of the Tribunal, with special focus on Justice Gilmar Mendes, due to his repositioning in the case of *Operation Car Wash*.

The opening of this investigation, *ex officio*, generated a strong reaction from the Attorney General's Office, the press, and even from the most conservative sectors of the legal community, insofar as it imposed an act of censorship on a means of communication, as well as an unusual investigation, given the characteristics of the Brazilian accusatorial system.

The political party Rede Sustentabilidade filed an ADPF (ADPF 572)[372] arguing, in summary, that the president of the Supreme Court, in addition to encroaching on the competence of the Executive and the Public Ministry, which should initiate an investigation, would be violating the principle of due process of law, personal freedom and freedom of expression, legality, as well as the provisions of Article 5, XXXVII, which prohibits judges and tribunals of exception. The initial petition pointed out that "legal entities" could not be victims or "passive subjects" of crimes against honor, according to the Supreme Court's own jurisprudence, which would render the investigation devoid of cause. Finally, the petition pointed out violation of the principle of "natural judge," to the extent that the rapporteur, Alexandre de Moraes, was chosen by the president of the STF to conduct the investigation.

ADPF 572, which had Justice Edison Fachin as rapporteur, was only adjudicated in June 2020. During this span of time other acts and threats to the STF, in addition to those that motivated the opening of Inquiry 4,781[373] in March 2019, entered the horizon of this judgment. In judging ADPF 572, the STF outlined its doctrine of defensive democracy. After reporting the manifestations of PGR, Attorney General's Office (AGU), and

the information provided by the Justice Alexandre de Moraes, appointed to preside over the inquiry, it converted the trial of the preliminary injunction into a trial of merit, for considering the case sufficiently instructed.

In his vote, Justice Fachin analyzed each of the alleged violations of the Constitution, with particular emphasis on the issues related to freedom of expression and the competence of the president of the STF to start, *ex officio*, a criminal investigation. The central point of Justice Fachin's vote, however, was to outline a robust justification for the defensive posture that the STF would take throughout the Bolsonaro administration:

> No provision of the Constitutional text may be interpreted or practiced in such a way as to allow groups or persons to suppress the enjoyment and exercise of fundamental rights and guarantees. No provision may be interpreted or practiced in such a way as to exclude other rights and guarantees that are inherent to the human being or that arise from the representative democratic form of government.
>
> This line of thinking echoes what Karl Loewestein called militant democracy (*streitbare Demokratie*), but instead of simply abolishing groups or parties, as the German constitutionalist's thesis is sometimes read, they restrict its application to acts that, by abusing the rights and guarantees protected by the Constitution, invoking them under the pretext of political ideology, aim

> to abolish or restrict the rights of certain people or groups.
> [...]
> There is no democratic order without respect for judicial decisions. There is no law that can justify the noncompliance with a judicial decision from the last instance of the Judiciary. After all, it is the Judiciary Branch that is responsible for ruling out, even against constitutional majorities, any measures that suppress the rights guaranteed in the Constitution. Therefore, the defense of dictatorship, the closing of the National Congress or the Supreme Federal Tribunal are inadmissible in the democratic rule of law. There is no freedom of expression that supports the defense of these acts. Whoever commits them needs to know that he will face constitutional justice. Whoever practices them needs to know that the Supreme Federal Tribunal will not tolerate them.[374]

While establishing that freedom of expression occupies a "preferred position" in the Brazilian constitutional system, Justice Fachin argues that it is necessary to admit the possibility of restricting this right, when it is abused, exposing democracy to "effective risk," provided that this restriction is put into practice in an exceptional and restricted manner. These hypotheses are foreseen in the law, such as those that prohibit hate speech, anti-Semitic speech, the practice of racism or child pornography,

but also those that impose an "effective risk" to the institutions of democracy or to the fundamental rights regime.

> In the initial phase of deliberation, that comprises the opening of the investigation, I believe that its object should be limited to manifestations that denote an ***effective risk*** [my emphasis] to the independence of the Judiciary ([*Constituição da República Federativa do Brasil*] CRFB, art. 2), by way of threat to its members and, thus, risk to the established Powers, to the Rule of Law and to democracy. Attacks against one of the Powers, inciting its closure, death, the imprisonment of its members, disobedience to its acts, and the leaking of classified information are not, finally, manifestations protected by freedom of expression.[375]

The second defensive aspect of the vote casted by Justice Edson Fachin refers to the possibility of the president of the Court to initiate criminal investigations. For Justice Fachin, the omission of the other organs of control would leave the constitutional system vulnerable to attacks from radical sectors. Therefore, the STF should seek to overcome this omission and for this there was a legal authorization, provided for in the Rules of Procedure of the STF itself:

> It is verified, *in casu*, unequivocal absence of proper action of the organs of control

> with the purpose of ascertaining the intention of damaging or exposing to danger of damaging the independence of the Judiciary and the democratic state of law. Hence, article 43 of the [*STF Bylaws*] RISTF applies: in the event of an omission by the control organs, to investigate, within the limits of the nature of the informative piece, any injury or danger of injury to the independence of the Judiciary and to the democratic rule of law.[376]

Likewise, the requirement that the crime had been committed at the "site" or "premises" of the STF would not offer an obstacle, since "[...] the diffuse nature of crimes committed over the internet [...] allows the concept of the site of the Tribunal to be extended [...]"; the crimes investigated in the inquiry having a "formal nature," although committed in the virtual environment, "are also consummated" within the premises of the STF.

In the conclusion of his vote, Justice Edson Fachin set a series of conditionals to the Supreme's action, reaffirming the need to demonstrate "effective risk" to the independence its jurisdiction, making it clear that the exercise of defensive democracy by the Court could not take place at the margin of fundamental rights and guarantees, stressing that:

> There is no law in the abuse of rights. The antidote to intolerance is democratic legality. It is necessary to be careful that the dose of the medicine does not turn it into a poison.

> Dissent is inherent to democracy. The intolerable dissent is precisely that which seeks to violently impose consensus.[377]

In this way, Justice Fachin demarcates that the defensive posture in defense of democracy cannot take place outside the normative structures of the Brazilian constitutional democracy. There are rules and powers to be employed in the defense of democracy. The defensive posture indicates that these rules and powers must be employed vigorously and that those responsible for them must be vigilant, including with the traps that are set to neutralize the system of defense of the Constitution, but never outside the field of protection of fundamental rights.

In line with the rapporteur's vote, Justice Gilmar Mendes built a broad argument about the abusive use of freedom of expression on social networks, done systematically and with the employment of robots, in order to undermine the legitimacy of the electoral process and other democratic institutions. According to Justice Gilmar Mendes, this kind of strategy cannot find protection in the system of fundamental rights. He also quotes directly from the German experience:

> Germany is characterized by many as a militant democracy. In this sense, according to Ronald Krotoszynski: "any speech that aims at the destruction of democratic government has no protection under the Basic Law."[378]

Asserting that Constitutional Tribunals have an obligation to ensure the independence of their own jurisdictions, he emphasized that it is imperative for the STF to assume a political function:

> [...] when what is at stake is the political substance of the Constitution, the Constitutional Tribunal is legitimized to act on an equal footing with the other constitutional bodies [...] [379]

With the exception of Justice Marco Aurélio, who accepted the various objections of the ADPF plaintiff, including that there was an irreparable defect of origin, since the STF had "usurped" the exclusive function of PGR, the other justices of the STF endorsed the vote of the reporting Justice, Edison Fachin. This decision played a fundamental role, as it expressed the foundations on which the STF began to act to contain antidemocratic actions, in a context in which the main control bodies had not been fulfilling their tasks.

Inquiry 4,781,[380] of March 14, 2019, was followed by no fewer than eight more inquiries, directly related to attacks on the democratic regime and its institutions. Inquiry 4,781 itself would be renewed, several times, in view of the ambiguous position of PGR regarding Bolsonaro's government.

In these inquiries several investigation fronts were opened, such as the one called "hate cabinet," which included the search and seizure at the addresses of figures very close to the former president of the republic, such as businessman Luciano Hang and former congressman Roberto Jefferson. Diligences were authorized to investigate the leaking of personal information of the STF justices; the arrest of Federal Deputy Daniel Silveira, who would

be sentenced on April 20, 2022, for defending antidemocratic measures and violent actions against the justices. The congressman would later be pardoned by the president of the republic, in a clear sign of affront to the STF's decision. The pardon would be annulled in May 2023 by the STF.

On April 20, 2020, at the request of PGR, Inquiry 4,828[381] was opened, known as the inquiry into "antidemocratic acts," to investigate the facts that occurred on April 19, in light of the "agglomeration of individuals in front of the Brazilian Army barracks, where claims of animosity between the Armed Forces and national institutions were reported," which, at the time, consisted of possible crimes under the National Security Law. This same inquiry later went on to investigate the shooting of fireworks at the STF headquarters on June 13, 2020.

On April 28, 2020, also at the request of the PGR, STF opened Inquiry 4,831,[382] this one originally presided over by Justice Celso de Mello (who retired) and later by Justice Alexandre de Moraes, to investigate the accusations made by the then Minister of Justice Sergio Moro, about President Bolsonaro's attempt to interfere with the Federal Police in order to serve the interests of his presidency and his family members.

In this inquiry, Justice Celso de Mello ordered the release of a ministerial meeting video, from April 22, 2020, in which the then Minister of Education attacks the STF and the former Minister of the Environment proposes to take advantage of the pandemic to "pass the buck" on environmental legislation, in addition to the president himself constraining the Minister of Justice to accept a politically motivated change in the Federal Police.

On July 1, 2021, Inquiry 4,874[383] was opened, following the filing request by the PGR for Inquiry 4,828,[384] which had the purpose of investigating antidemocratic acts. The difficulty in opposing the successive filing requests promoted by the PGR led to the

solution proposed by Justice Alexandre de Moraes—endorsed by the majority of the Court—to open new inquiries, on the understanding that the PGR's omission would jeopardize the continuity of the investigations. In this way, a defensive position was imposed, aimed at mitigating the capture of control agencies by president Bolsonaro.

This investigation determined the arrest of Allan do Santos, a blogger and youtuber who disseminates the radical ideas of Bolsonaro, who fled to the United States; the blocking of several bank accounts of bloggers involved in antidemocratic activities; as well as an official letter to Google, to provide information about the monetization of several channels involved in the dissemination of fake news.

On November 10, 2021, the Justice Alexandre de Moraes determined the removal of the former Federal Deputy Roberto Jefferson from the presidency of the PTB (political party), for detecting evidence that he was using the structure and resources of the party to commit antidemocratic activities, considered criminal. In this case, the PTB is using one of the typical tools of militant democracy, by intervening in the sphere of party autonomy. Roberto Jefferson would later be caught in the act and charged for firing against Federal Police Officers, in a dramatic scene some days before the second round of the 2022 presidential election.

On August 4, 2021, the STF determined, *ex officio*, the opening of investigation 4878,[385] to investigate possible crimes committed by President Jair Bolsonaro, from "*notitia criminis*" forwarded by the Superior Electoral Court. Bolsonaro had disseminated on platforms and social networks documents relating to an alleged invasion of the TSE system and databases, with the aim of discrediting the Court and the electoral process. He was accompanied on this occasion by a Federal Police Officer and a member of the House of Representatives.

On August 16, 2021, weeks before the September 7 demonstrations, in which the president would come to directly attack the STF, the STF authorized the opening of Inquiry 4,879,[386] with the purpose of investigating the accusation that a group of members of Congress and truck drivers' leaders were inciting the population to provoke acts of violence against the STF and other constitutional institutions. Once again the STF would invoke the grammar of militant democracy, by claiming that the protesters were abusing the right to freedom of speech, assembly and even the right to strike, ignoring that nonpeaceful demonstrations aimed at constraining democratic institutions are not authorized by the Constitution. In this investigation, inquiries were authorized to examine reports that demonstrators had established a bounty on the "head" of STF justices and that these activities were being financed by a "big businessman" from Santa Catarina.

On December 3, 2021, the STF authorized the opening of Inquiry 4,888,[387] against the manifestation of the PGR, based on a request from the presidency of the CPI of the Pandemic, which was taking place in the Federal Senate. According to the CPI's final report, the then president of the republic had committed several crimes, which, although not directly associated with antidemocratic activities, put at risk the public health of the Brazilian population.

The case deserves attention in this study, not only for the seriousness of the accusation, but also because it reinforces the willingness of the STF to oppose the position of the PGR, which understood that a criminal investigation against Bolsonaro was unnecessary, arguing that there was a parliamentary investigation on the same facts. This case exposed the acute tension between the PGR and the STF, specially Justice Alexandre de Moraes, who understood that there was an omission on the part of the PGR. Once again, the investigation was shelved, but the rapporteur for the case ordered that the full investigation, led by the PGR, be sent

to the Federal Police, so that they could continue the investigations from where they stopped.

On July 29, 2022, once again in the vicinity of September 7, the Federal Police detected the movements of antidemocratic groups. In a decision that had a huge impact not only on the media, but also on business sectors, Justice Alexandre de Moraes ordered the breaking of communication secrecy of several businessmen who participated in a WhatsApp group, where antidemocratic messages circulated. Also in this pre-September 7, 2022 period, the Justice Alexandre de Moraes ordered the temporary arrest of demonstrators for practices associated with the crime of attempting to abolish the democratic rule of law, provided by the new legislation to protect democratic institutions.

After the presidential election of 2022, with Lula's victory, Justice Alexandre de Moraes authorized a police operation, on December 16, 2022, aimed at investigating the movements that were intended to prevent the inauguration of the elected president, in which he ordered the arrest of suspects of trying to implode a tanker truck near the Brasília airport to "provoke the intervention of the Armed Forces," as confessed by businessman George Washington de Souza. He also ordered the breaking of bank secrecy of the suspects, and determined searches and other measures in eight states of the Federation.

Immediately after the January 8, 2023 insurrection, which resulted in the invasion and depredation of the National Congress, the Presidential Palace and STF building, Justice Alexandre de Moraes determined the immediate removal of Governor of the Federal District of Brasilia, Ibaneis Rocha (within the procedures of Inquiry 4,879).[388] A controversial measure, since federal intervention had already been decreed in Brasilia. He ordered the dissolution, within 24 hours, of antidemocratic encampments around military barracks and units throughout the country.

Moraes also ordered the arrest of the former Minister of Justice and then secretary of security of the Federal District, Anderson Torres, on suspicion of having participated in the organization of the insurrectional acts, by facilitating the depredation of the headquarters of three branches of power. Later, the draft of a decree to establish a state of defense intervening at the Superior Electoral Court was found at the residence of Bolsonaro's former Minister of Justice. The decree established a Commission of Electoral Regularity, composed of no fewer than eight "members of the Ministry of Defense," which should "reestablish the fairness" of the electoral process.

Finally, the Justice Alexandre de Moraes determined the opening of three inquiries, 4,920, 4,921, 4,922,[389] at the request of the PGR, in order to investigate the responsibility of those who invaded and depredated the headquarters of the three branches of government, those who gave material and financial support, as well as those who incited the coup acts of January 8, in which the conduct of former president Jair Bolsonaro should be investigated. These inquiries involve the arrest and investigation of 2,170 people, of which 1,413 were charged of distinct antidemocratic criminal conducts before the STF. One year after the attempted coup d'état, only 30 people were convicted, and 66 remain in prison waiting for a trial. Bolsonaro is under investigation for his involvement in the January 8 attempted coup, but until this moment has not been indicted. However, it is important to mention at this point that he was convicted by the Superior Electoral Tribunal for abuse of political power during the 2022 presidential campaign. This conviction suspended Bolsonaro's political rights for eight years, impeding him to run for office until 2030.

CONCLUSION

Brazil should be considered a successful experience of "defensive democracy," since its democratic regime survived the threats and attacks perpetrated by a president of the republic hostile to its constitutional order.[390] The markedly consensual nature of the constitutional model adopted in 1988 makes it difficult for leaders who are not able to gather support from a solid parliamentary coalition to act, as well as to overcome the veto power that legal instances have to invalidate actions and policies that confront the basic rules of the Constitution.

The National Congress, although mostly conservative and aligned to several presidential views in the last term, played an essential role in blocking changes to the constitutional or legal system that would favor a rapid deterioration of democratic structures in the first term of Jair Bolsonaro. The President was an impotent head of government *vis-à-vis* the Legislative Branch. He failed to impose his legislative agenda and had more vetoes overturned than any of his predecessors.

Although the president of the Chamber of Deputies offered him a shield against more than a hundred impeachment petitions, this protection came in exchange for a shift of control over larger portions of the public budget, to satisfy the parliamentary leadership.

The Federal Senate had a more confrontational behavior with the president of the republic, which culminated with the establishment of the COVID-19 CPI, although this only happened after the determination of the STF. The CPI's final report imputed a series of crimes to the president and his aides in the conduct of the pandemic. To date, these criminal accusations have not been translated any conviction.

Finally, the National Congress made a fundamental contribution to the system of protection of Brazilian democracy by

approving the Law for the Defense of the Democratic Rule of Law (Law 14.197/21), giving the justice system clearer bases for holding accountable those who attempt against democratic institutions. Despite some presidential vetoes, the law was immediately applied by the STF through the various inquiries aimed at investigating antidemocratic acts.

Civil society, in clear alliance with the so-called traditional media, also played an important role in the defense of democracy. The association of important business organizations, such as Federation of Industries of the State of São Paulo (FIESP) and the Brazilian Federation of Banks (FEBRABAN), with several federations of worker's trade unions, social movements and civil society organizations, indicated the existence of an unusual and extended coalition in support of democratic institutions, notably the STF and the electronic voting system. Strong manifestations of support for democracy and confidence in the Brazilian electoral process by the governments of the United States and European Union also contributed to protect the democratic regime.

It is relevant to point out that, despite the insidious action of the president and his supporters, systematically inciting military intervention, self-restraint prevailed in the command of the Armed Forces, which refused to embark on the authoritarian adventure, even though many voices from the barracks echoed the authoritarian assaults by the president of the republic. It is worth mentioning, however, that the command of the Armed Forces never issued an official note repudiating the attacks on the democratic institutions.

In this challenging context, the Supreme Federal Tribunal occupied a central position both in the containment of the attacks on fundamental rights, the abuse of power, the attempted capture of state offices, the irrationality and obscurantism in the conduct of the pandemic, and in the defense, properly speaking, of democratic institutionally.

The systematic attacks on the constitutional jurisdiction and on some of the Justices of the STF, which were not opposed by the other control institutions, such as the PGR, had to be contained by the STF itself, supplying these omissions. The defensive posture of the STF was manifested by the forcefulness and proactivity with which it exercised its function as guardian of the 1988 CF, employing to the fullest extent the legislation in defense of the institutions of the Democratic Rule of Law.

Over the past four years, the STF has made it clear that it would not abdicate its mission to defend the democratic constitutional order, even when pressured by the Executive, by sectors of the Armed Forces, or by the most radicalized segments of public opinion. The internal fragmentation and conflict within the Tribunal, as well as the decline in the popular trust toward the STF, starting in 2013,[391] favored a certain skepticism about the Tribunal's ability to place due limits on a populist president. But, as stated by Justice Luís Roberto Barroso, when the issue is the defense of democracy, the Tribunal is united.

This does not mean that one cannot point out omissions and errors in the exercise of its function as "guardian" of the Constitution. There are many decisions that can be criticized and that require corrections. But there have certainly been more achievements than errors. The volume and substance of the STF's jurisprudence in this period allow us to affirm that the STF has consciously taken on the difficult task of actively fighting the attacks on democracy perpetrated by the Executive and maintaining a dialogue with Parliament, with the aim of contributing to the construction of an electoral alternative to the authoritarian populist candidate.

The STF acted in full harmony with the Superior Electoral Court, which not only defended the electronic ballot box and the counting process against the attacks of the president of the republic

and the military aligned to him, but also played an essential role in containing the use and dissemination of false news against the electoral process. In the exercise of its normative competence and policing of the electoral process, the electoral court edited and applied TSE Resolution no. 23,610/19, which prohibits the "dissemination or sharing of known untrue or seriously decontextualized facts that affect the integrity of the electoral process, including the processes of voting, counting, and tallying of votes."

The defense of Brazilian democracy required a defensive posture from constitutional institutions and from civil society itself, making effective the various legal tools of our defensive democracy. A central role fell to the STF, which was only possible because of the great number of attributions and powers conferred upon it by the 1988 CF, as well as the manner in which this "supremocratic" Tribunal put these attributions into practice throughout its recent history. It is not trivial that the STF has not succumbed in the exercise of its task of defending democracy, as has happened to many other courts around the world.

The survival of democracy, however, cannot depend on this system of institutional protection, no matter how robust it may be. The tools of "defensive democracy," as well as the "vigilant posture" of those who occupy the institutions of defense of democracy, can contribute to contain sporadic cycles of populist authoritarianism, but they can never impede longer processes of democratic disloyalty. Courts cannot substitute the political system itself, in the function of coordinating political conflicts and promoting solutions for the fulfillment of citizens' expectations of well-being within a fully democratic society.

At a time when Brazilian democracy is beginning to return to normality and threats no longer come from the core of one of the branches of power or even the Armed Forces, it is essential that the defensive posture wielded by the STF during the Bolsonaro

administration also contract. As pointed out by Justice Fachin, when defining the contours of Brazilian defensive democracy, "it is necessary to be careful that the dose of the medicine does not turn it into a poison."

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ENDNOTES

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155 Adam Przeworski, *Capitalismo e Social-Democracia* (São Paulo: Cia. das Letras, 1989).

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165 Oliveira Viana, *Instituições Políticas Brasileiras*, 34.

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169 Levitsky and Ziblatt, *How Democracies Die*.

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171 Stephen Holmes, "Constitutions and Constitutionalism," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: OUP Oxford, 2012), 198.

172 Ibid., 207.

173 Edward Palmer Thompson, *Senhores e Caçadores: A Origem da Lei Negra* (Rio de Janeiro: Paz e Terra, 1987), 348.

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192 Ibid., 28.

193 Ibid., 49-52.

194 Miguel Reale Júnior, "Pacto Por Ações Concretas," *Folha de S.Paulo*, October 11, 2003, https://www1.folha.uol.com.br/fsp/opiniao/fz1110200309.htm.

195 According to Pilatti, six of the eight commissions were led by the progressive politicians José Paulo Bisol, Egídio Ferreira Lima, José Serra, Severo Gomes, Almir Gabriel, and Artur da Távola. One was led by the moderate José Richa and one by the conservative Prisco Viana. At the level of the subcommittees, the distribution was more balanced. 12 were led by progressives, 11 by conservatives, and one by a moderate (Pilatti, *A Constituinte de 1987-1988*, 64-65)

196 André Magalhães Nogueira, "Assembleia Nacional Constituinte de 1987-88," in *Atlas Histórico do Brasil*, ed. Alzira Alves Abreu (Rio de Janeiro: Editora FGV, 2016), https://atlas.fgv.br/verbete/5742.

197 Pilatti, *A Constituinte de 1987-1988*, 151.

198 Ibid., 191.

199 Goulart, "Processo Constituinte e Arranjo Federativo," 186.

200 Pilatti, *A Constituinte de 1987-1988*, 222.

201 Ibid., 306.

202 Lêda Boechat Rodrigues, *História do Supremo Tribunal Federal*, vol. 1 (Rio de Janeiro: Civilização Brasileira, 1965), 1.

203 Alfred C. Stepan, *The Military in Politics: Changing Patterns in Brazil* (Princeton: Princeton University Press, 2015).

204 The Supreme Court's involvement in this episode was not official, according to statements made by Justice Sydney Sanches in an interview that is part of the Oral History of the Federal Supreme Court Project. When news came that President-elect Tancredo Neves had died, doubt arose whether José Sarney, President-elect Tancredo Neves' running mate, or Ulysses Guimarães, who was President of the Chamber of Deputies at the time, should assume the presidency of the nation. The justices of the Court decided to meet in case they were asked for an official position on how the transition should transpire. In the end, the question was not formally brought to the Court but, according to his interview, former Justice Sydney Sanches suspected that the justices' position was taken seriously and could be considered a sort of informal consultation. (Fernando de Castro Fontainha, Marco Aurélio Vannucchi Leme de Mattos, and Leonardo Seiichi Sasada Sato, *História Oral do Supremo [1988-2013] – Sydney Sanches* (FGV DIREITO RIO, 2015), 112–16, http://bibliotecadigital.fgv.br:80/dspace/handle/10438/13671.)

205 Oscar Vilhena Vieira, "Supremocracia," *Revista Direito GV* 4, no. 2 (2008): 441–63.

206 The 1988 Constitution greatly expanded the range of actors who possess the legal standing to challenge the constitutionality of normative actions directly before the Supreme Court. Whereas only the Attorney General (*procurador-geral*) possessed such standing under the previous constitutional regime, the 1988 Constitution also conferred it to political parties, the President of the Republic, the

Board of Directors of the Senate, the Board of Directors of the Chamber of Deputies,] the Board of Directors of the Legislative Assembly or Legislative Chamber of the Federal District (Brasília),] the governors of the 26 states and Federal District, the Federal Board of the Brazilian Bar Association (OAB), and to national trade unions and professional associations (Article 103 of the Federal Constitution).

207 The Supreme Court's jurisprudence has largely established that appeals for constitutionality control can raise claims that were not included in the initial lawsuit. This peculiarity is grounded on the deduction that constitutionality control comprises an objective analysis of a given legal arrangement in the abstract, that is, from a more general plane beyond the particular dispute of the parties (the plaintiff and defendant). See ADI 1358-MC, *Diário de Justiça da União* (*DJU*) 26 Justice Sydney Sanches (Supremo Tribunal Federal 1996). Although this rule does not exempt the Court from the obligation to remain within the scope of the appeal (following Article 490 of the Civil Procedure Code), the jurisprudence of the Court has loosened it. An example is the notion of unconstitutional encroachment, which gives the Supreme Court justification for striking down as unconstitutional norms that, although not challenged in the original lawsuit, are bound through a logical relation to the ones that were and, therefore, affect the original decision. See ADI 2982, *DJU* 17 Justice Gilmar Mendes (Supremo Tribunal Federal 2004).

208 Roberto Gargarella, Pilar Domingo, and Theunis Roux, *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate Publishing, Ltd., 2006).

209 C. Neal Tate and Torbjorn Vallinder, *The Global Expansion of Judicial Power* (New York: NYU Press, 1995); Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002).

210 This is the central thesis of Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass.: Harvard University Press, 2009). The threat that democracy

can pose to market logic is also analyzed in Robert D. Cooter, "Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant," *University of Pennsylvania Law Review* 144, no. 5 (1996): 1643–96.

211 Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*.

212 Antoine Garapon, *Le Gardien Des Promesses: Justice et Démocratie* (Odile Jacob, 1996).

213 *Constituição Dirigente e Vinculação do Legislador: Contributo para a Compreensão das Normas Constitucionais Programáticas*, 2. ed (Coimbra: Coimbra Editora, 2001).

214 Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*; Vieira, *Direitos Fundamentais: Uma Leitura da Jurisprudência do STF*.

215 Vieira, *A Constituição e Sua Reserva de Justiça: Um Ensaio Sobre os Limites Materiais ao Poder de Reforma*.

216 Virgílio Afonso da Silva, *A Constitucionalização do Direito: Os Direitos Fundamentais nas Relações entre Particulares*, 1. ed., 3. tir, Teoria & Direito Público (São Paulo, SP: Malheiros Editores, 2011) also Gustavo Binenbojm, *A Nova Jurisdição Constitucional Brasileira: Legitimidade Democrática e Instrumentos de Realização*, 3. ed., rev. ampl. e atualizada de acordo com a Emenda Constitucional n. 45/2004 (Rio de Janeiro: Renovar, 2010).

217 Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (Chicago; London: University of Chicago Press, 2015), chap. 1.

218 Marcos Paulo Verissimo, "A Constituição de 1988, vinte anos depois: Suprema corte e Ativismo judicial 'à brasileira,'" *Revista Direito GV* 4, no. 2 (July 1, 2008): 407-40.

219 Joaquim Falcão, Pablo de Camargo Cerdeira e Diego Werneck Arguelhes, "I Relatório do Supremo em Números: O múltiplo Supremo." *Revista de Direito Administrativo*, Rio de Janeiro, v. 262, 399-452, 2013.

220 Marcos Paulo Verissimo, "A Constituição de 1988, vinte anos depois," op. cit., 419.

221 Dimitri Dimoulis and Soraya Gasparetto Lunardi, "Definição da Pauta no Supremo Tribunal Federal e (Auto)Criação do Processo Objetivo," *Anais do XVII Congresso Nacional do CONPEDI*, 2008, 4357–77.

222 Since the introduction of the general applicability principle, the Supreme Court has ventured into analyzing the merit of extraordinary appeals if it finds they possess some economic, social, political, or legal relevance that transcends the interests of the parties in the lawsuit (in terms of Article 102, § 3, CF, introduced by Constitutional Amendment 45/2004 that is regulated by Article 534-A of Code of Civil Procedure (CPC)/73, currently Article 1035, caption and § 1 of CPC/15). The creation of this additional prerequisite filters access to the Supreme Court by requiring a finding of relevance that is also the competence of the Supreme Court itself.

223 The introduction of the binding precedent principle made it possible for the Supreme Court, after repeated decisions on the same legal question, to issue a pronouncement that obliges the public administration and other organs of the judiciary to follow its jurisprudence. This principle differs from precedents in general because it is not merely a recommendation. Failure to comply with a binding precedent is subject to direct review by the Supreme Court (Article 103-A of the Federal Constitution, also introduced by Constitutional Amendment 45/2004).

224 The author of an *amicus curiae* brief, although not a party to the lawsuit, seeks to provide information relevant to the dispute (Article 138 of the Civil Procedure Code). If the traditional notion of

amicus curiae is to allow third parties to furnish useful, neutral information to help reach a well-grounded decision (see Cassio Scarpinella Bueno, *Amicus Curiae no Processo Civil Brasileiro: Um Terceiro Enigmático* (São Paulo: Saraiva, 2006)), nowadays it is widely understood as a means for civil society and other interest groups to participate in the legal process in defense of their priorities (see, for the Brazilian case, Eloisa Machado de Almeida, "Sociedade Civil e Democracia: A Participação da Sociedade Civil Como *Amicus Curiae* no Supremo Tribunal Federal," 2006).

225 In putting the table together, parties were aggregated only when they changed name, not when they merged with another existing party. Hence, the PFL, which changed its name to the Democrat Party (DEM) in 2007, was referred to as PFL/DEM. The PCB, which changed its name in 1992 to the Socialist People's Party (PPS), is referred to as PCB/PPS. Lastly, the PDC, which in 1995 changed its name to the Christian Social Democrat Party (PSDC) is called PDC/PSDC (although it does not appear in the table because fewer than ten of its ADIS motions were taken up). The information on party names was obtained from the Superior Election Court website (http://www.tse.jus.br/arquivos/tse-historico-partidos-politicos, last accessed June 22, 2018).

226 Jeferson Mariano Silva, Jurisdição Constitucional no Brasil (1988-2016). Harvard Dataverse, 2017. Database available at: http://doi.org/10.7910/DVN/LIH0FS, last accessed June 22, 2018. The database contains information on all the direct actions of unconstitutionality (ADI) from October 5, 1988, until December 31, 2016, according to the filing date of the initial motion given by the trial progress webpage on the Supreme Court's website.

227 Data prior to 1988 is not available on the Supreme Court website. The data was obtained from Carlos Mário da Silva Velloso, "Do Poder Judiciário: Como Torná-lo Mais Ágil e Dinâmico: Efeito Vinculante e Outros Temas," *Revista de Direito Administrativo* 212 (1998): 7-26.

228 Octavio Luiz Motta Ferraz, "Between Usurpation and Abdication? The Right to Health in the Courts of Brazil and South Africa," in *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa*, ed. Oscar Vilhena Vieira, Upendra Baxi, and Frans Viljoen (Pretoria: Pretoria University Law Press, 2013), 375.

229 Mandado de Injunção (MI) 107, Justice Mauricio Correa (Supremo Tribunal Federal, 1990). *Mandado de Injunção* (MI): a Writ of Injunction, granted whenever the lack of regulatory provisions hinders the exercise of constitutional rights and liberties in addition to the prerogatives inherent to nationality, sovereignty and citizenship.

230 Certain subjective rights are guaranteed by the Federal Constitution but are not completely regulated by its text. In these cases, the Constitution only guarantees the right in the abstract and confers to the legislature the duty to pass a specific law defining the regulation and exercise of the right. If the National Congress fails to pass such a law within a reasonable period, a writ of mandamus can be brought by individuals or groups who, by virtue of the absence of an implementing law, are unable to exercise their constitutionally guaranteed right.

231 The factual circumstances of MI 670-ES exemplify legislative omission. The case involves the right of civil servants to strike that is established in Article 37, VII, of the Federal Constitution "in the manner and within the limits defined by a specific law." The union for civil police in the state of Espírito Santo were able to file a writ of mandamus because the absence of a specific law denied them the ability to exercise this right.

232 In the absence of a legal provision, two extreme positions regarding the motion are possible: on one side is the position that its objective would be to effectively supply the missing norm, that is, the objective of the writ of mandamus would be to request that the judiciary effectively guarantee the right by setting out the parameters for its exercise; on the other side is the position that the judiciary is not

authorized to supply the regulatory norm. Following this rationale, the objective of the writ of mandamus would be merely to request a declaration from the judiciary that the regulation from the competent organ is overdue (a *declaração de mora legislativa*) as a means to provoke or pressure the body to pass the specific law. For an analysis of these positions and defense of the former, see José Afonso da Silva, *Curso de Direito Constitucional Positivo*. Rev. e atual. (São Paulo: Malheiros, 2017), 452.

233 Reversing its previous jurisprudence, the Supreme Court established that, in the absence of a specific regulating law, the judiciary has the competence to issue the parameters for the exercise of the right in question. In the specific case before the Court, it ruled that until the legislature passed a specific law, the right to strike of civil servants would be regulated by the law governing the right to strike of workers in general (Law no. 7783/89) (MI 670, Justice Maurício Corrêa (Supremo Tribunal Federal 2007).

234 ADI 239, Justice Dias Toffoli (Supremo Tribunal Federal 2014).

235 ADI 223, Justice Paulo Brossard (Supremo Tribunal Federal 1990).

236 "Provisory Measure 173," Pub. L. No. 173 (1990), http://www.planalto.gov.br/ccivil_03/mpv/1990-1995/173.htm.

237 MS 21564, Justice Octavio Gallotti 17019 (Supremo Tribunal Federal 1992).

238 ADI 926, Justice Sydney Sanches (Supremo Tribunal Federal 1994).

239 ADI 926, Justice Sydney Sanches (Supremo Tribunal Federal 1994).

240 Recurso Extraordinário (RE) 271286, Justice Celso de Mello (Supremo Tribunal Federal 2000). *Recurso Extraordinário* (RE) – Extraordinary Appeal: an appeal to the STF in cases of violation of constitutional norms by superior courts.

241 Octavio Luiz Motta Ferraz, "Harming the Poor through Social Rights Litigation: Lessons from Brazil," *Texas Law Review* 89 (2010): 1643.

242 ADI 3197, Justice Celso de Mello (Supremo Tribunal Federal 2012).

243 ADPF 186, Justice Ricardo Lewandowski (Supremo Tribunal Federal 2012).

244 ADI 3137, Justice Ricardo Lewandowski (Supremo Tribunal Federal 2007).

245 ADPF 54, Justice Marco Aurélio (Supremo Tribunal Federal 2012).

246 HC 82424, Justice Moreira Alves (Supremo Tribunal Federal 2003).

247 ADI 4815, Justice Cármen Lúcia (Supremo Tribunal Federal 2015).

248 ADI 1969, Justice Ricardo Lewandowski (Supremo Tribunal Federal 2007).

249 Petição (Pet) 3388, Justice Ayres Britto (Supremo Tribunal Federal 2009). *Petição* (*Pet*) – Right of Petition: general procedural remedy used to inform or claim something at the STF.

250 Vieira, Baxi, and Viljoen, *Transformative Constitutionalism*.

251 Adriana Ancona de Faria, *O Ativismo Judicial do STF no Campo Político-Eleitoral: Riscos Antidemocráticos* (PhD Thesis, Pontifícia Universidade Católica de São Paulo, 2013).

252 ADI 1351 and ADI 1354, Justice Marco Aurélio (Supremo Tribunal Federal 2006).

253 MS 26602, Justice Eros Grau (Supremo Tribunal Federal 2008); MS 26603, Justice Celso de Mello (Supremo Tribunal Federal 2007); MS 26604, Justice Cármen Lúcia (Supremo Tribunal Federal 2008).

254 ADPF 132 and ADI 4277, Justice Ayres Britto (Supremo Tribunal Federal 2011).

255 ADPF 187 and ADI 4274, Justice Celso de Mello (Supremo Tribunal Federal 2011).

256 ADI 4815, Justice Cármen Lúcia (Supremo Tribunal Federal 2015).

257 ADPF 54, Justice Marco Aurélio (Supremo Tribunal Federal 2012).

258 HC 124306, Justice Marco Aurélio (Supremo Tribunal Federal 2016).

259 The *Ficha Limpa* Law ("clean sheet or record," also known as the Conditions of Ineligibility Law), which dates back to 1990, disqualifies candidates who have been removed from office, resigned in order to avoid removal, or have been convicted of a crime by a panel of judges (more than one) from running for office for eight years, even if the conviction was still under appeal. ("Ficha Limpa Law," Pub. L. No. LCP 135 (2010), http://www.planalto.gov.br/ccivil_03/leis/lcp/lcp135.htm.)

260 Ação Direta de Constitucionalidade (ADC) 29, ADC 30 and ADI 4578, Justice Luiz Fux (Supremo Tribunal Federal 2012). *Ação Direta de Constitucionalidade* (ADC): Direct Action of Constitutionality of federal and state laws or normative acts to impede further challenges to a law already considered constitutional by the Supreme Federal Tribunal.

261 Medida Cautelar em Ação Cautelar (AC-MC) 4039, Justice Teori Zawascki (Supremo Tribunal Federal 2015). *Medida Cautelar em Ação Cautelar* (AC-MC): Precautionary Injunction in Precautionary Action.

262 AC-MC 4070, Justice Teori Zawascki (Supremo Tribunal Federal 2016).

263 ADI 5526 and ADPF 402, Justice Marco Aurélio (Supremo Tribunal Federal 2016).

264 Medida Cautelar em Mandado de Segurança (MS-MC) 34070, Justice Gilmar Mendes (Supremo Tribunal Federal 2016); MS-MC 34609, Justice Celso de Mello (Supremo Tribunal Federal 2017). *Medida Cautelar em Mandado de Segurança* (MS-MC): Precautionary Injunction in a Writ of Mandamus issued to protect a clear and certain right, when such right is not protected by *habeas corpus* or *habeas data*, whenever the party responsible for the illegal action or abuse of power is a public authority or an agent of a legal entity performing governmental duties.

265 ADC-MC 43, Justice Marco Aurélio (Supremo Tribunal Federal 2018).

266 AP 470, Justice Joaquim Barbosa (Supremo Tribunal Federal 2012).

267 AP 470, Justice Joaquim Barbosa (Supremo Tribunal Federal 2012).

268 Prosecuting defendants individually has significant consequences because the cases, excepting those whose position of authority brings them under the Supreme Court's direct jurisdiction, will be tried in normal courts. If the defendants are tried together, all the trials are combined and go before the Supreme Court. In 2014, the Court made it known that trying defendants individually should be considered the general rule, that is, it came to the understanding that it should exercise its jurisdiction only over high-level authorities.

269 MS-MC 34070, Justice Gilmar Mendes (Supremo Tribunal Federal 2016).

270 MS-MC 34609, Justice Celso de Mello (Supremo Tribunal Federal 2017).

271 Diego Werneck Arguelhes and Leandro Molhano Ribeiro, "Ministocracia: O Supremo Tribunal Individual e o Processo Democrático

Brasileiro," *Novos Estudos CEBRAP* 37, no. 1 (April 2018): 13–32, https://doi.org/10.25091/s01013300201800010003.

272 This graph has been drafted for the original edition of this book, which was published in Portuguese in 2018. In 2020, a new interface has been released by the Court to display statistics about pending cases and issued decisions, and the former interface has been discontinued. The change has been a consequence of an alleged update on the Court's technological resources. While preparing the graphics for the English edition, in 2023, a mismatch has been noticed between some numbers displayed in the old interface and the numbers available now, regarding the same period of time. Now, the data shows even more monocratic decisions in the same period. A choice has been made to keep the information as originally displayed. Nevertheless, the difference between the numbers does not affect the conclusions, since the point of showing the data was to illustrate the huge number of monocratic decisions.

273 ADPF 378, Justice Marco Aurélio (Supremo Tribunal Federal 2015).

274 ADPF 378, Justice Edson Fachin (Supremo Tribunal Federal 2015).

275 With the initiation of impeachment proceedings, it was necessary to elect a Special Commission. The Impeachment Law (Law no. 1079.50), however, failed to establish the precise voting procedure (that is, whether the vote should be secret or open). For strategic reasons, the President of the Chamber of Deputies at the time, Eduardo Cunha, decided that the vote would be secret and that voting for write-in candidates not nominated by party leaders would be allowed. Following these criteria, and despite the commotion it caused in the Chamber of Deputies, the election was carried out and 39 members of Congress, write-in candidates from the opposition, were chosen to form the Special Commission. Because of the controversy, Justice Edson Fachin issued a preliminary injunction on December 8, 2015, suspending the election on the basis of ADPF 378. In considering the merits the following week, a majority

of the justices on the Court determined that the election should have been public and not open to write-in candidates. This decision annulled the results of the election and required a new vote. Talita Abrantes, "Oposição vence eleição para formar comissão do impeachment." *Exame*, December 8, 2015, available at https://exame.com/brasil/oposicao-vence-votacao-para-formar-comissao-do-impeachment/. Last accessed June 22, 2018; and ADPF 378, Justice Edson Fachin (Supremo Tribunal Federal 2015).

276 ADPF 378, Justice Edson Fachin (Supremo Tribunal Federal 2015).

277 AC 4070, Justice Teori Zawascki (Supremo Tribunal Federal 2016).

278 The individual decision of Justice Teori Zavascki (subsequently endorsed by the Supreme Court) concluded that the exceptional removal from office of Eduardo Cunha was justified because the investigations into Cunha were not being directed by the Supreme Court, meaning Cunha's position in Congress gave him access to mechanisms he could employ to impede the investigations, thus putting them in jeopardy. Moreover, Justice Zavascki found that allowing Cunha to remain in office would offend the dignity of Congress as an institution, especially when it was for Congress, many of whose members were under investigation, to determine whether or not they could be imprisoned (AC 4070, Justice Teori Zawascki (Supremo Tribunal Federal 2016).

279 ADI 5526, Justice Edson Fachin (Supremo Tribunal Federal 2018).

280 HC 126.292, Justice Teori Zawascki (Supremo Tribunal Federal 2016).

281 HC 84078, Justice Eros Grau (Supremo Tribunal Federal 2009).

282 HC 68726, Justice Néri da Silveira (Supremo Tribunal Federal 1991).

283 HC 84078, Justice Eros Grau (Supremo Tribunal Federal 2010).

284 HC 126292, Justice Teori Zawascki (Supremo Tribunal Federal 2016).

285 There are two actions of constitutionality control before the Court (ADCs 43 and 44) in which this matter is discussed. In October 2016, the Court issued preliminary decisions for both actions reaffirming its understanding that provisory execution of the prison sentence is permissible, but examination of the merits is still pending. Ever since the Court rapporteur in these cases, Marco Aurélio, authorized the case to go to judgment in December 2017, the President of the Court, Justice Cármen Lúcia, has been under significant pressure to schedule it on the docket. After prolonged resistance, instead of the two actions of constitutional control on provisory execution of sentences, she included the *habeas corpus* involving the imprisonment of former President Lula.

286 Konrad Hesse, *Escritos de Derecho Constitucional* (Madrid: Centro de Estudios Constitucionales, 1983).

287 ADI 239, Justice Dias Toffoli (Supremo Tribunal Federal 2014).

288 Luciana Oliveira Ramos et al., "Relatório ICJ Brasil" (São Paulo: Fundação Getulio Vargas, 2017).

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290 The expression "democratic rule of law" is a direct translation of article 1o. of the 1988 Brazilian Federal Constitution: "A República

Federativa do Brasil, formada pela união indissolúvel dos Estados e Municípios e do Distrito Federal, constitui-se em **Estado Democrático de Direito** e tem como fundamentos [...]"; when refering to the Brazilian legislation, the expression "democratic rule of law" will be used.

291 David Landau, "Abusive Constitutionalism," *U.C. Davis Law Review* 47, no. 1 (November 2013): 189; Kim Lane Scheppele, "Autocratic Legalism," The University of Chicago Law Review 85, no. 2 (March 2018): 545–84.

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In the context of strong political polarization, intensification of distributive conflicts and clashes among powers—which have permeated Brazilian political life in the last decade—, the country has experienced profound constitutional malaise. Oscar Vilhena Vieira provides us in this book with an analysis of the Brazilian institutional crises with sobriety and erudition. An acute observer of the process of constitutionalization of the Brazilian political life, the author points to the fundamental role of consensual political model adopted by the 1988 Constitution to enable and defend the rules of the democratic order.

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